2008/10/14 - PL. ÚS 40/06: OBLIGATORY MEMBERSHIP IN CZECH MEDICAL CHAMBER

HEADNOTES

The Czech Medical Chamber, governed by Act No. 220/1991 Coll., as amended by later regulations, cannot be defined as an 'association' specified by Art. 20 para. 1 of the Charter of Fundamental Rights and Basic Freedoms, and thus obligatory membership of the same (§ 3 para. 1 of the Act) is not capable of aggrieving the right of free association incorporated by the above-specified Article of the Charter.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court Plenum, composed of Stanislav Balík, František Duchoň, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová, and Michaela Židlická, adjudicated the matter of a petition filed by a group of Senators from the Senate of the Parliament of the Czech Republic, represented by JUDr. Milan Vašíček, an attorney at law with a registered office at No. 57 Lidická St., Brno, concerning the annulment of § 3 para. 1 of Act No. 220/1991 Coll. on the Czech Medical Chamber, the Czech Dental Chamber, and the Czech Pharmaceutical Chamber as follows:

The petition is denied.

REASONING

I.
Recapitulation of the petition

1. A group of Senators from the Senate of the Parliament of the Czech Republic, referring to Art. 87 para. 1 clause a) of the Constitution of the Czech Republic (hereinafter the "Constitution") and in accordance with § 64 para. 1 clause b) of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (hereinafter the "Act on the Constitutional Court"), by a filing delivered to the Constitutional Court on 25 May 2006, proposed that the Constitutional Court annul § 3 para. 1 of Act No. 220/1991 Coll. on the Czech Medical Chamber, the Czech Dental Chamber, and the Czech Pharmaceutical Chamber, as amended by later regulations (hereinafter "Act No. 220/1991 Coll."), whereby it is imposed that each physician exercising a medical profession in

medical and preventive care in the territory of the Czech Republic is obliged to be a member of the Czech Medical Chamber, due to a conflict of the above-specified regulation with the constitutional order, specifically with Art. 4 para. 4, Art. 20 para. 1, Art. 26 para. 1, and Art. 27 para. 1 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter the "Charter").

2. The petitioners primarily expressed their conviction that "the right of free association also comprises the right not to associate, provided that the given entity is not interested in associating", and that the right freely "to associate" as specified by Art. 20 para. 1 of the Charter contains also the right "not to associate" covered by equal constitutional protection.

3. According to the petitioners, the principle of obligatory membership of the Czech Medical Chamber, "a public law corporation associating all physicians", forces each physician to choose between two constitutionally guaranteed rights: that of free exercise of profession (Art. 26 para. 1 of the Charter) and the right of free association or non-association (Art. 20 para. 1 of the Charter). If a physician wishes to "utilise" their right of free exercise of profession, they must obligatorily join "the organisation with which they (for example) do not want to identify themselves" and, vice versa, if a physician wishes to exercise their right to freely not associate, they can but waive their right of free exercise of profession.

4. The petitioners proclaim that when limiting fundamental rights and basic freedoms it is necessary to preserve their fundamentals and sense, and, therefore, "it is necessary to apply the least limitations which still lead to the achievement of the desired objective, and it is necessary to choose restrictions proportional to the significance of the pursued objective", while "the entire system of restrictions is then governed by the principle of subsidiarity, when no restriction can be made where the desired purpose could be achieved without any such restriction".

5. With respect to Art. 26 para. 2 of the Charter (Art. 4 para. 4), the need for the above-mentioned "choice" is acceptable, according to the petitioners, only when the same is necessary in order to achieve a constitutionally legitimate objective and only when the same is proportional "to the importance of the purpose in view".

6. The petitioners identify this purpose approved by constitutional law with an understandable necessity of creating a suitable regulatory framework for the profession of a physician, since such a profession requires extraordinary expertise and diligence, and the exercise of such a profession immediately affects essential interests of individual natural persons concerning the maintenance of their lives and good health. The petitioners acknowledge that "it is surely a legitimate and constitutionally acceptable objective of the state to strive for adequate regulation in the provision of medical care and to supervise the quality of the provided services", since "treatment affecting the physical integrity of individuals carried out by physicians often represents expertly and ethically extraordinarily demanding procedures which are, at the same time, irreversible or difficult to correct". According to the petitioners, supervision by the state is thus a legitimate interest capable of substantiating a restriction of fundamental rights and basic freedoms, and, therefore, "legislature has chosen a way" which "pursues a legitimate

objective"; the petitioners then do not question that the professional chamber (the Czech Medical Chamber) is capable of achieving this purpose through the supervision entrusted to it by law.

7. However, according to the petitioners, compulsory membership of the Czech Medical Chamber is not the only possibility of administering "public affairs in a health care service", in particular of supervising the exercise of the profession of physicians, and guaranteeing their professional qualifications. The Chamber is not necessary when "equally effective regulation" is available through "direct exercise of state administration", within the framework of which the state would define proficiency and other requirements for the exercise of the medical profession, and inspect, directly through its executive bodies, compliance with the same without forcing individual physicians to identify themselves with a "professional organisation" (that is without infringing the constitutionally guaranteed right of association or "non-association").

8. The petitioners declared, in support of the "pattern based on non-obligatory membership of the medical chamber", that the same "is largely applied in Europe", that it shows no particular disadvantages compared to the system existing in the Czech Republic, and since it does not affect the constitutionally guaranteed right of association, it is "more acceptable from the viewpoint of the constitutional order of the Czech Republic".

9. While, for instance, "association in a corporative body in the nature of a professional chamber is unambiguously necessary" in the case of advocacy, since exercise of advocacy "is very often aimed against the state, its interests and bodies, be it defence in criminal proceedings, suits against the state concerning compensation for loss, administrative actions, and suchlike", in the case of the medical profession there is no special reason for establishing supervision over the exercise of such a profession through a professional self-government, since, according to the petitioners, "there is no such sufficiently ambivalent relationship of the physicians to the state that would justify their necessary isolation from state administration – and would thus also enforce their obligatory membership of the chamber".

10. The petitioners then consider it important that the general public projects the attitudes held by the Czech Medical Chamber towards its individual members. This is seen as a precarious issue in particular due to the fact that the Czech Medical Chamber is "a corporation, i.e. a legal entity with its own actions, will, attitudes, reputation, objectives, and values", and "carries out actual activities, communicates with its environs, and participates in events which are perceived in a certain way by the public", "acts politically, makes declarations on economic and political issues, takes political stands, supports this or that government or non-government strategy for health care services, prefers procedures which are approved by one group of physicians and disapproved by another, etc.", and "is closely interconnected, in terms of personnel, with the Ministry of Health which exerts direct influence over the same". "This awareness, this reputation and effect of the Czech Medical Chamber" is, according to the petitioners, logically more or less transferred onto the members of the Chamber. Those who are identified by the public with the Chamber may be "displeased" that the public connects them with

activities with which they “fundamentally” disagree or which they consider to be an assault on their own interests.

11. According to the petitioners, the legislature has thus not respected the criterion of necessity as they restricted the constitutionally guaranteed rights of individuals, i.e. the freedom of association. Even though it was for a legitimate purpose, it was prepared “completely superfluously and thus unacceptably”; “unless such association is necessary – and comparison with foreign countries shows that it is not – there is no other way than to designate such forced membership as an unconstitutional requirement”.

12. The petitioners finally stated their opinion that the Constitutional Court should “possibly” postpone the enforceability of a repealing judgment to some “suitable time” so that the legislature could adapt the strategy of the health care service to such membership of the Czech Medical Chamber which would not be obligatory.

II.
Statements, opinions and reply

13. The Constitutional Court, in accordance with the provisions of § 69 of the Act on the Constitutional Court, transmitted the petition for commencement of the proceedings to the parties to the proceedings – the Chamber of Deputies and the Senate of the Parliament of the Czech Republic. Beyond this statutory framework, the Constitutional Court also addressed the institutions concerned, that is the Ministry of Health, the Czech Medical Chamber, and the Czech Medical and Social Service Workers Union; their statements were then forwarded to the petitioners, who then submitted a reply to the same.

The Chamber of Deputies of the Parliament of the Czech Republic
14. In their statement dated 1 February 2007, signed by Ing. Miloslav Vlček, the Chairperson, the Chamber primarily stated that the legislature (the former Czech National Council) acted, in terms of handling the bill of Act No. 220/1991 Coll., in accordance with the prescribed procedure and in confidence that the adopted act is not in conflict with the Charter of Fundamental Rights and Basic Freedoms. According to the Chairperson of the Chamber of Deputies, the sponsors of the bill were aware that it goes beyond the concept of a number of chambers which are usually established “as prestigious associations”, while the mission of medical chambers is directed towards the civic public, which the chambers wish to protect by controlling the quality of expert medical care; the chambers wish to work as a basic controlling element which would pursue the interests of patients in particular. According to the sponsors, the organisational principle chosen was the only one possible from a practical viewpoint; it was based on the possibility of limiting the right to freely associate which is granted by Art. 20 para. 3 of the Charter; took into account the right to protection of health incorporated in Art. 31 of the Charter; and, therefore, with respect to the professional aspects of such goods, it does not represent a disproportional limitation. The Chamber of Deputies pointed out that the annulment of § 3 para. 1 of Act No. 220/1991 Coll. without affecting the similar provisions of § 3 para. 2 and § 3 para. 3 of the same Act which regulate obligatory membership of the Czech Dental Chamber and the Czech

Pharmaceutical Chamber, would necessarily be unsystematic and lead "to certain discrimination".

The Senate of the Parliament of the Czech Republic
15. The Senate of the Parliament of the Czech Republic did not participate in the legislative process (in relation to the contested provision), however, they did take part in subsequent legislative amendment to Act No. 220/1991 Coll., specifically that implemented by Act No. 285/2002 Coll. on Donating, Removing, and Transplanting Tissues and Organs, and on Amendment to Certain Acts (Transplantation Act), and Act No. 111/2007 Coll. whereby Act No. 20/1966 Coll. on Public Health Care, as amended by later regulations, and some other acts, are modified. With respect to the above, the Senate exercised its entitlement to submit a statement concerning the petitioners' proposal (a contr. Judgment of the Constitutional Court dated 27 June 2000, file Nos. Pl. ÚS 12/99, N 98/18 SbNU 355, 232/2000 Coll.).

16. The statement dated 2 February 2007, authorised by the President of the Senate, MUDr. Přemysl Sobotka, points out that "many medical professional chambers exist in the world with obligatory membership of physicians [of different scopes], such as those in Austria, Germany, Belgium, and France, while those in Ireland, Canada, and Great Britain feature obligatory registration", and that a similar issue (of obligatory membership of medical chamber) was dealt with by the European Court of Human Rights in a decision in the case of "Le Compte, Van Leuven and De Meyere v. Belgium, dated 23 June 1981, and Albert and Le Compte v. Belgium, dated 10 February 1983", in which it was concluded that the professional chamber (the Belgian Medical Association in the case under consideration) cannot be considered an association as specified by Art. 11 of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter the "Convention"), and thus "the obligation of physicians to register with the list of such an organisation and to be subject to the authority of its bodies does not result in any limitation, let alone suppression, of the right guaranteed by Art. 11 para. 1 of the Convention". What is to be considered, says the statement, is whether or not the obligation of each physician exercising medical profession in the territory of the Czech Republic to be a member of the Czech Medical Chamber may be qualified "analogically… also in relation to the Charter". In the statement, the President of the Senate also questioned incredulously as to why the petitioners did not contest the constitutionality of obligatory memberships of the Czech Dental Chamber and the Czech Pharmaceutical Chamber.

The Ministry of Health
17. The Ministry of Health (hereinafter the "Ministry"), represented by MUDr. Tomáš Julínek, the Minister, in their opinion dated 29 March 2007, stated that "however they acknowledge" the specific nature of self-governing public law corporations and their distinction both from clubs in the real sense of the word (voluntary associations) and from associations which serve to defend exclusively the socio-economic interests of their members, they do not perceive these circumstances as a condition completely sufficient for "non-application of Art. 20 and Art. 27 of the Charter of Fundamental Rights and Basic Freedoms to their full extent". Additionally, according to the Ministry, when evaluating the constitutional conformity of the legal regulation being contested, it is necessary to proceed not

only from Art. 20 and Art. 27, but also from Art. 26 of the Charter, in connection with Art. 4 para. 4 of the same, and examine whether the statutorily imposed obligatory membership of the professional chamber does or does not violate the very nature of the right to free choice of profession.

18. The Ministry recapitulated the three components of the test of proportionality, that is the criteria of suitability, necessity, and of measuring mutually conflicting values according to their "significance".

19. The Ministry holds the opinion that the criterion of suitability "is fulfilled at best only partly", since doubtlessly legitimate public interest may be "considerably more suitably" ensured by using the method of direct exercise of state administration, without any clash of interests between members (which are to be defended by such public law corporations) and society. A self-governing corporation with obligatory membership, according to the Ministry, "completely and clearly tends to behave, in a certain form, as a cartel; this, in comparison with the provision of services by the medical industry under standard, even if regulated, conditions, leads to reduced effectiveness of managing financial resources, as well as to a worsened quality of medical care". The Ministry also accentuated that "the extent of independence of the Czech Medical Chamber" is "unparalleled in comparison with European chambers endowed with the exercise of public power".

20. From the viewpoint of necessity, the principle of obligatory membership of the Czech Medical Chamber, according to the Ministry, is "definitely" not valid, since the pursued objective may again be achieved (for example) through "direct exercise of state administration". Even here the right to free choice of profession is limited, since "each physician must be aware that their activities will be supervised by an institution", but this system, believes the Ministry, is characterised by a greater "implied" independence of the state body undertaking direct exercise of the state administration in comparison with the Czech Medical Chamber, whose elective officers are clearly motivated by their electors to defend their own interests rather than those of potential competitors (candidates for membership), or the public interest, such as that "in thorough investigation of specific cases of failure by individual members of chambers".

21. With respect to the criterion of "significance", the Ministry believes it is true that, with respect to the indubitable public interest present, "no measure or imposed obligation which may lead to ensurance of maximum quality of care for human health may be considered improper with reference to an intrusion in a certain constitutionally guaranteed right", but it does not affect the argument on greater effectiveness and impartiality of supervision over the exercise of the medical profession by a state body, when compared with "a totally independent self-governing corporation". Nevertheless, the Ministry acknowledges that the conditions accompanying the origination and existence of membership (§ 4 and § 9 para. 2 of Act No. 220/1991 Coll.) do not represent an inadequate burden, and the obligation to pay contributions to the "Chamber" is also legitimate, naturally under the pre-condition of "adequacy of the amount of the same".

22. According to the Ministry, "two basic models" are applied in "European" circumstances. One of them presumes "a highly independent chamber with non-

obligatory membership and considerably limited exercise of public power"; the other is represented by "a chamber with obligatory membership and extensive competencies of public power, but to a large degree subject to control by an executive body". According to the Ministry, the Czech Medical Chamber represents a hybrid, which, not only by its statutory competencies "but also practical functioning", goes beyond the position of an independent, yet self-governing entity exercising public power and "exhibits a tendency to infringe areas regulated by Art. 27 of the Charter of Fundamental Rights and Basic Freedoms, in an attempt to enjoy the advantages of being both an ex lege corporation and a quasi trade union defending the economic and social interests of its members". Experience demonstrates, says the Ministry, that the above-mentioned roles are not always fully compatible, in particular when there is a conflict of interests between those of their members and the public, especially when the valid regulation is lacking a "safeguard" similar to the "significant inspection powers of the Ministry of Justice" over the Czech Bar Association.

The Czech Medical Chamber

23. The Czech Medical Chamber (hereinafter the "Chamber"), acting through MUDr. Milan Kubek, its President, in a statement dated 6 February 2007, with respect to the issue of the position and powers of "professional chambers in a democratic law-based state", firstly pointed out "our nation's traditions of … self-government" declared in the Preamble of the Charter and emphasised, as a starting point for the considerations to follow, that professional chambers, as public law corporations founded by law and endowed with a certain scope of public law powers, are crucially different from "clubs, trading companies, civic associations, and other legal associations", which, on the contrary, are of the nature of private law entities. The Chamber stated that the fact that the petition is aimed only against the Czech Medical Chamber, is unsystematic, "probably also politically motivated", and "remarkable".

24. As for contested obligatory membership, the Chamber stated "the issue that somebody is obligatorily a part of a professional chamber does not mean membership in terms of a club, in spite of the fact that Act No. 220/1991 Coll. uses this term; it means the granting of rights (but not obligations) to participate in such a self-government". That is why Art. 20 and Art. 27 of the Charter cannot be applied to professional chambers, since they apply only to private law corporations. The term "member" of the Czech Medical Chamber is positioned equally with the term "citizen of a state" or "inhabitant of a municipality", and the inappropriateness of using the category of "membership" may be demonstrated, in the opinion of the Chamber, using Act No. 85/1996 Coll. on Advocacy, which consciously avoids this category and uses the concept of 'obligatory registration'. The possible transfer of powers of the Czech Medical Chamber to the state is not, according to the Chamber, "an issue of constitutional law but one of political decision", and necessarily this would lead to annulment of Act No. 220/1991 Coll. in entirety. Subsequently, it would be necessary to establish an "agency" to take over the agenda of the Czech Medical Chamber. This would mean not only a commitment of the state to "pay for the same", but, in particular, lead to problems with setting up a "team of officers" which would be able to "administer" the present powers of the Chamber, given the professional specificity of the exercise of medical profession. As for the issue of measuring the "values

protected" by constitutional law "and their alleged conflict", the Chamber stated that "a physician does not actually obligatorily associate with a medical chamber, but their registration ('membership' at present) with a chamber is merely evidence of their capacity to exercise the medical profession, and of the fact that they are, at the same time, subject to professional supervision by the Chamber". Therefore, the arguments of the petition are completely misleading, since being subject to supervision by a professional chamber established under law does not mean denial of the right not to associate.

25. The capability of the contested legal regulation of fulfilling "the pursued purpose" is, according to the Chamber's statement, given by the capacity of professional supervision and by disciplinary capacity; if membership of the Chamber were selective or optional, "the disciplinary powers and the entire professional supervision by the Chamber over the proper exercise of medical profession would be unfeasible, since potential exclusion of a physician from the Chamber would not prevent them from continuing to practice the medical profession".

26. It is also not suitable to differentiate between "private" physicians and physicians as "employees". On the basis of individual special cases, the Chamber justified why professional supervision should also be applied to the latter category of physicians; for example, for reasons that not each case of ethical or expert transgression of a physician constitutes a case that would form a cause for termination of employment.

27. With respect to "international connections", the Chamber stated that "the Council of Europe recommends member countries to replace the position of state administration bodies with the operation of bodies of professional self-government", and remarked that a number of member countries of the European Union accepted the principle of obligatory membership of a given medical chamber, while other countries acknowledge the "principle of obligatory registration, which is not defined as 'membership', but in effect means the same", in other words, the difference effectively lies at the level of "semantics and, in a way, psychology".

28. The Chamber denied the objection that they "act politically", and referred to the fact that in some cases (similarly to advocacy) "they must defend the interests of citizens against the interests of the state", for example, as it is in the field of official medical reviews by physicians.

The Czech Medical and Social Service Workers Union

29. The Czech Medical and Social Service Workers Union (hereinafter the "Workers Union"), represented by RNDr. Jiří Schlanger, the President, in their opinion dated 5 February 2007, in particular highlighted the significance of differentiating between a physician as an employee and a physician exercising the medical profession independently on their own account and liability (typically, these are private general practitioners, private ambulatory specialists, and suchlike). In the case of physicians as employees, exercise of their profession is subject to direct control by employers, and such employers are (in principle) liable for the employees towards third parties and, therefore, "only voluntary membership of the

Chamber is legally justified" for such employees, possibly obligatory membership should remain in existence solely for managers of medical establishments (deputies for medical and preventive care and heads of wards.) According to the Workers Union, alternative normative means, restricting less the values of constitutional law under consideration, consist of obligatory membership of the Chamber for "private physicians" and for "physicians as head employees of medical establishments", and of direct exercise of state administration towards others. As for the issue of assessing values protected by constitutional law in terms of their being in collision, the Workers Union referred to previous conclusions and stated that the solution to "the clash of fundamental rights" in the case of "physicians as ordinary employees of medical establishments" is disproportional and thus not acceptable.

Reply from the petitioners

30. The petitioners, in their reply dated 18 May 2007, firstly outlined regulation of supervision over the exercise of the medical profession in some European countries (the Federal Republic of Germany, Austria, Belgium, Norway, the Netherlands, Ireland, the United Kingdom, and Slovakia) and concluded that "the present system in the Czech Republic, entrusting endless powers to the Czech Medical Chamber without supervision by the state, is completely different from other European systems which do not undesirably infringe constitutionally guaranteed rights".

31. The petitioners further declared that they believe the "right to medical professional self-government" is not a constitutionally guaranteed one, and referred to opinions pronounced in legal theory, according to which the constitutional concept of the exercise of public power in the Czech Republic in a broad sense "contains gaps and explicitly includes only local self-government, while it does not acknowledge the existence of other forms of self-government, such as professional, economic, scientific, social, educational, or academic self-government" ("Ústavní právo ČR 1 /Constitutional Law of the Czech Republic 1/, Masaryk University, Brno 2003"), and its "faint constitutional support" may only be found in the introductory declaration of the Charter of Fundamental Rights and Basic Freedoms, where the drafter of the constitution acknowledges "our nations' traditions of … self-government".

32. The petitioners oppose the statement by the Chamber of Deputies by repeated accentuation of the fact that obligatory membership of a professional organisation is not the only conceivable concept, since the possibility of control and supervision over individuals exercising a certain profession is not based upon obligatory membership of such a controlling body, but upon the powers entrusted to such a body. The petitioners repeated that necessary expertise of control may be ensured by the state alone through its "physicians-specialists". The issue of the degree of onus of conditions for membership of the Czech Medical Chamber is, according to the petitioners, "totally irrelevant" (even if the conditions were set as "completely minimal as they are at present"), since this "membership is obligatory and compulsory" anyway. The annulment of similar provisions of Act No. 220/1991 Coll. relating to obligatory membership of the Czech Dental Chamber and the Czech Pharmaceutical Chamber has not been proposed, since "it is necessary to infringe the legal order to the least possible degree" and "the above Chambers perform their functions somewhat better than the Czech Medical Chamber, and without

undue excesses", and that is why it is proper to leave "amendments" to the regulation, which may also be unconstitutional, up to the legislature.

33. In connection with the statement by the Senate, the petitioners doubted the aptness of the reference to the judgments of the European Court of Human Rights dated 23 June 1981 in the case of Le Compte, Van Leuven and De Meyere v. Belgium, Applications Nos. 6878/75; 7238/75, and dated 10 February 1983 in the case of Albert and Le Compte, Applications Nos. 7299/75; 7496/76. The former judgment was based on a situation when members of the Belgian Medical Association and their interests were and still are very strongly controlled directly by the state, which intervenes both in the appointment of members to the bodies of the chamber and the wording of important regulations by the chamber or disciplinary proceedings to a considerable degree. That is why the petitioners believe it is not applicable to the differing circumstances in the Czech Republic, where "the Czech Medical Chamber at present effectively resembles a trade union or an association of private law", and in no way protects minority opinions held by the "private physicians", is politically engaged, and its members are "additionally forced to pay for such a chamber". As for the latter judgment of the European Court of Human Rights, the petitioners state that the relevant part "only refers" to the previous decision.

34. By contrast, the petitioners refer to "more recent case law of the European Court of Human Rights" which "deals in particular with the right not to associate" and which does not explicitly exempt from the same public law corporations, as well as to case law applying to the formal origination or legal incorporation, and actual operation of associations and corporations ("§100 of Chassagnou and others v. France, dated 29 April 1999"), as well as possibly to case law which confirms the importance of the negative aspect of the freedom of association – even though in connection with "compulsory membership of trade unions" ("judgment Sorensen and Rasmussen v. Denmark, dated 11 January 2006" in "§ 54").

35. The petitioners also expressed a suspicion that excluding the association of public law from the concept of association as specified by Art. 11 of the Convention is intentionally biased, since particularly associations founded by law may violate the freedom not to associate and not to be forced to associate, since private law associations can hardly have the resources for ensuring and enforcing obligatory membership of the same; to this the petitioners added that "the wording of Art. 20 of the Charter of Fundamental Rights and Basic Freedoms by no means implies any difference for application to private or public law associations".

36. To the contrary, the petitioners aligned themselves with the statement of the Ministry of Health. They also see no reason, especially with respect to powers entrusted to the Czech Medical Chamber and its actual "functioning", for which it would be possible to exclude the same from the effects of Art. 20 and Art. 27 of the Charter. The petitioners also highlighted the argument of the Ministry that upon exercise of the administration of this section of public affairs directly by a state body, such a body would be more independent in comparison with the Czech Medical Chamber, since the Chamber's elective officers are logically motivated by their electors "to especially defend their own interests as those of physicians rather than interests of patients, i.e. the public interest". The petitioners

exhibited that they are one in mind with the Ministry also in the opinion that the legal definition of the Czech Medical Chamber "considerably" deviates from "European regulations concerning medical chambers". They also remarked that Art. 11 para. 2 of the Convention incorporates the criterion of "indispensability", and "the word 'indispensable' is not as flexible as the terms 'useful' or 'suitable'", and expressed a belief that it is the very case of legal regulation of the Czech Medical Chamber where there was a confusion between the terms "indispensability" and "suitability".

37. The petitioners "principally disagree" with the statement of the Czech Medical Chamber, as it declares present membership of the Chamber is "only in the nature of registration"; even though obligatory membership of a medical chamber as such is not under all circumstances unconstitutional, its unconstitutionality is based "only in connection with the regulation of the medical chamber, which, in the case of the Czech Medical Chamber, is starting to resemble, in some respects, an association of private law". The petitioners claim the opinion is incorrect that, in the case of non-obligatory membership, supervision by the chamber would become impossible, since a system "similar to the English one" is conceivable, "where… all registered physicians are subject to supervision by the chamber, and the chamber itself even sets up its own ethical code". Conventions of the Council of Europe, to which the Chamber refers, do not apply directly to professional self-government, but only to local self-government, and recommendations from the Committee of Ministers are not legally binding upon member countries of the Council of Europe. As for the relationship between physicians and the state as is inferred by the Chamber, the petitioners object that within the scope of official medical reviews a physician is effectively in the position of a "quasi-body" of the state, and their activities go against the patient and not against the state, as was claimed. In conclusion, the petitioners assessed that the statement by the Chamber – in entirety – implies "the Chamber's natural desire to retain its present position of a self-governing professional organisation and one which has all conceivable competencies without being accountable to anyone or controllable in any way".

38. The petitioners then agreed with the Czech Medical and Social Service Workers Union insofar that it is necessary to take into account the differences between both types of exercise of the medical profession (that is by private physicians and physicians as employees), however they emphasised that if "the freedom of free association for protection of economic and social interests is guaranteed to everybody, then the same must apply equally to both physicians as employees and physicians as private persons".

39. On 6 June 2007, the Constitutional Court received "Amendment to the statement dated 18 May 2007 with the journal of the Czech Medical Chamber" appended with 15 copies of a journal Tempus medicorum, year 2007, No. 5, published by the Czech Medical Chamber. The petitioners explained that they did so in order to make it possible for the Constitutional Court to "form a clear idea" of the Czech Medical Chamber on the basis of this telling evidence on this organisation.

40. Finally, on 30 June 2008, the petitioners submitted another "Amendment to the statement", in which they declared their disagreement with the "exponents of

obligatory membership", and referring back to earlier applied arguments, they developed the same in detail. The petitioners denied the comparison of self-government and state power, as well as the argument whereby state citizenship and affiliation to a municipality or a region on one hand and obligatory membership of a professional organisation on the other are considered equal. "From this viewpoint", local self-government is allegedly purposeful, but this type of self-government is concentrated on local affairs, and "as opposed to the Czech Medical Chamber, it usually does not publish politically pronounced writings" and "does not promote the opinions of a specific political party". Whereas inhabitants who do not agree with the acts of their municipality may move away, this is not possible for a physician, even though external displays of the Chamber are at a level "not unlike 'Rudé právo'" [The Red Law, a pre-1989 official newspaper of the Communist Party of Czechoslovakia], and remind one "of a basic unit of a certain political party", which the petitioners documented by appending another issue of the Tempus medicorum journal. The petitioners acknowledged that the establishment of a self-governing professional chamber is "merely a political decision", which in itself does not constitute any infringement of constitutionally guaranteed fundamental rights, and that obligatory membership is not always unconstitutional. However, they repeated what they had previously stated, which is that the same becomes unconstitutional only "in connection with the regulation of the medical chamber", when the same resembles an association of private law. Repeatedly they designated "as absurd" the opinion that obligatory membership is not connected with an obligation but a right to participate in self-government, since physicians allegedly now have "only the right to choose whether to practice their profession or not". Again they opposed the opinion that Art. 20 and Art. 27 of the Charter do not apply "to professional chambers", since – as they had stated earlier – "the legislature, by using the term 'membership' and legal regulation of their activities, approximated the Czech Medical Chamber to a private law association", and indeed, the Chamber actually operates as thus. It is always necessary "to maintain a list of physicians from which it is possible to verify their competency to exercise the medical profession", but this, according to the petitioners, does not justify obligatory membership of the Czech Medical Chamber, since it may be entrusted to a relevant state body. Finally, the petitioners consider inappropriate the argument that the Chamber acts against the state in the protection of the health of citizens (whereby the Chamber approximates the bar association), since – amongst other points – until now (as shown by "historic experience") it endeavours not to protect patients but its own interests or those of physicians themselves, and their "usually financial" requirements. The petitioners sum up that obligatory membership is thus neither justified by the necessity to maintain a list of physicians, nor by protection of patients, since the former task may be ensured without such membership, and the Chamber "does not serve, and by its very nature, cannot serve" the latter. The statement that takeover of the Chamber's tasks by the state would be inexpedient "with respect to the specific features of the medical profession", is, according to the petitioners, "mere speculation" which is disproved by regulations that "function" in foreign countries.

III.
Oral hearing

41. In the course of the oral hearing, representatives of the parties to the proceedings (representatives of the petitioners, and the person authorised to act on behalf of the Chamber of Deputies), summed up the arguments contained in the previously submitted written filings. The representative of the petitioners particularly pointed out the specific features of the legal regulation of the Czech Medical Chamber, consisting of its extraordinary independence and, at the same time, insufficient supervision by the state, including vague judicial supervision. The representative of the Chamber of Deputies opposed this and made it clear that they consider self-government to be generally "more correct" governance of an organisation for the exercise of the medical profession than state administration.

IV.
Active standing of the petitioners

42. The petitioners infer their active standing for filing the petition under consideration from Art. 87 para. 1 clause a) of the Constitution, according to which the Constitutional Court decides on annulment of statutes or individual provisions thereof if they are in conflict with the constitutional order; in connection with § 64 para. 1 clause b) of the Act on the Constitutional Court, according to which a petition proposing the annulment of a statute or individual provisions thereof, as specified by Art. 87 para. 1 clause a) of the Constitution, may be submitted by a group of at least 17 Senators. In the given case, this precondition has been fulfilled.

V.
Constitutional conformity of legislative process

43. In accordance with § 68 para. 2 of the Act on the Constitutional Court, in decision-making in proceedings concerning annulment of a statute or other enactment, according to its Chapter Two, Division One, the Constitutional Court also examines whether the contested statute was adopted and issued within the confines of the powers set down in the Constitution, and in a constitutionally prescribed manner. However, this requirement may be effectively applied only in the case that there is an effective constitutional regulation, on the basis of which the legal regulation under consideration was adopted; this implies that, with respect to legal regulations issued prior to the effectiveness of Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, the Constitutional Court is entitled to review merely their contentual accord with the present constitutional order, but not the constitutionality of the procedure of their origination and compliance with normative powers (cf. Judgment of the Constitutional Court dated 6 October 1999, file Nos. Pl. ÚS 9/99, N 135/16 SbNU 9, 289/1999 Coll.). The above fully applies to the case under consideration, as Act No. 220/1991 Coll. was approved by the former Czech National Council on 8 May 1991 and became effective on 1 June 1991, that is prior to the effectiveness of the Constitution of

the Czech Republic; the contested provisions of § 3 para. 1 were not affected by any amendment to this Act made in the relevant period of time (that is by Act No. 285/2002 Coll. and Act No. 111/2007 Coll.). Moreover, the petitioners did not claim any relevant procedural deficit.

44. Following the establishment of such, the Constitutional Court proceeded to examine the content of the contested provisions of the Act from the viewpoint of its compliance with the constitutional order of the Czech Republic [Art. 87 para. 1 clause a) of the Constitution].

VI.
Wording of the contested provisions of § 3 para. 1 of Act No. 220/1991 Coll.

45. The provisions of § 3 para. 1 of Act No. 220/1991 Coll. contested by the petitioners state: each physician who exercises a medical profession in medical and preventive care in the territory of the Czech Republic must be a member of the Czech Medical Chamber.

VII.
Self-government and constitutional order of the Czech Republic

46. The issues of professional self-government are subject to constitutional law review less frequently than those of local self-government; that is why their substantive examination in the case law of the Constitutional Court is not widespread. Theory acknowledges the term (in addition to local self-government) of "other forms of public law self-government", which include, for example, professional, academic, economic, insurance, and educational self-government (Filip, J.: Ústavní právo České republiky. 1, Základní pojmy a instituty. Ústavní základy České republiky /Constitutional Law of the Czech Republic. 1, Basic Terms and Institutes. Constitutional Basis of the Czech Republic/; Brno: Masaryk University, published by Doplněk, 2003, p. 501).

Local self-government

47. The Constitutional Court in a Judgment dated 19 November 1996, file Nos. Pl. ÚS 1/96 (N 120/6 SbNU 369, 375, 294/1996 Coll.), stated that the Court "considers local self-government to be an irreplaceable component for developing democracy. Local self-government is an expression of the right and capability of local bodies – within limits specified by law, within the scope of liability, and in the interest of local inhabitants – to regulate and manage some public affairs." In a Judgment dated 9 July 2003, file Nos. Pl. ÚS 5/03 (N 109/30 SbNU 499, 211/2003 Coll.), the Constitutional Court added that, according to the basic thesis on which the concept of self-government was founded, the basis of a free state consists of a free municipality, then (from the viewpoint of regional importance) at a higher level of local hierarchy, of a self-governing community of citizens – a region.

Professional self-government

48. As for professional self-government itself, the Constitutional Court expressed an opinion – in relation to the profession of a veterinarian – in a Judgment dated 16

April 2003, file Nos. I. ÚS 181/01 (N 58/30 SbNU 97), that “this is an issue relating to the ‘special-interest self-government’, specifically professional chambers with obligatory membership, associating self-employed natural persons exercising certain professions, where there is a strong public interest in the proper exercise thereof. These chambers are legal entities of public law, founded by law, endowed with the competence of adopting various internal regulations for the chamber and members thereof, who must, with respect to obligatory membership, subject themselves to the same. The chamber thus exercises certain authoritative powers over such members – people belonging to a certain professional class. These powers typically include … disciplinary powers”. Regarding the issue “whether membership of the Czech Veterinary Chamber is obligatory or not”, the Constitutional Court added, as obiter dictum, that with respect to obligatory membership of the Chamber, and the above-mentioned public interest in the exercise of the given profession, “(similarly to proper operations of attorneys at law, notaries public, physicians, pharmacists, patent attorneys, and suchlike)” the Chamber has been entrusted “certain authoritative powers, so that the Chamber is able to ensure such a requirement. The very existence of any self-government by definition limits state bureaucracy, makes it possible for people to take immediate care of affairs which directly affect them, and thus contributes to greater freedom and independence of an individual. That is also why professional self-government is supported by a democratic law-based state”. “However, with respect to its operations, it is necessary to insist on unconditional compliance with fundamental rights and basic freedoms which are under the protection of independent judicial power, and within such protection as ‘ultima ratio’ safeguarded by the Constitutional Court as a judicial body protecting constitutionality”.

49. Art. 21 para. 1 of the Charter, whereby citizens are guaranteed the right to participate in the administration of public affairs (Filip, J.: Ústavní právo České republiky. 1, Základní pojmy a instituty. Ústavní základy ČR /Constitutional Law of the Czech Republic. 1, Basic Terms and Institutes. Constitutional Basis of the Czech Republic/; Brno: Masaryk University, published by Doplněk, 2003, p. 502), may be considered the constitutional basis for professional self-government. It is appropriate also to refer to the Preamble of the Charter, whereby “The Federal Assembly, on the basis of the proposals of the Czech National Council and the Slovak National Council, … proceeding from … our nations’ traditions of democracy and self-government … has enacted this Charter of Fundamental Rights and Basic Freedoms”.

50. Otherwise, the constitutional order does not provide explicit support for the origination of this type of self-government, and the requirement to establish ‘professional chambers’ is not thereby imposed on the legislature.

51. Legal theory has formulated a conclusion that the Constitution explicitly does not regulate public law forms of self-government other than local self-government, but this surely does not mean that the Constitution excludes the same (Filip, J.: Ústavní právo České republiky. 1, Základní pojmy a instituty. Ústavní základy ČR /Constitutional Law of the Czech Republic. 1, Basic Terms and Institutes. Constitutional Basis of the Czech Republic/; Brno: Masaryk University, published by Doplněk, 2003, p. 503); besides there is the “principle of a democratic state under Art. 1 para. 1 of the Constitution of the Czech Republic, and then the unwritten

principle of a social state, to which also the principle of participation in the administration of public affairs should apply, and more so in the administration of affairs which directly affect citizens and which must be authoritatively organised in any case" (p. 506 ibid).

52. Therefore, even if it were possible to agree with the petitioners that direct constitutional law support for professional self-government "is faint", from what is mentioned above it is implied that such self-government is not, within this context, completely neutral, and favourable evaluative tendencies, in particular in relation to the "state" administration confronted by the petitioners, are perceivable.

VIII. Public health protection

53. The determining aspect for the organisation of supervision over practice of the medical profession thus is protection of public health, this being under circumstances when the existence of a special constitutional guarantee of a right to professional self-government cannot be convincingly inferred. Within these boundaries, the constitutional order provides the legislature with relatively wide scope for considering how the same should be specifically ensured; guaranteeing (the organisation of such) proper expert exercise of medical care (exercise of medical profession) is then undoubtedly one (and an important example) of the requirements enabling this objective incorporated by constitutional law to be achieved. Under Art. 6 para. 1 of the Charter, everyone has the right to life; and Art. 31 establishes that everyone has the right to protection of their health.

54. In accordance with a Judgment of the Constitutional Court dated 27 September 2006, file No. Pl. ÚS 51/06 (No. 483/2006 Coll.), it is worthy to note that "the rights to life and health, as specified by Art. 6 para. 1 and Art. 31 of the Charter of Fundamental Rights and Basic Freedoms respectively, are absolute fundamental rights and values".

55. The importance of life and health in a constitutional law context may similarly be inferred from Art. 2 of the Convention on the Protection of Human Rights and Fundamental Freedoms (published in Collection of Laws under No. 209/1992 Coll.), Art. 12 of the International Covenant on Economic, Social and Cultural Rights (promulgated in Collection of Laws under No. 12/1976 Coll.), Art. 24 of the Convention on the Rights of the Child (promulgated in Collection of Laws under No. 104/1991 Coll.), Art. 11 and Art. 13 of the European Social Charter (promulgated under No. 14/2000 of the Collection of International Agreements), possibly from Art. 2 and Art. 3 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, as amended by its Supplemental Protocol of 12 January 1998 (promulgated under No. 96/2001 and No. 97/2001 in the Collection of International Agreements).

56. It is worth noting that according to the Conclusions of the Council concerning common values and principles in health systems of the European Union (2006/C 146/01), published in the Official Journal of the European Union dated 22 June 2006, health systems form an indivisible part of Europe's social infrastructure. When negotiating future strategies, the common interest should lie in protection of

values and principles on which health systems of the European Union rest. The Council of the European Union also noted the intention of the European Commission to develop principles of the Community for safe, high-quality, and effective medical care by strengthening co-operation among member countries, and ensuring clarity and certainty in the enforcement of the law of the Community in the field of medical services and medical care. According to the Statement on common values and principles of Health Ministers of the European Union, on which health systems of the European Union rest, and which form an appendix to the above-mentioned Conclusions of the Council of the European Union, basic values include universality, access to high-quality care, equality, and solidarity, such values being generally acknowledged by various bodies of the European Union in their work. All health systems of the European Union endeavour to focus primarily on the patient and to respond to their individual needs, but various member countries adopt varying attitudes to the application of such values in practice. Ministers of Health noted growing interest in the issue of the role of market mechanisms (including pressure by economic competition) in managing health systems, and stated that it is up to each member country to determine their own approach containing specific modifications tailored towards each individual health system.

IX. Systems of supervision over the exercise of medical profession

57. Detailed information on the conditions for approaching the medical profession, as well as on supervision over the exercise of the same, is provided by a study from the World Health Organisation, “Regulation and Licensing of Physicians in the WHO European Region” issued in 2005, and available at http://www.euro.who.int/document/e87789.pdf.

58. The professional association of physicians in France, the French Medical Chamber (see http://www.conseil-national.medecin.fr/) is of the nature of a “public service”. The law establishes that membership of the chamber is a pre-condition for the exercise of the profession of a physician (/the Chamber/ “obligatorily associates all physicians exercising medical practice”). The Chamber decides on registrations in a list of physicians, and ensures compliance with ethics and a professional quality of medical care, and is competent to handle disciplinary proceedings against its members. In Austria, there are medical chambers for individual states as well as the Austrian Medical Chamber (http://www.aerztekammer.at/) to which all physicians authorised to exercise medical profession belong as regular members. The Chamber maintains a list of all physicians in Austria entitled by the state chambers to exercise the profession, be they regular or associate members, and the Chamber is entitled to administer disciplinary proceedings. The chambers are also entitled to protect and support the working, social, and economic interests of physicians. In Germany, the central organisation in the system of medical self-government consists of the German Medical Association (http://www.bundesaerztekammer.de/). The positions of medical chambers in Germany are regulated by law governing individual states. In Bavaria, for example, there are district and regional medical clubs and a medical chamber, and each physician exercising their profession (or residing) there has a duty to register with the district medical club, of which they become members

following payment of a fee. Professional association in Belgium, the Belgian Medical Association (http://www.ordomedic.be/), holds the position of a public law corporation with a legal personality, the membership of which is obligatory; medical practice may only be exercised by those registered on the list of the Association. The Association deliberates on registration on the list of physicians, ensures compliance with medical ethics and rules for the exercise of medical practice, and administers disciplinary proceedings.

59. On the contrary, in Great Britain, the task to "protect, support, and maintain public health and safety" is assigned to the General Medical Council (http://www.gmc-uk.org/) which is of the nature of a corporation (body corporate); all physicians must be obligatorily registered with the Council. The Council consists of elected members (by all registered physicians); other members are appointed by various designated institutions (universities with medical faculties, Royal Colleges), and nominated by the Privy Council. (Davies, M.: Medical Self-regulation. Crisis and Change. Medical Law and Ethics, Ashgate, 2007, pp. 15 et seq.; the Parliament of the Czech Republic, Office of the Chamber of Deputies, Parliamentary Institute: Postavení lékařských komor v zahraničí /Position of medical chambers in foreign countries/, Informational base No. 5.033, January 1994).

60. The conditions for the exercise of the medical profession in the First Czechoslovak Republic were governed by Act No. 113/1929 of the Collection of Laws and Orders, on Medical Chambers (in the wording of Act No. 176/1934 of the Collection of Laws and Orders), where § 3 para. 1 says that "all physicians who permanently reside in the district of the medical chamber and exercise medical practice … are members of the medical chamber". This did not apply to physicians "appointed to national service (both civil and military)" who were members of the chamber "only insofar as their practice beyond these confines is concerned". The Chamber was of the nature of a public law self-governing corporation, and its Honourable Council exercised disciplinary powers (§ 27 para. 1).

X. Freedom of association

61. With respect to the framework for the constitutional law review set up by the petitioners concerning the contested provisions of § 3 para. 1 of Act No. 220/1991 Coll., the key issue involves the question of its conformity with the freedom of association, or its incorporation within the constitutional order.

62. Art. 20 para. 1 of the Charter, to which the petitioners referred, determines that the right of free association is guaranteed, and everybody has the right to associate together with others in clubs, societies, and other associations. According to Art. 20 para. 3 of the Charter, the exercise of these rights may be limited only in cases specified by law, if it involves measures that are necessary in a democratic society for the security of the state, the protection of public security and public order, the prevention of crime, or the protection of the rights and freedoms of others.

63. Art. 11 para. 1 of the Convention says that everyone has the right to freedom

of peaceful assembly and to freedom of association with others, including the right to form or join trade unions for the protection of their interests. According to Art. 11 para. 2 of the Convention, no restrictions shall be placed on the exercise of these rights other than such as prescribed by law and necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

64. The negative aspect of the freedom of association ('negative right of freedom of association') is then generally understood to be the possibility of freely deciding not to be a member of a certain association, and a corresponding prohibition of forcing any person to associate (cf. Judgment of the Constitutional Court dated 11 June 2003, file Nos. Pl. ÚS 40/02, N 88/30 SbNU 327, No. 199/2003 Coll.).

65. It is not questionable that the meaning and extent of the term 'association' established in Art. 11 para. 1 of the Convention, and in Art. 20 para. 1 of the Charter, that is in "general norm of the right of association" (Klíma, K.: Komentář k Ústavě a Listině /Commentary on the Constitution and the Charter/. Pilsen: Aleš Čeněk Publishing House, 2005, p. 757), are equivalent. Even the petitioners do not claim any relevant difference or any reasons therefor.

66. Here, as was mentioned earlier, the petitioners resorted to the statement that "excluding the association of public law from the concept of 'association' as specified by Art. 11 of the Convention is intentionally biased", and that "the wording of Art. 20 of the Charter of Fundamental Rights and Basic Freedoms by no means implies any difference for application to private or public law associations"; they refer (specifically) to differences between the Czech Medical Chamber and the Belgian Medical Association evaluated by the European Court of Human Rights in a judgment dated 23 June 1981 in the case of Le Compte, Van Leuven and De Meyere v. Belgium, Applications Nos. 6878/75; 7238/75, and, furthermore, "more recent case law of the European Court of Human Rights".

67. Therefore, it is necessary to deal with the question whether Art. 11 of the Convention and Art. 20 para. 1 of the Charter are applicable ratione materiae in relation to the Czech Medical Chamber.

XI. Decision-making practice of the bodies of the Convention

68. According to the decision-making practice of the bodies of the Convention, the viewpoint that the term 'association', normatively regulated by Art. 11 para. 1 of the Convention, must be given an autonomous meaning, is determining in terms of interpretation. National law classification has only a relative value and forms only a starting point.

69. The issue whether a medical chamber falls within the effects of Art. 11 of the Convention was dealt with by the European Court of Human Rights in its judgment dated 23 June 1981 in the case of Le Compte, Van Leuven and De Meyere v.

Belgium, Applications Nos. 6878/75; 7238/75, and in a decision on admissibility dated 6 November 2003 in the case of Popov and others, Vakarelova, Markov and Bankov v. Bulgaria, Applications Nos. 48047/99, 48961/99, 50786/99, and 50792/99; and by the European Commission of Human Rights in a decision on admissibility dated 8 July 1992 in the case of Simón v. Spain, Application No. 16685/90. In such cases, the bodies of the Convention established that the institutions under consideration are not associations as specified by the above-mentioned article, and that is why an infringement of the negative aspect of the freedom of association by obligatory membership of the same could not have occurred.

70. The European Court of Human Rights, in a judgment dated 23 June 1981 in the case of Le Compte, Van Leuven and De Meyere v. Belgium, Applications Nos. 6878/75; 7238/75, dealt with the Belgian Medical Association. The Court stated that the Association is an institution of public law, it was established not by individuals but by law, it is integrated within the state structure, and judges nominated by the King are appointed to the majority of its bodies. The Association pursues an objective in the public interest, specifically protection of health, and this by ensuring, in compliance with the relevant law, a form of public control over the exercise of medical practice. Within this power, it is especially required to maintain a list of the members of the Association. In order to carry out the tasks entrusted to it by the state, this organisation has been endowed with some administrative, normative, and disciplinary privileges exceeding the sphere of ordinary law, and thus it utilises legal instruments of public power.

71. The European Court of Human Rights, in its decision on admissibility dated 6 November 2003, in the case of Popov and others, Vakarelova, Markov and Bankov v. Bulgaria, Applications Nos. 48047/99, 48961/99, 50786/99 and 50792/99, evaluated the Bulgarian Medical Association and Bulgarian Dental Association (hereinafter the “Associations”). The Court remarked that the bodies of the Convention steadily view the regulatory bodies of freelance occupations as not being associations as specified by Art. 11 of the Convention. Generally, the objective of these bodies established by law is regulation and support of professions, whereby they exercise significant public law functions aimed at protecting the public. Thus they cannot be compared to private law associations or trade unions, and remain integrated within the state structure. Nevertheless, the Court must resolve in concreto whether both Associations in the given case, characterised by their functions, structures, and memberships, are associations falling under Art. 11 of the Convention, or whether they are effectively public law institutions, where contested obligatory membership of the same cannot interfere in the freedom of association. In this connection, the Court noted that the Associations – similar to the Belgian Medical Association – pursue objectives in the public interest, specifically protection of health, this by exercising, in compliance with relevant law, public control over the exercise of medical practice; in particular they maintain registries of physicians and dentists, are authorised to create rules, and bestowed with disciplinary powers. They propose codes of professional ethics for physicians and dentists, adopt rules of good practice together with the National Health Insurance Fund in accordance with the Act on Professional Organisations of Physicians and Dentists, and impose sanctions for medical malpractice. The Court thus concluded that the Associations apply procedures of public power. Furthermore, the Court had to

address a specific objection from the petitioners that the Associations are private law associations, since they are authorised to negotiate and effect the National Framework Contract with the National Health Insurance Fund. In their opinion, such a Contract is comparable with a collective agreement setting up terms and conditions under which physicians and dentists work and receive remuneration (which is a task of trade unions, and thus the Associations have features of trade unions within the scope of Art. 11 of the Convention). However, the Court stated that the National Framework Contract does not regulate such issues as wages and working conditions; the Contract applies to payments which may be required by the providers of medical care from the National Health Insurance Fund for services provided to insured persons, as well as quality, quantity, and the manner of provision of such services. According to the Court, the Contract is thus similar to a price controlling mechanism rather than to a collective agreement. For example, if a hospital is effecting an individual contract with the National Health Insurance Fund on the basis of the National Framework Contract, it may be hardly stated that the relationship in question is similar to that of an employee and employer. Even though it is true that individual contracts effected by (private) physicians and dentists extensively affect the manner of work and prices that may be charged to an insured person, they still do not resemble employment contracts, since they only set up the terms and conditions under which services are provided to patients, and amounts which may be required by physicians and dentists from the National Health Insurance Fund for medical services provided. The Court added that remunerations for medical services provided to patients holding a different type of health insurance or no health insurance whatsoever are not regulated by the Contract. The Court also referred to a “recent” decision by the Bulgarian Supreme Administrative Court which concluded that the Contract may be compared with secondary regulations and is subject to judicial review. Therefore, the Court stated that from negotiations on the Contract and effecting of the same, it cannot be inferred that the Associations act as trade unions; the structures of the Associations are described in detail in the Act on Professional Organisations of Physicians and Dentists, including the structures and functions of the central and regional bodies of both Associations, and membership of such bodies (the statutes of the Associations deal only with subsidiary issues, such as exact numbers of members of the bodies, and technical details of procedures of appointing the bodies). The Court also added that memberships of the Associations were based on a decision by an individual to practice a profession which requires special legal regulation, and not on other factors, such as ownership of land (a contrario report of the Commission dated 30 October 1997 in the case of Chassagnou and others v. France, Application No. 25088/94, para. 89).

72. The European Commission of Human Rights in its decision dated 8 July 1992, in the case of Vialas Simón v. Spain, Application No. 16685/90, stated that medical chambers in Spain are public law institutions established by law and pursuing the public interest – the protection of (public) health – by ensuring certain public control over the exercise of medical practice and compliance with medical ethics. Within the powers entrusted to the medical chambers by the state, the chambers enjoy certain administrative as well as disciplinary privileges. Medical chambers also participate in the process of creating legal norms and implementary regulations, possibly give their opinions on proposals in the field of health care services, submitted by bodies of public power. According to the Commission, with

respect to the powers granted to the medical chamber, it is proper to conclude that this is not an association as specified under Art. 11 of the Convention. In the given case, the petitioner claimed that for physicians active in the public sector, chambers are nothing but associations recognised by this Article, since typical functions of control over exercising medical practice and compliance with medical ethics, with respect to such physicians, are exercised by bodies of administration employing such physicians. However, the Commission referred to a judgment of the Spanish Constitutional Court dated 17 July 1989, and concluded that even the fact that the state ensures compliance with statutory and contractual obligations by physicians employed by the state, cannot be equated to (as was required by the petitioner) removing the powers of medical chambers in relation to physicians employed in the public sector, so that they would carry out control over exercise of medical practice and compliance with medical ethics.

73. The bodies of the Convention inferred that Art. 11 of the Convention is neither ratione materiae applicable in the case of other professional chambers.

74. It is proper to refer also to a partial decision by the European Commission of Human Rights on admissibility dated 12 March 1981 in the case of Barthold v. Germany, Application No. 8734/79, which related to obligatory membership of the Council of Veterinary Surgeons.

75. In a decision on admissibility dated 8 September 1989 in the case of Revert and Legallais v. France, Applications Nos. 14331/88 and 14332/88, the Commission concluded, in relation to obligatory membership of the French Chamber of Architects, that the obligation imposed by law to join the Chamber of Architects is aimed at protecting the public interest (an interest which is not specified in closer detail, but, from the context of the case, identifiable also with protecting recipients of the services, or the public).

76. In a decision on admissibility dated 2 July 1990 in the case of A. and others v. Spain, Application No. 13750/88, the Commission made it clear that bar associations in Spain are institutions of public law regulated by law and pursuing objectives in the general interest, which is support of free and adequate legal aid and thus support of justice. The Commission accentuated that registration with the list maintained by the chamber, such a list representing a preliminary and indispensable condition for the exercise of the profession of an attorney at law, is open to anyone who meets the statutory conditions. The Commission then added that professional chambers are not, according to the settled decision-making practice of the bodies of the Convention, associations as specified by Art. 11 of the Convention.

77. The Court, in a decision on admissibility dated 3 April 2001, in the case of O. V. R. v. Russia, Application No. 44319/98, in connection with the issue of membership of Archangelsk Notarial Chamber, realised again that chambers of freelance occupations are not associations as specified by Art. 11 of the Convention. The purpose of these bodies established by law is to regulate and support such occupations and also to fulfil public law tasks for the protection of the public. Thus they cannot be compared with trade unions – they remain integrated within a state’s structure.

78. In a decision on admissibility dated 12 October 2004 in the case of Bota v. Romania, Application No. 24057/03, the Court also referred to settled case law, according to which chambers of freelance occupations are institutions of public law, regulated by law and pursuing objectives in the public interest, and thus Art. 11 of the Convention does not apply to them. The Court emphasised again that the Romanian Bar Union under evaluation in this case was established by law and pursues an objective in the general interest, which is to support adequate legal aid and, implicitly, support justice.

79. We may point out other decisions by the European Commission of Human Rights, where the bodies of the Convention concluded that the entities under evaluation stand outside the impact of Art. 11 of the Convention, such as a decision on admissibility dated 6 July 1977 in the case of Association X. v. Sweden, Application No. 6094/73 (Association "A. Studentkar" was under assessment), a decision on admissibility dated 12 April 1991, in the case of Halfon v. United Kingdom, Application No. 16501/90 (Exeter College Students' Union), a decision on admissibility dated 10 July 1991 in the case of Weiss v. Austria, Application No. 14596/89 (Carinthian Chamber of Commerce), and a decision on admissibility dated 14 January 1998 in the case of M. A. v. Sweden, Application No. 32721/96 (Stockholm University's Student Union). Other decisions from the case law of the European Court of Human Rights include a decision on admissibility dated 14 September 1999 in the case of Karakurt v. Austria, Application No. 32441/96 (board of employees), and a decision on admissibility dated 4 July 2002 in the case of Köll v. Austria, Application No. 43311/98 (tourism association).

80. For the sake of completeness, it is proper to note that, on the contrary, infringement of the negative aspect of the freedom of association in contravention of Art. 11 of the Convention was proclaimed by the European Court of Human Rights (as for membership of trade unions), for example, in a judgment dated 13 August 1981 in the case of Young, James and Webster v. United Kingdom, Applications Nos. 7601/76, 7806/77, a judgment dated 20 April 1993 in the case of Sibson v. United Kingdom, Application No. 14327/88, a judgment dated 25 April 1996 in the case of Gustafsson v. Sweden, Application No. 15573/89, a judgment dated 11 January 2006 in the case of Sorensen v. Denmark, Applications Nos. 52562/99 and 52620/99, also in a judgment dated 30 June 1993 in the case of Sigurdur A. Sigurjónsson v. Iceland, Application No. 16130/90 (Frami Automobile Association), and in a judgment dated 29 April 1999 in the case of Chassagnou and others v. France, Applications Nos. 25088/94, 28331/95 and 28443/95 (approved municipal hunters' associations).

XII. Case law of the Constitutional Court

81. The Constitutional Court has expressed its opinion on the attributes of professional chambers in the above-mentioned Judgment dated 16 April 2003, file Nos. I. ÚS 181/01, N 58/30 SbNU 97 (see clause 48). The Court also identified itself with the doctrinal definition in a Judgment dated 25 June 2002, file Nos. Pl. ÚS 36/01, N 80/26 SbNU 317, 403/2002 Coll., having based its opinion on aspects defining the term 'public law body'; the Court considered these to include factors

of public purpose, method of foundation of the same, and powers entrusted to the same.

XIII. Legal characteristics of the Czech Medical Chamber

82. With respect to opinions continually held by the Constitutional Court concerning the importance of its own previous case law, as well as decisions by the bodies of the Convention, in particular the European Court of Human Rights, and their consequences on the assessment of the specific case, it suffices to say that the Constitutional Court again proceeds from both types of decisions (as was explained in the previous Sections X and XII).

83. Attention is thus paid to the issue whether the opinions declared up to now in these resources regarding 'professional self-government', or 'professional chambers', in relation to Art. 11 of the Convention and Art. 20 para. 1 of the Charter, are applicable in the case of the Czech Medical Chamber. In this it is not omitted that the aspects determining interpretation as presented are of informative value particularly when viewed together.

Establishment of the Czech Medical Chamber

84. The Czech Medical Chamber was established by law (provisions of § 1 para. 1 of Act No. 220/1991 Coll.) and defined as a self-governing non-political professional organisation endowed with a legal personality, associating all physicians registered on the list maintained by the Chamber itself (§ 1 para. 2 and 3 of Act No. 220/1991 Coll.).

85. Therefore, the Chamber is characterised by the same form of establishment as other professional chambers, which, according to the decision-making practice of the bodies of the Convention, stand beyond the effects of Art. 11 of the Convention. In addition, other professional chambers were established by law within the legal order of the Czech Republic: the Czech Dental Chamber, the Czech Pharmaceutical Chamber (§ 1 para. 1 of Act No. 220/1991 Coll.), the Czech Chamber of Patent Attorneys (§ 22 of Act No. 237/1991 Coll. on Patent Attorneys, or Act No. 417/2004 Coll. on Patent Attorneys and on Amendments to Act on Protection of Industrial Property), the Czech Veterinary Chamber (§ 1 of Act No. 381/1991 Coll. on the Czech Veterinary Chamber), the Notarial Chamber of the Czech Republic and notarial chambers at seats of regional courts (§ 35, or § 29 of Act No. 358/1992 Coll. on Notaries and Their Operations), the Czech Chamber of Architects and Czech Chamber of Authorised Engineers and Technicians Operating in Building Development (§ 23 of Act No. 360/1992 Coll. on Execution of Profession of Authorised Architects and Authorised Engineers and Technicians Operating in Building Development), the Chamber of Tax Advisers of the Czech Republic (§ 9 of Act No. 523/1992 Coll. on Tax Advisory Services and the Chamber of Tax Advisers of the Czech Republic), the Chamber of Auditors of the Czech Republic (§ 24 para. 2 of Act No. 524/1992 Coll. on Auditors and the Chamber of Auditors of the Czech Republic, or Act No. 254/2000 Coll. on Auditors), the Czech Bar Association (§ 40 para. 3 of Act No. 85/1996 Coll. on Advocacy), and the Chamber of Distress Officers of the Czech Republic [§ 6 and § 109 para. 1 of Act No. 120/2001 Coll. on Judicial Distress Officers and Their Operations (Rules of Distress) and on Alterations to

Other Acts].

86. Even the manner of establishment of the Czech Medical Chamber affirms the opinion that it is an institution identifiable with those treated by the bodies of the Convention as public law corporations (see clauses 69 to 79 above), whilst it differentiates from associations as assessed by the European Court of Human Rights in the judgment referred to by the petitioners, dated 29 April 1999, in the case of Chassagnou and others v. France, Applications Nos. 25088/94, 28331/95 and 28443/95. The approved municipal hunters' associations under assessment remained "private law institutions", while Act No. 64-696 dated 10 July 1964, known as "Loi Verdeille", then represented an "invitation to membership of association established under an Act from 1901", which applies (para. 32 and para. 99 of the above-quoted judgment) to private law association (thereby the judgement on the relative informative value of compliance with the above-specified criterion is not doubted, as it is implied, for example, in relation to the origination of a "private law" joint stock company on the basis of Act No. 77/2002 Coll. on the Joint Stock Company 'České dráhy' /Czech Railways/, 'Správa železniční dopravní cesty' State Organisation /Railway Infrastructure Administration/, and on Alterations to Act No. 266/1994 Coll. on Railways, as amended by later regulations, and of Act No. 77/1997 Coll. on State Enterprises, as amended by later regulations; cf. file No. III. ÚS 63/06).

Obligatory membership
87. Due to "compulsory" membership under § 3 para. 1 of Act No. 220/1991 Coll., the Czech Medical Chamber resembles a public law corporation according to case law summary in Sections XI and XII, and in such case, the objection that there is a completely "intentionally biased" exclusion of "association of public law from the concept of association as specified by Art. 11 of the Convention", is purely fanciful. The consideration of the petitioners that "private law associations can hardly have the resources for ensuring and enforcing obligatory membership of the same" then also goes against the ambition to reconcile obligatory membership with "private law institutions" or associations as specified by Art. 11 of the Convention, evidenced by cases evaluated by the European Court of Human Rights and listed in clause 80 above.

Supervision over the exercise of medical profession
88. When the Czech Medical Chamber, under § 2 para. 1 clauses a) and b) of Act No. 220/1991 Coll., sees to it that members exercise their profession expertly, in accordance with its ethics and in a way determined by law and rules of the Chamber, and guarantees the expertise of its members and approves compliance with conditions for exercise of the medical profession under special regulations, then the purpose of its establishment is to ensure proper practice of the medical profession as such and, with respect to the nature of the same (see Section VIII 'Public health protection'), "fulfilment of public law tasks for the protection of the public", with this being beyond any doubt.

Normative powers
89. The provisions of § 2 para. 1 clause a) of Act No. 220/1991 Coll. anticipate that the Czech Medical Chamber issues "rules of the Chamber", and by the provisions of § 15 para. 2, the Chamber is granted powers "to approve, modify and annul the

rules of organisation, procedure, election, and discipline". This normative power is exercised by the convention of delegates to which authority to issue ("approve") also other regulations of the Chamber is attributed, as is inferred from a non-exhaustive enumeration of powers of such a body. Normative power is typical also of other professional chambers, one of the most comprehensive examples being the regulation included in Act No. 85/1996 Coll. on Advocacy (§§ 49-53).

90. Autonomous normative powers, binding upon the members of the Chamber, thus represent "a constitutive element of public power entrusted to a public law corporation" (Beran, K.: Právnické osoby veřejného práva /Legal Entities of Public Law/. Prague: Linde, 2006, p. 63).

91. For this conclusion, decisive in terms of the issue under consideration, it is no longer relevant to solve the issue of possibly reviewing this creation of norms ("professional regulations"). However, it is beyond doubt untrue that decisions by bodies of the Chamber which interfere with the legal position of members of the same are not subject to judicial review, or that obligations imposed on the individual members on the basis of professional regulations (cf. the above-specified Judgment of the Constitutional Court dated 16 April 2003, file No. I. ÚS 181/01) are completely beyond the scope of judicial protection. Besides, the petitioners' objection that relevant judicial supervision is lacking is clearly aimed at another issue than obligatory membership, this being the matter exclusively under consideration here.

Personnel and disciplinary powers

92. The Czech Medical Chamber maintains a list of members [§ 2 para. 1 clause e) of Act No. 220/1991 Coll.] and a list of visiting persons [§ 6a para. 1 of Act No. 220/1991 Coll.]. The public law nature of registrations on the lists maintained by the Czech Medical Chamber is retained even under the very limited conditions applicable to administrative discretion allowed under the provisions of § 4 and § 6a para. 2 of Act No. 220/1991 Coll. An applicant wishing to be placed on the list of members of the Chamber and not subsequently registered by the Chamber on said list, or whose listing was not processed in due time, has the right to seek judicial protection (§ 6a para. 11 and § 7 of Act No. 220/1991 Coll.).

93. Even following the date of effectiveness of Act No. 95/2004 Coll. on Medical Professions of Physicians, Dentists, and Pharmacists, it remains under the power of the Czech Medical Chamber to set conditions for the exercise of private practice of its members and of the function of authorised representatives under special regulation, as well as of head physicians and heads of wards in non-governmental medical establishments, and to issue certificates on complying with such conditions [§ 2 para. 2 clauses c) and d) of Act No. 220/1991 Coll., professional regulation No. 11 - Licensing Rules]. The option of judicial review has been preserved (§ 2 para. 3 and 4 of Act No. 220/1991 Coll.).

94. In "personnel" connections, it is also proper to refer to the right of the Czech Medical Chamber to participate in tenders for staffing management positions in health care services, to require from its members documents related to the exercise of the profession, to give opinions concerning the conditions and methods of the further education of physicians, stomatologists and pharmacists, to take part

in organising specialisation tests, and to issue opinions binding upon members of the Chambers relating to professional issues concerning the provision of medical care and medical research [§ 2 para. 2 clauses b), g), h) and i) of Act No. 220/1991 Coll.].

95. The Czech Medical Chamber has been entrusted with disciplinary powers [§ 2 para. 2 clause f) of Act No. 220/1991 Coll.] exercised by the Honourable Council of a district association, or the Honourable Council of the Czech Medical Chamber (§ 13 para. 1 and § 18 para. 1 of Act No. 220/1991 Coll.). A proposal for commencing disciplinary proceedings under § 14 para. 2 clause c) of Act No. 220/1991 Coll. is submitted by an auditing committee of a district association [cf. also § 2 para. 2 clause e) of Act No. 220/1991 Coll.] and the resulting decision by the Honourable Council of the district association, whereby disciplinary measures are imposed, may be contested by a remedy to be decided on by the Honourable Council of the Chamber. The decision of the Honourable Council on imposing a disciplinary measure is, under § l8 para. 5 of Act No. 220/1991 Coll., reviewable by a court of justice.

96. The nature of summed-up personnel and disciplinary attributes – as attributes indicative for a public law corporation – was rendered by the Supreme Administrative Court in its judgment dated 6 January 2005, file No. 6 As 36/2003-115, according to which the disciplinary powers (here in relation to attorneys at law) represent "a part of public administration, since if the same had not been entrusted to the Chamber, it would have been a part of general state administration". There is no reason not to concur with this conclusion; and as for "personnel and disciplinary" regulation of powers of the Czech Medical Chamber thus there is, even here, a clear similarity to those "public law corporations" assessed by bodies of the Convention in Section XI above.

97. When the petitioners refer to "more recent case law" of the European Court of Human Rights which, in their opinion, "deals in particular with the right not to associate and which does not explicitly exempt from the same public law corporations", and to case law "applying to the formal origination of incorporation, and actual operation of associations and corporations (§100 of Chassagnou and others v. France, dated 29 April 1999)", it is necessary to add that at the level of the powers entrusted, a considerable difference exists between the Czech Medical Chamber and approved "municipal hunters' associations", which according to the Court did not enjoy "privileges exceeding the sphere of ordinary law, be they administrative, normative, or disciplinary", and thus did not utilise "procedures of public power" (para. 101 of the above-specified judgment).

Participation in proceedings under the Act on Public Health Insurance
98. According to the provisions of § 2 para. 2 clause a) of Act No. 220/1991 Coll., the Chambers are entitled to participate in negotiations on generating tables of tariffs for medical acts, on generating prices of medication, pharmaceutical preparations, and tables of tariffs for other services provided by pharmacies. Together with the regulation contained in § 17 para. 3, § 17 para. 6, and § 48 para. 1 clause b) of Act No. 48/1997 Coll. on Public Health Insurance, as amended by later regulations, this represents a basis for various types of proceedings featuring the participation of the Czech Medical Chamber in relation to public health

insurance, or the scope and conditions under which medical care is provided from health insurance.

99. Provisions of § 17 para. 1 of Act No. 48/1997 Coll. specify that, in order to ensure the material execution of the provision of medical care to insured persons, the General Health Insurance Company and other health insurance companies established under special statute (Act No. 280/1992 Coll. on Departmental, Professional, Employees' and Other Health Insurance Companies, as amended by later regulations) effect contracts with medical establishments concerning the provision of and remuneration for medical care ('individual contracts'). Prior to effecting these individual contracts, a tender must be organised according to § 46 para. 2 of Act No. 48/1997 Coll.; the course of such tenders is regulated by the provisions of § 46 to § 52; a representative of the relevant professional organisation, which includes the Czech Medical Chamber, is a member of the committee established by the organiser (Regional Council or Prague City Hall) for each tender. However, the health insurance company is not bound by the results of the tender – they "take the same into account", as well as they "take into account" the opinion of the organiser, when effecting individual contracts (§ 52 para. 2 of Act No. 48/1997 Coll.) which are governed by the 'Framework Contract'. This, according to § 17 para. 3 of Act No. 48/1997 Coll., is a result of negotiation procedure between representatives of health insurance companies unions (representatives of the General Health Insurance Company of the Czech Republic and employees' health insurance companies) and representatives of various group contractual medical establishments represented by their own special-interest associations (including the Czech Medical Chamber).

100. A Framework Contract should contain provisions governing the time period of effectiveness, manner of and reason for termination of an 'individual contract', should regulate the manner of provision of remuneration for the medical care provided, the rights and obligations of parties to the individual contract unless the same are specified by law, general conditions for the quality and effectiveness of medical care provision, conditions indispensable for the discharge of the individual contract, a control mechanism relating to the quality of care provided and accuracy of amounts charged, as well as an obligation for mutual notification as regards relevant inspection of the necessary data (§ 17 para. 3 of Act No. 48/1997 Coll.). Framework Contracts agreed upon in individual segments of the medical care provided are, following their acceptance, submitted to the Ministry of Health which then evaluates their compliance with legal regulations and the public interest, and subsequently issues the same as a decree (at present, Decree No. 618/2006 Coll. whereby Framework Contracts are issued, is effective). If no new contract is concluded prior the expiry of the contract, the validity of the contract is prolonged until the time a new Framework Contract is concluded. If the parties to the negotiation procedure fail to agree on the contents of the Framework Contract within a period of six months, or if the submitted Framework Contract is in conflict with legal regulations or the public interest, the Ministry of Health is then called upon to make the relevant arrangements.

101. § 17 para. 6 of Act No. 48/1997 Coll. then defines the procedure resulting in the determination of the 'point value', the amount of reimbursement for medical care covered by health insurance, and regulatory limits for the following calendar

year. Negotiation procedure is participated in by representatives of the General Health Insurance Company of the Czech Republic, other health insurance companies, and relevant professional associations of providers as representatives of contractual medical establishments.

102. When an agreement on 'point value', the amount of remuneration for medical care covered by health insurance and regulatory limits is arrived at, the contents of such an agreement is evaluated by the Ministry of Health from the viewpoint of its compliance with legal regulations and the public interest. If the result of the agreement is found to be in compliance with the above, the Ministry of Health issues the same as a decree. Should negotiation procedure bring about no such result within 90 days prior to the termination of the given calendar year, or when the Ministry of Health ascertains that the result of the negotiation procedure does not comply with legal regulations or the public interest, the Ministry establishes such parameters for the following calendar year by a decree (Decree No. 383/2007 Coll. on establishment of 'point values', the amount of remuneration for medical care covered by health insurance and regulatory limits on the volume of the provided medical care covered by public health insurance for 2008, is currently effective). A list of medical acts with their 'point values' is issued by the Ministry of Health as a decree (§ 17 para. 5 of Act No. 48/1997 Coll.); prior to effectiveness of Act No. 267/2007 Coll. on Stabilisation of Public Budgets, negotiation procedure was also applied in this process.

103. Upon evaluation of the powers of participation in tenders and negotiation procedures so summarised, it is proper to conclude that – in the context of the above-mentioned (clause 71) decision by the European Court of Human Rights on admissibility dated 6 November 2003 in the case of Popov and others, Vakarelova, Markov and Bankov v. Bulgaria, Applications Nos. 48047/99, 48961/99, 50786/99 and 50792/99 – even in this instance, it is not true that the Czech Medical Chamber would thereby "resemble" a trade union (Art. 11 para. 1 of the Convention, Art. 27 para. 1 of the Charter). A clear conclusion is inferred from the above-specified particulars of Framework Contracts (and, subsequently, 'individual' contracts), this being that regulation of relationships between health insurance companies and medical establishments cannot be identified, in terms of their contents, with an equivalent of collective agreements (principally specifying relationships between employers and employees, and potentially their rights and obligations in relationships of labour law). The same is true for the regulation of the position of the Czech Medical Chamber to the arrangement of determining the 'point value', the amount of reimbursement for medical care covered by health insurance and regulatory limits, where, in the words of the European Court of Human Rights (ibid), it is "a price controlling mechanism" which, by the very nature of the matter, is characterised not by private law attributes but "public law" attributes.

XIV. Assessment of the petition for annulment of § 3 para. 1 of Act No. 220/1991 Coll.

104. It is easy to identify with the fact that "non-local" public law corporations of professional self-government show (similarly to local self-government) the following attributes, they: 1/ are established by law; 2/ are entrusted with the

exercise of public power in relation to a certain group of inhabitants; 3/ have a legal personality; 4/ have a personal basis (a special reason for membership); 5/ are independent of the state in terms of financing and budget; 6/ bear responsibility for their actions; 7/ act in their own interest as well as in the general or public interest; 8/ are, along with their activities, supervised by the state; 9/ make authoritative decisions which may be contested at court (see Filip, J.: Ústavní právo České republiky. 1, Základní pojmy a instituty. Ústavní základy České republiky /Constitutional Law of the Czech Republic. 1, Basic Terms and Institutes. Constitutional Basis of the Czech Republic/; Brno: Masaryk University, published by Doplněk, 2003, pp. 500-501).

105. Similarly, it is possible to accept reasoning that the statutory definition of the Czech Medical Chamber, as presented in Section XIII, adequately reflects these attributes. The Czech Medical Chamber completely fulfils attributes 1 to 5 above. (With respect to attribute 5, it is proper to quote § 20 of Act No. 220/1991 Coll., according to which the Chambers independently manage their assets and administer resources in accordance with their annual budgets. The revenues of the Chamber are composed of members' fees, grants, donations, and other income. Revenue from fines is allocated to the social fund of the Chamber.) The responsibility of the Chamber at the level of civil and administrative law is also discernable. Acts passed by the Czech Medical Chamber do not stand, as was stated above, beyond the reach of judicial control (however problematic the arrangement of normative powers and its judicial control seems to be – much like with other chambers, with certain exceptions, such as with the Czech Bar Association or the Czech Chamber of Patent Attorneys). Acting in the public or general interest is indubitably correlated to the protection of public health.

106. Case law description provided by the Constitutional Court in its Judgment dated 16 April 2003, file No. I. ÚS 181/01 (clause 48), concerning the Czech Veterinary Chamber established by Act No. 381/1991 Coll., corresponds with that mentioned above. It is also proper to relate to the Czech Medical Chamber the conclusion that it is one of several professional chambers "with obligatory membership, associating self-employed natural persons exercising certain professions, where there is a strong public interest in the proper exercise thereof. These chambers are legal entities of public law, founded by law, endowed with the competence of adopting various internal regulations for the chamber and members thereof, who must, with respect to obligatory membership, subject themselves to the same. The Chamber thus exercises certain authoritative powers over such members – people belonging to a certain professional class. These powers typically include … disciplinary powers".

107. It has already been emphasised in particular points in Section XIII, in relation to "legal characteristics" of the Czech Medical Chamber summarised there, that these attributes as "public law" factors separate the Czech Medical Chamber from such "private law" associations which enjoy natural protection under Art. 11 of the Convention, or Art. 20 para. 1, and possibly Art. 27 para. 1, 2 of the Charter.

108. It is crucial that these legal attributes also make it possible to identify the Czech Medical Chamber with such institutions evaluated by the bodies of the Convention (in particular the European Court of Human Rights) in decisions

enumerated in Section XI. It is evident that there indeed exists no relevant difference between the Czech Medical Chamber and – for example – the Belgian Medical Association evaluated by the European Court of Human Rights in the case of Le Compte, Van Leuven and De Meyere v. Belgium as an "institution of public law", established not by individuals but by law, integrated in the state structure, pursuing an objective in the public interest, specifically as regards protection of health, by ensuring, in accordance with the relevant law, a form of public control over the exercise of medical practice; for the execution of tasks entrusted… by the state, it enjoys some administrative, normative and disciplinary privileges outside the sphere of ordinary law, "and thus it utilises legal instruments of public power" (see clauses 69 and 70). On the contrary, the argument of the petitioners that the Belgian Medical Association is "very strongly controlled directly by the state" then does not imply absolutely clearly a need for decisive differentiation (in relation to the Czech Medical Chamber), and the same is also true with respect to the statement that the Czech Medical Chamber, in its actual operation, "at present effectively resembles a trade union", i.e. "an association of private law", since decisive characteristics of, to the contrary, an "institution of public law" have been retained by the Chamber in any case, and the lack of "private law" elements is also demonstrable (see clause 103) in relation to its participation in tenders and negotiation procedures, possibly in the arrangement of determining the 'point value', the amount of reimbursement for medical care covered by health insurance, and regulatory limits. As for the thoughts of the petitioners on the "intentionally biased" exclusion of the "association of public law from the concept of association as specified by Art. 11 of the Convention", it suffices to refer to clause 87 above, from which it is implied that, in the cases of 'professional chambers' mentioned in Sections XI and XII ("institutions of public law"), differentiation is objective, resting on a legal basis which also applies – with respect to similar legal definition – to the Czech Medical Chamber. The degree of their autonomy in relation to the state, accentuated by the petitioners, does not itself prevent such "differentiation".

109. It is then of key significance that when the bodies of the Convention inferred that (these) institutions under evaluation are not associations as specified by Art. 11 of the Convention and, therefore "an infringement of the negative aspect of the freedom of association by obligatory membership of the same could not have occurred", it is also reasonable to apply this conclusion to the institution comparable with them, this being – as has been inferred – the Czech Medical Chamber. If then, as implied by the conclusions stated under clause 65, there are no doubts that the sense and scope of the term 'association' established in Art. 11 para. 1 of the Convention, and in Art. 20 para. 1 of the Charter are identical, then it is logically true that the summary on exclusion of interference in freedom of association also applies in relation to the negative aspect of the same (the right "not to associate"), which is based on Art. 20 para. 1 (possibly Art. 27 para. 1, 2) of the Charter to which the petitioners referred.

110. When the freedom of association (in its negative aspect) cannot be at all objectively affected by obligatory membership of the Czech Medical Chamber, there is also no room for continuing evaluation of the petitioners' petition by the test of proportionality, so as to verify whether it is not limited in a way impermissible from the viewpoint of constitutional law, or whether there existed or

not any means “more sparing” to the given freedom.

111. It is not improper to note here that the institute of obligatory membership under § 3 para. 1 of Act No. 220/1991 Coll. is, under comparable (European) circumstances, nothing exceptional (see Section IX above); and that this institute is “logical” by organically ensuring the competence of the Czech Medical Chamber towards the persons directly addressed (physicians) by the very fact that the same are members of the Chamber. The binding nature of norms, acts, and other measures by the Chamber would be possible to achieve by means other than exclusively through obligatory membership (see, for example, clause 59), but it is essential that its establishment within the decisive conditions cannot be at all linked to arbitrariness or capriciousness of the legislature.

112. Obligatory membership of the Czech Medical Chamber under § 3 para. 1 of Act No. 220/1991 Coll. is, therefore, not in conflict with Art. 20 para. 1 (Art. 27 para. 1, 2) of the Charter.

XV. On other objections of the petitioners

113. Therefore, the dispute on the “suitability” of using the categories ‘member’ or ‘membership’ in Act No. 220/1991 Coll., administered on the basis of comparison with Act No. 85/1996 Coll. on Advocacy, which uses the term “registration on the list of attorneys at law maintained by the Czech Bar Association” (§ 4), remains only theoretical (within a necessary reflection on the result of the proceedings). It is not clear which kind of a real (a contr. symbolic, formal, semantic, psychological, etc.) change would be brought about by the corresponding modification to Act No. 220/1991 Coll. For the purpose of a constitutional law review (when obligatory “membership“ of the professional chamber is not an expression of limits imposed on the freedom of association) it is possible to state only that the comparison of both legal arrangements does not imply the position of attorneys at law towards the Czech Bar Association is contentually (at the level of rights and obligations) different from that of physicians in their relationship towards the Czech Medical Chamber. This conclusion cannot be questioned even by the reference made by the petitioners to the “actual operation” of the Czech Medical Chamber, or the objection that “each member of the organisation is logically identified with the same, and as such is displeased that they are associated with activities with which they fundamentally disagree”, since there is apparently no constitutional-law reflection included in the same.

114. The thoughts of the petitioners that the same may be ensured (and more suitably) not by way of the Czech Medical Chamber but via direct exercise of administration by the state are unimportant, with respect to the inferred non-existence of infringement of the constitutionally guaranteed freedom of association, because they only reflect political issues (the election of this or that concept of administration), the evaluation of which is, due to the nature of the matter, not appropriate for the Constitutional Court. It is merely noted here that in clause 52, in accordance with the petitioners, it is acknowledged that direct constitutional law support for professional self-government “is faint”, however,

that “favourable evaluative tendencies, in particular in relation to the state administration confronted by the petitioners”, are perceivable.

115. The need for differentiating between “private” physicians and “physicians as employees” (in the form of consent to the opinion of the Czech Medical and Social Service Workers Union), as was stated by the petitioners, was commented on by the European Commission of Human Rights in a decision dated 8 July 1992 in the case of Vialas Simón v. Spain (clause 72 above), and there is no reason to oppose the opinion pronounced by the Commission (that the difference is not crucial when it comes to the relations under consideration).

116. References by the petitioners to “more recent case law” of the European Court of Human Rights have been – as for the judgment in the case of Chassagnou and others v. France, dated 29 April 1999 – taken into account in clauses 86 and 97 above, with the result that it is not possible to infer any effective support for their opinions therefrom. In a judgment dated 13 August 1981 in the case of Young, James and Webster, Applications Nos. 7601/76, 7806/77, para. 57, the Court stated that the protection of personal belief provided by Art. 9 and 10 of the Convention in the form of (guaranteeing) freedom of thought, conscience, and religion, and freedom of expression, is one of the purposes of the freedom of association under Art. 11 of the Convention, and an enforcement of a person against their will to be a member of an association thus assaults the very nature of Art. 11 of the Convention. However, the point in this instance was membership of trade unions, i.e. associations as specified by Art. 11 of the Convention. Similarly, the European Court of Human Rights in its judgment dated 30 June 1993, in the case of Sigurdur A. Sigurjónsson v. Iceland, Application No. 16130/90, evaluated in this way opinions presented by representatives of the Frami association (para. 37), but also only after they had declared that the association in question falls under Art. 11 of the Convention (para. 32). The criticised regulation of Act No. 220/1991 Coll. does not limit in any way the possibility of establishing “true” associations as specified by Art. 20 para. 1, Art. 27 para. 1, 2 of the Charter.

117. The statement that obligatory membership of the Czech Medical Chamber is also an infringement of the right established by Art. 26 para. 1 of the Charter, according to which everyone has the right to free choice of profession, is also invalid. When it was inferred that freedom of association as specified by Art. 20 of the Charter (in its “negative aspect”) is not aggrieved by obligatory membership, then logically the statement, which is contrarily based on “aggrieving” such freedom, necessarily cannot stand. Therefore, it is not true, as the petitioners state, that the right to free exercise of medical profession is aggrieved due to the fact that those wishing to exercise such a profession must surrender the freedom of association, since there is no such right. Constitutional law conformity of other statutory preconditions for the exercise of the medical profession (§ 4 of Act No. 220/1991 Coll.) apparently cannot be doubted by referring to Art. 26 of the Charter, something even the petitioners did not do.

118. In the cases when membership of associations as specified by Art. 11 of the Convention is not under evaluation, there is no scope for deliberating on the infringement of the negative aspect of the freedom of association. This is documented by the decision-making practice of the bodies of the Convention, for

example, in a decision on admissibility dated 8 September 1989 in the case of Revert and Legallais, Applications Nos. 14331/88 and 14332/88, in which the European Commission of Human Rights declared that the petitioners may freely express their personal opinions in "another manner". In a decision dated 12 April 1991 in the case of Halfon v. United Kingdom, Application No. 16501/90, the Commission did not accept as relevant objections relating to political activities of the Exeter College Students' Union associated with the National Union of Students.

119. Similar aspects can also be applied in relation to an apparently determining motive that led the petitioners to disapprove of obligatory membership, which they identify with resolute antagonism towards the public and political activities of the Czech Medical Chamber, as they described in detail (see clauses 10 and 40 above) and documented, amongst other items, by the issues of the Tempus medicorum journal submitted. Furthermore, here the petitioners must be reminded of the fact that when freedom of association as specified by Art. 20 of the Charter is not "the issue", an effective framework of constitutional law is missing for favourable evaluation of their criticism. The activities of a professional chamber, as a bearer of public power, may objectively give rise to an infringement of such fundamental rights and basic freedoms which are protected by sources of the constitutional order, but the response to this may be only the establishment of an adequate legal (judicial) framework for such necessary protection, not exclusion of persons endangered by such an infringement from the competency of such a body. Besides, the petitioners – in addition to an inapplicable reference to Art. 20 of the Charter – did not claim any infringement of fundamental rights and basic freedoms; the statement that (some) members of the Chamber "are displeased" with being associated with activities with which they "fundamentally" disagree and consider them "an assault on their own interests", naturally does not imply such an infringement. The petitioners also disregarded that the outwardly presented "will" (including "political opinions") of the Czech Medical Chamber against which they protest are a manifestation of established institutional mechanisms, in particular the bodies of the Chamber and their representatives, the constitutionality (democratic nature) of which they did not doubt, and whose functioning and socio-political actions are, therefore, objectively participated in by all "obligatory" members (physicians); thus necessarily also those who at present do not agree with the public expressions of the Chamber. It is then possible to proceed from the fact that the current public image of the Czech Medical Chamber reflects the will of their members, or (all) physicians, dominant at the given moment, which may also be expressed in such a way that the Chamber exists in such a form that the physicians wish, or possibly such a form as they "permitted". The fact that the situation against which the petitioners protest is not a direct manifestation of a legal regulation of the Czech Medical Chamber is obvious (including regulation of obligatory membership), which the petitioners themselves also demonstrate by not proposing that obligatory membership of the Czech Dental Chamber and the Czech Pharmaceutical Chamber (governed by the same provisions of § 3 of Act No. 220/1991 Coll.) be annulled. These arguments are definitely not relevant from the viewpoint of constitutional law.

XVI.
Conclusion

120. On the basis of the above, the Constitutional Court has concluded that the petition for annulment of the contested provisions of § 3 para. 1 of Act No. 220/1991 Coll. is not justified and, therefore, under § 70 para. 2 of the Act on the Constitutional Court, the petition was denied.

Note: Decisions of the Constitutional Court cannot be appealed.

Dissenting Opinion of Justice Eliška Wagnerová

I do not agree with the verdict of the Judgment whereby the petition for annulment of § 3 para. 1 of Act No. 220/1991 Coll. was denied; I also do not agree with the reasoning of the Judgment.

From the Judgment it is clear that the contested provisions were examined merely from the viewpoint of whether or not the same were in conflict with the constitutional expression of professional self-government, which the Judgment, in accordance with doctrine, identified with Art. 21 para. 1 of the Charter and with the Preamble of the Charter (clause 21).

Additionally, the Judgment (Section VIII) infers that the determining aspect for the organisation of supervision over the exercise of medical profession is the protection of public health. Within the limits outlined, the legislature has allegedly a host of options for creating a system which would ensure accomplishment of a constitutionally established objective (Art. 6 para. 1 of the Charter – right to life, and Art. 31 of the Charter – right to protection of health). The Judgment, on the contrary, does not mention the fact that the legislature, in creating any system, must respect additional fundamental rights, and if the same must be restricted in order to achieve the objective pursued, then the restriction of the fundamental rights adopted by the legislature must succeed in the test of proportionality. The Judgment errs when it evaluates the institute of obligatory membership of professional self-government only in such an isolated manner and outside other conjunctions.

Furthermore, the Judgment wordily and repeatedly argues that membership of the Czech Medical Chamber is not subject to conditions resulting from the freedom of association, since the Chamber is a public law corporation, or a professional self-governing body, to which the state passed the power the state otherwise should and would have to exercise itself. This aspect of the matter is naturally very clear and was probably neglected only a result of tardiness or a lack of information on the part of the petitioners.

On the other hand, this very aspect (i. e. the fact that transfer of state power is

involved) went unnoticed by the Judgment. The Constitutional Court has not dealt exhaustively with the issue to which extent the state may transfer its power to other entities, or at least the Constitutional Court has not presented its opinion whether or not such a transfer requires constitutional authorisation and why. Moreover, the Constitutional Court has not determined limits for such a transfer of state power, even though it is obvious that the state cannot be completely deplenished. It is certain that in the case of the ordinary course of events, the exercise of state power is subject not only to judicial control, to which some decisions of the Chamber are subject, but also – and especially – the exercise of state power is subject to control within the scope of constitutional responsibilities of the mutual individual powers, in which the acts of the executive are granted legitimacy through an elected parliament, from which the executive, and actually its very existence, is derived. Thus, the exercise of state power is subject to multiplied control within the scope of constitutional processes, and such control is complemented by another executed by judicial power. The transfer of the exercise of state power also means "de-parliamentarisation", this meaning that the process of a clash of interests is devolved exclusively to the field of the executive, with parliament being left aside. Should this tendency advance, a transmission could gradually take place from a constitutionally ordered parliamentary political system which is associated with the requirement of the democratic legitimacy of bodies of the state endowed with certain power, to another, constitutionally not defined political system, i.e. neo-corportism (in the given case) governed by other principles (see also Judgment Pl. ÚS 52/03, N 152/35 SbNU 117).

Additionally, I believe that the contested provisions should have been examined from the viewpoint of whether it improportionally limits the fundamental right to the general freedom of persons exercising the medical profession or, at least, a part of the same. Generally speaking, this right forms the basis and a fixed point to which the entire remaining order of explicitly enumerated additional fundamental rights and basic freedoms is related. This right may be derived from the requirement of a law-based state, based on respect for the rights and freedoms of a person (Art. 1 para. 1 of the Constitution of the Czech Republic), i.e. a state built on the idea of prevalence of a free individual over the state (such as I. ÚS 643/06, I. ÚS 2254/07, IV. ÚS 359/05, I. ÚS 557/05). Naturally, this freedom has social bonds and is exercised by responsible persons. This concept of an individual and the state is also shared by other European democratic states (e.g. P. Unruh Der Verfassungsbegriff des Grundgesetzes, Mohr Siebeck, Tübingen, 2002, pp. 532-541).

In the case under consideration, the specific issue is that the requirement for obligatory membership of the Chamber is not limited only to physicians exercising their profession as freelance occupation, but is required also of those physicians who exercise their profession as employees. The latter group of physicians is controlled, and in the case of a lapse also punished, by an employer which is also liable for the exercise of their work, as well as by the Chamber. Therefore, this group of physicians faces an imbalance in position in contrast with their professional colleagues who exercise a profession as a "freelance occupation" and is, in my opinion, improportionally restricted in the exercise of their general freedom. The legitimate objective attempted by obligatory membership of the Chamber, may be, with respect to this group, attained through labour-law regulation. Any other regulation, in my opinion, improportionally lessens the

breadth of freedom of this group of physicians. When the Judgment refers to the decision of the European Commission of Human Rights in the case of Vialas Simón v. Spain, it cannot be neglected that this European body had no reason to deal with the case beyond and above the review of possible violation merely of the right of association, i.e. the right which is acknowledged by and contained in the Convention, but the Court did not review a possible infringement of other fundamental rights which the Convention (unlike national constitutions) does not acknowledge and contain. In addition to this, it is clear that in order to evaluate the relevance of this decision for its utilisation as a comparative argument, it would be necessary to be familiar with Spanish labour-law regulation, with which most of those who voted in favour of the Judgment have not acquainted themselves.

Besides, historically speaking, it was the very nature of a profession as a "free occupation" which gave rise to chambers. It was not desirable that the issues supremely expert be dealt with by the state, which could pollute its decisions with ideas other than expert ones. However, the exercise of certain professions was nevertheless necessary to control since it was related to a potential detriment to or infringement of the rights of third persons. Thus also the Judgment with which I do not agree contains a reference to Judgment I. ÚS 181/01 that states: "this is an issue relating to the 'special-interest self-government', specifically professional chambers with obligatory membership, associating self-employed natural persons exercising certain professions, where there is a strong public interest in the proper exercise thereof." The above-quoted Judgment thus, in the issue of evaluation of 'special-interest self-government', also allowed for the free exercise of profession, not the exercise of profession under labour-law conditions as an employee.

The legitimate objective of the Chamber outlined above is made problematic by obligatory membership of all physicians of the same, in addition to the combination with broad and varied obligations and authorisations of the Chamber (§ 2 para. 1, 2 of the contested Act) which partly overlap, in terms of purpose, with the functions of trade unions. The Chamber thus represents, in fact, a socio-liberal corporation which acts (or may act) on behalf of the "medical class" or a "guild" in negotiations with the state, concerning its interests in the area of economic, social, fiscal (and other) policies. Therefore, the Chamber is a political body from the very nature of the matter, representing the whole medical class, and additionally endowed with considerable power. The concentration of power in the form of broad authorities and obligations in the hands of a so conceived Chamber does not provide, be it only from the viewpoint of the selected model itself, a sufficient guarantee for protection of and respect to the interests and the fundamental rights of patients. By approving the constitutionality of obligatory membership of all physicians of the Chamber, the Constitutional Court implicitly made its position even stronger.