2008/03/27 - PL.ÚS 56/05: SQUEEZE-OUT

HEADNOTES

1. The Constitutional Court adjudicates also further circumstances of given matter if formal annulment of the legal regulation would mean the danger that the same regulation would be passed again, but simply with the difference that all the requirements of the legislative process would be observed. In such a case, the formal and procedural aspects of the review cede to the requirements of the principles of a material law-based state, legal certainty, and effective protection of constitutionality.

2. The reference point for review of the constitutionality of statues under Art. 87 par. 1 let. a) and Art. 88 par. 2 of the Constitution of the CR is the constitutional order. The application of community law as directly applicable law is in the jurisdiction of the ordinary courts, which, in cases of doubt about the application of the law, have the opportunity, or obligation, to turn to the European Court of Justice with a preliminary issue under Art. 234 of the Treaty on European Community (TEC).

3. An obligation arises from Art. 1 par. 2 of the Constitution of the CR for the Constitutional Court, as a state body, of the Czech Republic, to make an interpretation of the constitutional order consistent with European law in those areas where community law and the legal order of the Czech Republic meet (the undertaking of loyalty under Art. 10 of the TEC). Of course, it has to be a matter of interpretation of the constitutional order in relation to domestic law.

4. If an international treaty contains a different legal regulation, it is necessary to apply the principle that the treaty takes precedence and refer to the rules enshrined in Art. 10 and Art. 95 par. 1 of the Constitution of the CR. The observance of this principle is adjudicated by the Constitutional Court in the framework of the proceeding on constitutional complaint.

5. Lack of clarity in a statutory regulation must be eliminated by the case law of the ordinary courts, and eliminating lack of unity in the decision-making of the ordinary courts falls under the jurisdiction of the Supreme Court. The Constitutional Court has already stated several times that it can intervene in this area only if there is simultaneously a violation of the constitutional order, and the lack of precision, uncertainty, and lack of foreseeability of a legal regulation extremely violates the fundamental requirements of a statute in the context of a law-based state.

6. The use of a forced buy-out does not rule out interference in the constitutionally guaranteed rights of shareholders, but that possibility alone does not make the regulation unconstitutional. That could happen only if the state, within its protective function, did not provide minority shareholders means for legal protection. The fact that constitutionally guaranteed rights may be violated on the basis of the legal regulation of a particular institution (e.g. detention, expulsion, expropriation, expulsion from a society) does not make

the regulation unconstitutional. That would happen only if the constitutional "guarantees" were shown to be fictitious.

7. A corporation has a different character than a trade union, association, political party, or religious society. The purpose of a corporation is the concentration of capital, investment, conduct of business, and earning profits. The position of shareholders cannot be compared with membership in other types of associations or societies. Therefore, both the rights of shareholders and their obligation differs.

8. From the point of view of applying the prohibition on discrimination, it is important that the Commercial Code, in defining the principal shareholder and minority shareholders, does not provide any exceptions. The possibility of a forced buy-out conducted by the principal shareholder can not be considered an unjustified advantage, because it is based on rational and objective grounds (see above). Likewise, we can not determine that comparable groups of minority shareholders are in an unequal position in terms of the same possibility to apply their shares in the same scope, as can be done under the same conditions (defined by the statute) by a comparable group of other minority shareholders.

9. Decision making at a shareholder meeting, based on owning shares of a particular nominal value, is fully in accordance with the nature of this kind of entrepreneurial association under Art. 11 par. 1 and 3, Art. 20 par. 1 and Art. 26 par. 1 and 2 of the Charter. Insofar as the Commercial Code provides different levels of minority protection in a corporation, based on the importance of a decision being made (unanimity, nine tenths, three fourths, two thirds, a simple majority – §183i par. 1, §186 of the Com. Code) and ties this to the relationship between the shareholders (§66a of the Com. Code), there can be no objections to this on constitutional grounds.

10. For the Constitutional Court, in the case of a forced buy-out, it is essential that this economically based procedure (rationality and suitability of interference) be legally regulated as is required in a law-based stated (legality of interference). Therefore, it is not necessary to consider the question of the public interest in the same procedure as for expropriation.

11. The right to a forced buy-out does not involve the usual decision-making at a shareholder meeting. There is a qualified majority so large that possibly objections about abuse of position are already practically suppressed. In terms of the principle of proportionality, in view of such a ratio, it is difficult to make any objections, if other safeguards for protecting property rights are observed in the regulation of the forced-buy out procedure (adequate consideration, legal protection). Permitting a forced buy-out is a matter for business decision of a majority shareholder, where it is limited by the deadline and conditions which, although they will not protect the membership of minority shareholders (the aspect of the right to association, freedom to do business, and opportunity to decide) in the corporation, will protect their existing business share, as expressed in the form of shares, which is a condition for such a regulation to be constitutional (Art. 4 par. 4 of the Charter). The role of the state and its bodies

(the Czech National Bank, a court) is not to review the outlook for whether the business decision is correct, but to evaluate whether the statutory conditions for taking such a step were met, and, if appropriate, provide legal protection to the bought-out shareholders. In terms of proportionality, in this case priority is given to the principal shareholder's property rights and right to do business (Art. 11 par. 1 and Art. 26 par. 1 and 2 of the Charter).

12. If the principal shareholder uses the opportunity for a forced share buy-out that the law provides for the abovementioned reasons, it behaves permissibly and does not abuse the right. The rules prohibiting abuse of position by a shareholder under §56a of the Com. Code, with the ability to proceed under §131 of the Com. Code (invalidity of shareholder meeting resolution), also naturally apply to a forced share buy-out.

13. In this regard the Constitutional Court concluded that non-amendment of a legal regulation for the entire existence of a legal relationship is unquestionably not part of the principle of legal certainty. The law is a dynamic system which responds to developments and trends in society. The present case of a forced share buy-out involves a generally accepted false retroactivity. The regulation of a forced buy-out does not in any way affect the acquisition of securities and the entitlements connected with them.

14. The question of proportionality of price for the bought-out shares can be addressed only as part of a procedure under §183i par. 5 of the Com. Code (review by the Czech National Bank) and §183k of the Com. Code (judicial protection of the owners of securities). In an abstract review of the constitutionality of a statute we can only evaluate in terms of proportionality whether interference is possible, necessary, and desirable in terms of another fundamental right, whether protection exists at all, and whether it is adequately guaranteed.

15. A share, as an expression of a proportion of a certain property value, is the subject of property rights. In this case, in view of what was stated above about the nature of a corporation, the nature of shares, and the nature of the right to a forced buy-out, we must start with Art. 4 par. 4 of the Charter and take into account the essence and significance of share ownership. The proportionality of price means a requirement to take into account all important circumstances in connection with the forced buy-out. That means that, from the point of view of the law, it may not be set subjectively.

16. In this regard, adequate consideration, in view of the grounds for a forced buy-out, preserves the value of shares as a special kind of uncertain investment. Whether a price is adequate is a matter for expert and impartial evaluation. The selection of the expert by the principal shareholder, if it is compensated for by other measures on the part of the state, does not cause unconstitutionality of legal regulation of setting price, as well as the fact that the costs of an expert appraisal are paid by the principal shareholder. The same objection could be raised if the costs were paid by a minority shareholder. Bad experiences with some experts can not lead the Constitutional Court to declare

unconstitutional a legal regulation that may be interpreted and applied unconstitutionally.

17. From that point of view the term "different amount of consideration" in §183k par. 1 of the Commercial Code must be understood only as a threshold below which one may not go in judicial review. This also applies to the actions of the Czech National Bank under §183i par. 5 of the Commercial Code. In terms of Art. 11 par. 1 of the Charter any other interpretation would be disadvantaging the minority shareholder.
18. Even though, in the case of the Czech National Bank, in view of its position, the required distance from the shareholders is presumed, it is nevertheless not a body that meets the requirements of Art. 4 of the Constitution of the CR and Art. 36 of the Charter.

The lack of a specified interest rate for late payment of consideration under §183m of the Commercial Code can not be considered as unconstitutional with regard to the existence of general legal regulation. In contrast, it would be necessary if the law wanted to rule out application of the legal regulation of commercially binding relationships for relationships arising between shareholders [e.g., §369 of the Com. Code, or §340 par. 2 of the Com. Code, together with §261 par. 3 let. a) of the Commercial Code].

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, consisting of František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný and Michaela Židlická, in the matter of a petition from a group of senators from the Senate of the Parliament of the Czech Republic, represented by Senator Soňa Paukertová, legally represented by JUDr. Petr Zima, attorney in Prague 2, Slezská 13, seeking the annulment of §183i to §183n of Act no. 513/1991 Coll., the Commercial Code, with the participation of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic, as parties to the proceedings, in a hearing, decided as follows:

The petition is denied.

REASONING

I.
Recapitulation of the Petition and the Petitioner's Arguments

1. In the petition, which was delivered to the Constitutional Court on 16 November 2005, a group of senators (the "petitioner") sought the annulment of §183i to §183n of Act no. 513/1991 Coll., the Commercial Code, as amended (the "Com. Code"), which are included under the general heading "The Right to Buy Out Securities," (the "buy-out right" or "Squeeze-Out"). Pursuant to §35 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), the Constitutional Court denied the petition by its resolution of 8 December 2005, file no. Pl. ÚS 53/05, when it determined that it had already received, in the same matter, under file no. Pl. ÚS 43/05, a petition from the Municipal Court in Prague seeking the annulment of §183i to §183n of the Com. Code and §200da of the Civil Procedure Code (the "CPC"). In accordance with §35 par. 2 of the Act on the Constitutional Court, the petitioner became a secondary party to the proceedings in the matter file no. Pl. ÚS 43/05.

2. The petitioner filed its petition again, referring to new elements that, compared to the petition file no. Pl. ÚS 43/05, were introduced into the provisions on the right to buy out securities by the amendment of the Commercial Code in Act no. 377/2005 Coll., on Financial Conglomerates. It referred to the arguments that it presented in the previous filing regarding the contested provisions of the Commercial Code.

3. The Act on the Constitutional Court does not expressly address the status of a petitioner whose petition was denied under §35 par. 2 of that Act, and who therefore became a secondary party in a previously opened proceeding, in which proceeding the petition was denied without being reviewed on the merits. In particular, in a case where the petitioner in the previously opened proceeding is a court, under §64 par. 3 of the Act on the Constitutional Court (specific review of constitutionality), it is not ruled out that the Constitutional Court may reach a conclusion that the petition does not meet the requirements of Art. 95 par. 2 of the Constitution of the CR, and deny the previous petition due to the petitioner obviously being unauthorized, or a situation may arise where the proceeding before the ordinary court, where the initiative arose to file a petition under Art. 95 par. 2 of the Constitution of the CR, was stopped. This would place the later petitioner in a situation where he would be deprived of the possibility to exercise his claims and defend his fundamental rights and freedoms. The Constitutional Court addressed this situation in its decision-making practice with a legal construction according to which, in such a case, it considers the impediment of lis pendens to have fallen away (cf. judgment file no. Pl. ÚS 5/05, no. 3/2006 Coll.). In the adjudicated matter, the Constitutional Court, in its resolution of 5 September 2006, file no. Pl. ÚS 43/05 and ref. no. Pl. ÚS 56/05-41, removed from the proceeding under file no. Pl. ÚS 43/05, for separate review, the petition filed by the petitioner as a secondary party in the proceeding file no. Pl. ÚS 43/05, and attached this excised petition of the secondary party (original petition file no. Pl. ÚS 53/05), for joint proceedings, to the petition conducted heretofore as file no. Pl. ÚS 56/05. A new judge rapporteur was appointed at the same time.

4. We note that during the course of the proceeding under file no. Pl. ÚS 43/05, on 10 March 2006, 10 April 2006, and 4 September 2006 the Supreme Court received applications from Jaromír Horáček, Ing. Jiří Nejezchleba and Ing. Jan Čížek to be granted secondary party status under §63 or §76 par. 3 of the Act on the

Constitutional Court, in connection with the application of §183i to §183n of the Com. Code, relating to the transfer of securities from them to a shareholder who met the conditions set forth in §183i par. 1 (the "principal shareholder"). On 22 June 2006 the Constitutional Court received a letter from the Municipal State Prosecutor's Office in Prague stating that, in the legal matter of the petitioner Zkušebnictví, a. p., on an application to register the transfer of shares into the commercial register under §183i of the Com. Code, it was entering the proceeding under §35 par. 1 let. i) CPC. These applications were handled within that proceeding, with reference to the fact that, in proceedings on the annulment of statutes and other legal regulations, the Act on the Constitutional Court does not recognize secondary participation, with the exception of cases arising as a result of procedures under §35 par. 2 of that Act. A party to proceedings before the Constitutional Court can be only a party designated as such by the Act on the Constitutional Court (§28 par. 1 to 4).

5. The petitioner presented its arguments in the petition file no. Pl. ÚS 53/05, which, on the basis of the abovementioned resolutions (point 3), was attached for joint review to petition file no. Pl. ÚS 56/05, and subsequently maintained under file no. Pl. ÚS 56/05. Of course, in the course of the proceedings, the petition (whether under file no. Pl. ÚS 43/05 or Pl. ÚS 56/05) was further supplemented by other filings, together with additional evidence consisting of articles from expert journals, examples of foreign regulations of "squeeze-outs," statements from the Securities Commission, etc. The arguments were added to in this manner by filings of 5 January 2006, 18 April 2006 and 27 September 2006. Finally the petitioner summarized and completed its petitions and arguments in a filing on 28 February 2007. This last filing was therefore taken as a starting point for summarizing and organizing its arguments, though the previous filings were also taken into account. The objections against the regulation of a forced buy-out can be organized as follows:
a) in the first group of defects the petitioner included conflict with the legal regulation of the buy-out of securities as contained in the European Parliament and EC Directive 2004/25/EC, Official Journal of the EU. Special edition 2004. Ch. 17, vol. 002 (the "Thirteenth Directive");
b) the second group, according to the petitioner, are defects that represent conflict with the principles of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention");
c) the third group of defects are conflicts with the provisions of international treaties on the protection of investments;
d) the fourth group of defects the petitioner described as defects of a procedural nature;
e) the last group includes defects which, according to the petitioner, do not fall into groups one through four.

6. As regards objections that the buy-out regulation is in conflict with community law, the petitioner alleges, primarily:
a) incorrect adoption of Art. 15 of the Thirteenth Directive, because under the directive it is necessary to meet two cumulative conditions – reaching at least 90% ownership of shares, and simultaneously at least 90% of the voting rights, not only one of these conditions;

b) the fact that the rights to a minority sell-out is not provided, i.e. the right of a minority to shareholder to require the majority shareholder to buy all his shares. In one of its previous filings the petitioner pointed out that the buy-out right, (the "squeeze-out") and the minority shareholder's right (the "sell-out") are mutually complementary measures. Non-implementation of the second institution in the Czech Republic was not justified in any way, and it mars the outcome prescribed by the directive. In this manner the other side, i.e. shareholders who own 10% and less of securities, under §183i par. 1 of the Com. Code;
c) At the time the Thirteenth Directive was passed, the Czech Republic did not have a regulation for the right to buy out listed shares. Therefore it could not pass any regulation of the right to buy out such shares that did not follow a takeover bid. The basic rule is that a buy-out offer can only follow a takeover bid (§183a of the Com. Code). An exception is made only for states that already had such a regulation when the Thirteenth Directive was adopted;
d) related to this is the non-implementation of a rule assuming that the price is correct after a voluntary takeover bid. A takeover bid, which is to precede a buy-out, is an important test of the adequacy of the share price. If no one accepted the takeover bid, the consideration for shares can not be adequate (proportionate) to the share value;
e) related to this is the absence of the condition in Art. 15 par. 5 of the Thirteenth Directive – a guarantee of a fair price. However, that price is set by the principal shareholder and supported by an expert appraisal made by an expert selected and paid by the principal shareholder. The appraisal is always biased. The law does not provide any useable criteria for appraisal besides the terms "adequate" and "fair," so the amount depends on the expert's discretion. Here the petitioner pointed to appraisals that differ by several hundred percent.

7. According to the petitioner, the regulation of the buy-out right is also inconsistent with the European Convention. Among these defects it included:
a) conflict with the principle of legality, which requires a legal regulation to be precise, definite, and predictable (with reference to judgment file no. Pl. ÚS 44/03 of 5 April 2005, no. 249/2005 Coll.), which §183i of the Com. Code does not meet. This provision contains not just one element of uncertainty, but a number of them – an uncertainly specified deadline for calling a shareholder meeting, an unclear definition of the kind of proceeding and the required statement of claim (for determination, for performance), unclear regulation of the termination of the right, or expiration of the entitlement to review the consideration in §183k par. 2 and 3 of the Com. Code (with reference to the statement from I. Štenglová in the supplement to the 10th ed. of the Commentary to the Commercial Code from the publishing house C. H. Beck, p. 88), an unclear circle of parties to the proceedings under §183k of the Com. Code, an unclear definition of the party obligated to provide consideration, unclear rules for the date of record for evaluation of the amount of consideration under §61 par. 2 of the Com. Code compared to the practice of the principal shareholders and the Czech National Bank, lack of clarity regarding the opportunity for other shareholders to proceed under §183k par. 5 of the Com. Code, and unclear rules for returning to the original state in the event that a court finds the shareholder meeting resolution to be invalid. According to the petitioner, the basic attributes of consideration for shares are unclear, because the terms "adequate" and "fair consideration" are subjective. All these elements of lack of clarity work to the benefit of the principal shareholder, as it is clearly

described how it is to acquire shares. The procedure for protecting the rights of minority shareholders is described unclearly or is completely lacking. Yet, courts can not be expected to protected them, because of the exaggerated formalism of the general justice system (Holländer, P.: Ústavněprávní argumentace [Constitutional Law Arguments]. Praha. Linde 2003, p. 77);
b) conflict with the requirement of the public interest when regulating the buy-out right. The public interest exists in the case of a buy-out in a company with listed shares, conducted after a takeover bid, because it arises from the fundamental documents of the European Communities. However, the Czech legislature did not provide any justification for the public interest in cases that it regulated beyond the framework of the Thirteenth Directive (buy-out of unlisted shares and buy-out of listed shares conducted without a takeover bid). No background report exists to the petition from Deputy Doležal; he simply referred to the Thirteenth Directive. The grounds given in the literature, to relieve a corporation of the pointless expense of shareholder meetings is deceptive and irrelevant. According to the press, even companies that conducted a share buy-out, are considering public offerings of shares again;
c) the lack of a possibility for preliminary review (before the transfer of share ownership) that a corporation's procedure in a buy-out has been legal. In legal systems where registration in the commercial register is a prerequisite for the transfer of rights (such as Germany and Austria), there is an opportunity to examine whether a corporation's procedure has been correct – e.g., whether the principal shareholder really has a sufficient number of shares, whether that is adequately documented, whether a shareholder meeting was duly called, whether conditions for the buy-out right were met, whether the right has not been abused, etc. In this regard, according to the petitioner, the Czech Republic is an exception (see §131 of the Com. Code).

8. According to the petitioner, a forced buy-out of shares is in conflict with international treaties on protection of investments, because corporations also have foreign shareholders. Here, the petitioner claims:
a) a measure to remove someone's property rights must be subject to judicial review, both in terms of the relationship to the investment, and in terms of correct appraisal. However, in commercial register registration proceedings, the court can not review anything (§200da CPC), and in proceedings to declare a shareholder meeting invalid §131 of the Com. Code is an impediment to effective review;
b) the lack of clarity that, in practice, leads to widespread recording of the amount of consideration as of a different date than that on which the transfer of ownership was announced. According to these treaties, compensation is supposed to be equal to the market value of the transferred investment immediately before the decision on the transfer was announced. However, in all known buy-out cases, the value of shares was set as of a "date of record" several months before the decision was announced. This is also in conflict with §61 par. 2 of the Com. Code;
c) the non-existence of interest on the consideration, from the transfer date to the payment date.

9. The petitioner sees procedural defects primarily in the failure to observe the principle of equal weapons, protection of the weaker party, and access to the courts. It identified the following specific inadequacies:

a) lack of a guarantee that a measure leading to a squeeze-out, will really be reviewed by a court in an adversarial and public trial. In registration proceedings, nothing is reviewed and the squeezed-out shareholder is not a party to the proceeding. Moreover, with the help of §131 of the Com. Code a reason is always sought to stop the proceeding or deny the complaint. Even if a minority shareholder's complaint were justified, original state of affairs may not be restored, as there is a certain fait accompli, created by the registration in the commercial register. The court that will rule in the matter will have that existing situation as its starting point, and, in view of the principle of legal certainty and protection of the rights of third parties, will be inclined to deny a petition to review the shareholder meeting resolution. Therefore, the review should take place before the transfer of ownership, as in a number of other states, even though it is tied to action by minority shareholders (the Netherlands, Great Britain, Sweden), or depends on the court's discretion (Germany, Austria). In the Czech Republic such review is ruled out under §131 par. 3 of the Com. Code. Also, the principle of protecting the weaker side is not observed in the review of the amount of consideration. Therefore, the proceeding is burdened with defects that violate the principle of proportionality;
b) failure to respect the principle of equal weapons in reviewing the amount of consideration. Under §183k of the Com. Code, a minority shareholder gets to have his say only when he already has against him obstacles such as the expert appraisal, the position statement from the Czech National bank, and registration in the commercial register, without having had an opportunity to be involved or be a party to the proceeding;
c) a considerable information deficit among minority shareholders concerning the state of the company's assets and its likely future business results, on which the appraisal is usually based. This results in unequal weapons in the review proceedings, because as a rule most appraisals are based on documentation from the company's board of directors;
d) the petitioner sees as a fundamental defect the principle that in the review proceeding the court is guided only by the plaintiff's complaint. The plaintiff has little information to enable him to calculate the correct amount of consideration in a short period of time. Together with allocation of the costs of the proceeding to the party that loses the dispute, this is another obstacle to the exercise of his rights. In Germany, for example, as part of the Spruchverfahren, a shareholder is not forced to make such a calculation of the amount of the claim;
e) thus, the burden of proof does not shift to the principal shareholder, unlike in foreign regulations (Germany, Austria);
f) the costs of the proceedings are imposed on the minority shareholder, which is another obstacle for exercising his rights in court. The regulation of proceedings costs thus has a discouraging effect. In the original petition, the petitioner further developed this opinion, stating that, according to some commentators on the Commercial Code, the squeezed-out shareholder would be forced to bear the costs of the review proceeding, and pay a court fee that becomes higher, the more the principal shareholder, in cooperation with the expert, "cheats" him when determining the amount of consideration. If the disproportionateness of consideration is also removed as grounds for a complaint to declare a shareholder meeting (§183k par. 5 of the Com. Code), then the complaint to declare a shareholder meeting invalid must be replaced by a proceeding that is conducted in an analogous regime, or a proceeding that does not further worsen the position of

the squeezed-out shareholder. Otherwise, it can not be said that the review proceeding is one that, in terms of adequate legal protection, replaces the proceeding to declare a shareholder meeting resolution invalid. Here the petitioner pointed to the example of the German regulation, in which the principal shareholder bears the costs of the review proceeding (Spruchverfahren);
g) the non-existence of any effective protection for other shareholders, as the regulation does not provide the institution of a joint representative, or their right to be informed about the result of the proceeding,
h) the need to file a complaint abroad if the principal shareholder is a foreign person. That is another burden, and for most minority shareholders, an insurmountable obstacle.

10. Among the remaining defects in the regulation of the buy-out right the petitioner presented:
a) the fact that this is a private law relationship, where the principle of formal equality should be respected. Nevertheless, the law gives the principal shareholder the right to unilaterally adjust the relationship – the amount of consideration is decided by an expert hired and paid by the principal shareholder, and the minority shareholder gets to have his say in adversarial proceedings only after all the important points have been decided by the shareholder meeting and reviewed by a notary, expert, and the Czech National Bank. The dialogue on the correct amount of consideration thus takes place between the principal shareholder and an expert hired by it, and the public authorities. Only after that does the minority shareholder get to have his say;
b) §183i of the Com. Code, which does not permit effective exercise of the right to supplemental consideration. The present legal regulation does not even give squeezed-out shareholders an opportunity to learn about the conduct of the dispute. In the original petition, the petitioner stated in this regard that civil court proceedings are public, but the decisions of courts in general matters are usually not made public (decisions in matters of unfair competition are an exception). In order for the right arising from §183k par. 3 of the Com. Code to be exercised, the other entitled parties first have to find out about the different amount of consideration. Because the law does not provide any mechanism for making the decision public, for most of the entitled parties this is merely a formal right, which can not be exercised effectively;
c) not respecting the rights of secured creditors, to whom the Commercial Code does not give the right to proceed under §183k par. 3 of the Com. Code

11. Thus, the legal framework does not motivate the principal shareholder to behave honestly, because it is not in any way penalized for conduct in conflict with good morals. Its only risk is that it might have to pay additional amounts to some shareholders who have sufficient funds to bring a lawsuit for review of consideration before a formalistically thinking judge. The requirements of legality and proportionality are not respected in the transfer of shares, in the proceedings to review the legality of measures leading to the transfer, or in setting and reviewing the amount of consideration.

12. Finally, the petitioner added a new argument, claiming that Deputy Doležal's proposal, which introduced the buy-out right into our legal framework, was described as an amending proposal, although, in light of Constitutional Court

judgment file no. Pl. ÚS 77/06, in view of the content and purpose of the original bill, it could not have been an amending proposal. The content and purpose of both proposals are diametrically opposed (regulation of the commercial register and the buy-out right). Deputy Doležal's amending proposal does not contain any supplemental material, change, or deletion of any provision proposed by Deputy Pospíšil. Thus, regulation of a fundamental issue was implemented through an add-on.

13. Therefore, for all the cited reasons, the petitioner requests annulment of the regulation of the buy-out right, as the effect of the fundamental defects listed in points 6 to 11, and the defects in legislative procedure, make the legal regulation unconstitutional. Here we must state that the last filing, which was to summarize the petitioner's arguments, does not contain a single specifically argued objection that the contested legal regulation of the institution of a forced buy-out is unconstitutional. For that, we would also have to look at the petitioner's original petition, file no. Pl. ÚS 53/05, which argued that this legal framework violates Art. 1 of the Constitution of the CR and Art. 4 par. 4 and Art. 11 par. 4 of the Charter of Fundamental Rights and Freedoms (the "Charter").

14. The original petition, over and above the summary, contained the following constitutional law arguments. According to the petitioner, the legal regulation of the buy-out right contained in §183i to §183n of the Com. Code is a procedure described in Art. 11 par. 4 of the Charter; it is expropriation in the form of taking shares away from their current owners to the benefit of another subject. A number of European courts have already ruled that in similar cases taking away shares in exchange for compensation violates property rights. In this regard, the petitioner stated that the legal regulation of a squeeze-out does not meet the conditions provided in Art. 11 par. 4, Art. 4 par. 4 of the Charter and Art. 1 of the Constitution of the CR. It supported this by saying that the issue of a buy-out of securities against the will of their owners, in particular the issue of compensation for expropriation, is regulated in a manner that practically makes impossible for the dispossessed investors any effective defense against abuse of the right, and thus puts them in a completely unequal position (see below). These investors do not have sufficient time to prepare for the shareholder meeting or to be able to decide whether the amount of consideration is set correctly. Also, investors are not protected in any way against abuse of the right in the calling of a shareholder meeting, the process of setting the amount of consideration permits arbitrariness by the principal shareholder and makes the parties to a legal relationship unequal, the process of reviewing the correctness or adequacy of the consideration is not governed by clear and understandable rules, and the commercial register registration proceeding does not provide protection for them.

15. Even if this were not a case of expropriation, an expropriating action by the state still takes place. Without registration in the commercial register, i.e. without an action by the state, the transfer of ownership can not occur. According to decisions of the European Court of Human Rights cited by the petitioner (e.g. James and Others v. the United Kingdom, 1986), this is actually expropriation, because it is classified under the second rule of Art. 1, second sentence, of Protocol No. 1 to the European Convention (deprivation of property). Therefore, the decision in James and Others must be applied to the squeeze-out much more

than the decision in the Bramelid matter, because the role of the state (registration in the commercial register) is far more significant in that case. Moreover, the description is not as important as the role of the state. The idea that an investor would deserve greater protection when deprived of property for the benefit of the state (expropriation) than when deprived of property for the benefit of another private investor is absurd. Yet, this difference can be documented in the new regulation in Act no. 184/2006 Coll., on Deprivation or Limitation of Ownership of Land or a Building (the Expropriation Act). Although it may be granted that the right to shares does not enjoy the same protection as ownership of other things, that does not mean that shareholders deprived of property under §183i et seq. of the Com. Code should have virtually no rights and guarantees.

16. As regards the deadline for calling a shareholder meeting, commentaries on this issue disagree markedly on whether it is possible to shorten the time between the notice date and the date of the shareholder meeting to a period shorter than 30 days. According to one view, §181 par. 1 a 2 of the Com. Code must be applied to this case, and thus the statutory 30-day period between the notice date and the shareholder meeting date, provided in §184 par. 4 of the Com. Code, can be shortened to 15 days. However, §181 par. 1 of the Com. Code, which permits calling a shareholder meeting in a shorter period, does not apply to cases that are envisioned in §183i et seq. of the Com. Code, for these reasons:
a) §183i par. 1 of the Com. Code speaks expressly of a "shareholder meeting," whereas §181 of the Com. Code speaks of "an extraordinary shareholder meeting." Thus, §181 of the Com. Code can not be applied to procedures under §183i of the Com. Code;
b) another reason for this is the nature of §181 of the Com. Code, which is intended to protect the minority, and not to make life easier for majority shareholders (here the petitioner pointed to the view in Havel B., Doležil T.: A zase ten squeeze-out: Úvahy nad interpretací §183i et seq. ObchZ [And There's That Squeeze-Out Again: Thoughts on the Interpretation of §183i et seq. of the Commercial Code], Právní rozhledy [Legal Perspectives], vol. 2005, no. 17, pp. 634-635). The provision of §181 of the Com. Code is also meant to speed up the process when it is necessary to quickly intervene in the management of a company, or when it is necessary to quickly obtain information from the board of directors. However, that is not the case with §183i of the Com. Code, where neither the company nor the principal shareholder is under any time pressure, and where, on the contrary, it is necessary to provide sufficient time to the squeezed-out shareholders;
c) further, none of the provisions concerning the buy-out of securities refers to §181 of the Com. Code. The provision of §183j of the Com. Code is a lex specialis to §184 par. 4 of the Com. Code. Likewise, §181 of the Com. Code is a lex specialis in relation to §184 par. 4 of the Com. Code. It is obvious from the foregoing that both §181 of the Com. Code, and §183j of the Com. Code are special provisions in relation to the general §184 par. 4 of the Com. Code. However, no special relationship can be concluded to exist between §181 and 183i et seq. of the Com. Code;
d) in a buy-out, minority shareholders are in the position of dispossessed persons, whose ownership of shares is taken away from them against their will. Thus, in this case the requirement of a sufficiently long period of time to prepare for the shareholder meeting should be accentuated, and not suppressed to the benefit of the expropriating principal shareholder.

According to the petitioner, some important experts have completely opposite opinions. This proves that the legal regulation is, in this regard, unclear, uncertain, and deceptive, and does not meet the requirements imposed on a law-based state in Art. 1 of the Constitution of the CR.

17. The petitioner also criticized the process of setting the amount of consideration. The legislature creates an impression of objectivity in setting the amount of consideration by including experts in the process of determining the amount. A fundamental element of every modern society is the law of voluntary transfer of ownership. Involuntary transfer of ownership is an exception, for which there must always be clear and strict rules. The regulation in §183i et seq. of the Com. Code does not meet that requirement. Contractual negotiation of a price is replaced by a unilateral setting of a "purchase price" (consideration) by the principal shareholder. If the consent of one of the parties is to be involuntary, or unwanted transactions with the price for the transfer replaced by a decision by the other party to the transaction, then documentation by an expert appraisal that it is correct and objective must meet strict criteria of objectivity, both in terms of the choice of the expert and the conduct of the appraisal, and in terms of the possibility for review of it. In cases of squeeze-out, however, the principal shareholder selects the expert for this purpose, and also sets the amount of the expert's compensation (§183j par. 6 of the Com. Code). That, of course, must have an effect on the question of the expert's independence or lack thereof. Also there is no guarantee that the principal shareholder must respect an expert's appraisal with which it disagrees. For that reason, the expert "documentation" of the price is purely a formal matter, without practical significance for protecting the dispossessed investors, and does not represent any protection of the rights of dispossessed persons. The objection that the expert is responsible for a defective appraisal and is liable for any damages caused, can not stand in view of the values that are at stake here.

18. Payment of consideration for the buy-out is not adequately ensured. The original provision about this (§183m par. 5 of the Com. Code) was annulled by the Act on Financial Conglomerates. That Act introduced the obligation to deposit part of the consideration in a bank account or with a securities broker. Even this new element does not adequately ensure payment of the consideration set by the principal shareholder. The term bank can be understood to mean any bank, even a bank doing business in a jurisdiction that is not accessible to Czech shareholders. In addition, the amendment made by the Act on Financial Conglomerates transfers the obligation to provide consideration from the principal shareholder (see the current wording of §183m par. 3 and 4 of the Com. Code, implemented by the Act on Financial Conglomerates) to the securities broker or the bank. Thus, there a further legal uncertainty arises as to who is actually responsible to "provide consideration." Logically, it should be the principal shareholder. Under the current wording of §183 m par. 3 and 4 of the Com. Code "consideration will be provided by the securities broker or the bank," so it is as if the obligation was on these two subjects. It is obviously unfair vis-à-vis the entitled persons whose fundamental right (ownership) is being taken away, that the legislature exposes them to such a high degree of uncertain regarding the foregoing matters. It is not reasonable for such considerable conflicts in the law, and its lack of clarity, in a situation where the fundamental right to peaceful enjoyment of property is taken away from

hundreds of thousands of citizens to not be addressed until the stage of the case law of the courts.

19. The petitioner includes among the defects of the review proceeding under §183k of the Com. Code the unclear definition of the circle of parties (point a), the kind of proceeding (point b), the complaint (point c), and the expiration of the right to appeal the inadequate consideration.
a) The text of the Commercial Code does not make clear the circle of parties to review proceedings. The logic of the matter indicates that parties to the proceedings should be a petitioner (one of the minority shareholders) and the principal shareholder. However, that is not expressly stated anywhere, and, on the contrary, §183k par. 3 of the Com. Code provides that "a court ruling … shall be binding on the principal shareholder and the company with regard to the basis …." Thus, according to this provision the court decision is also addressed to the company. If only the principal shareholder were a party to the proceeding, that sentence would not make sense. It is not at all apparent what role the company is to play in the proceeding. That is addressed by the new formulation of §183m par. 3 and 4 of the Com. Code (implemented by the Act on Financial Conglomerates), according to which the obligation to provide the consideration is the securities broker or the bank;
b) the text of §183k par. 1 of the Com. Code does not address the issue of the kind of proceeding. One can not infer from the words "may ask a court to review the adequacy of the consideration" whether the proceedings is adversarial or not. If analogy is made to §220p par. 4 of the Com. Code, which also provides a "right to ask for review of the adequacy of the consideration" in connection with transfer of business assets, it must be noted that that provision is also not clear. The High Court in Olomouc, in its decision ref. no. 8 Cmo 171/2005-731, stated that a proceeding on review of adequate settlement is a non-adversarial proceeding. In contrast, the High Court in Prague believes that it is an adversarial proceeding. The petitioner believes that an issue as serious as determining the kind of proceeding in issues where citizens are deprived against their will of a fundamental right (ownership) can not be left to the development of case law, but must be regulated precisely in terms of the requirements imposed on a law-based state (Art. 1 of the Constitution of the CR);
c) it is not clear from the text of §183k par. 1 of the Com. Code whether the verdict is to be for performance, determination, or otherwise. The provision of §183k par. 3 of the Com. Code speaks mysteriously of according "the right to a different amount of consideration," and paragraph 4 then speaks of a "determination of inadequacy." Thus, the law does not clearly answer the question of the kind of complaint. The problem can not be removed, even by analogy with §220p of the Com. Code. The text of §220p par. 4 of the Com. Code, i.e. the words "the right to ask for review of the amount of consideration in money," also does not make it clear what kind of complaint is involved (for performance, for determination, or another kind). Likewise, in practice one finds various interpretations, which the petitioner documents using the example of an opinion in the expert literature, where Dědič J. and others state, in Obchodní zákoník, Komentář [Commercial Code, Commentary], Polygon 2002, part II., p. 2865, that it is a complaint for performance, whereas §17 par. 1 of Act no. 627/2004 Coll. cites a complain for determination. The foregoing indicates that §183i of the Com. Code is an uncertain legal regulation that does not meet the requirements of being

precise, certain and foreseeable, defined by the Constitutional Court in the matter file no. Pl. ÚS 44/03. The same also applies to §183k of the Com. Code;
d) §183k par. 2 of the Com. Code precludes the right to appeal based on the inadequacy of the consideration. The provision of §183k par. 3, last sentence, of the Com. Code, on the other hand, sets the point when the period of limitations begins to run vis-à-vis all entitled persons, regardless of whether they were parties to the proceeding. The term "all entitled persons" is not defined, and evidently must be interpreted as the group of owners of securities. If it meant only persons who filed subsequent or parallel petitions for review, then the words "regardless of whether they were parties to the proceeding" would make no sense. Thus, the result of both these provisions is either a) the absurd situation that the right will first expire (because the entitled person does not file a petition for review, and as a result there is no proceeding in which it could be a party), and after it expires the period of limitations apparently begins to run from the moment a decision based on the petition of another party goes into legal effect, or b) there are two different rights, the right to review (which expires if no entitled person files a petition for review) and a right to supplemental payment (which apparently expires after the general period of limitations). The absurdity of that situation is also pointed out by the authors of the Komentář k obchodnímu zákoníku [Commentary on the Commercial Code], Štenglová I. et al. (supplement to the 10th edition of the Commentary, C. H. Beck, p. 88).

20. Under Art. 4 par. 4 of the Charter, in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. That means, among other things, that the legal framework connected with the limitation of a fundamental right (here, the right to peaceful enjoyment of property) must meet high requirements of clarity, understandability, and foreseeability (see the Constitutional Court's decision in the matter file no. Pl. ÚS 44/03, under which a provision in a legal regulation of a democratic, law-based state must also meet the requirements of sufficient precision, certainty, and foreseeability). This rule must apply twice as much in the case of interference that consists of the total deprivation of ownership. In addition, it is necessary that persons whose fundamental right is affected not be subject to disproportionately high burdens in the proceeding that is to lead to review of the compensation for the expropriation. In this regard, the petitioner provided arguments that, in its opinion, demonstrate these failings. Therefore, it is incorrect to leave it up to the courts, in their case law, to remove imprecision and lack of clarity if these have accumulated in one institution to such a great extent, in matters where the fundamental rights of citizens are affected, in view of the constitutional principle set forth in Art. 4 par. 4 of the Charter. The legal regulation of a squeeze-out of minority shareholders does not meet the requirement of proportionality between the means used for the limitation (removal) of the property right and the aim pursued. Also, the essence and significance of the fundamental right is not preserved at all (Art. 4 par. 4 of the Charter). Some individual conflicts or unclear points in the existing legal regulation could apparently be removed by a constitutional interpretation (perhaps, e.g. the kind of proceeding or the kind of complaint). However, a number of unclear points can not be removed even through a constitutional interpretation. Even if it were possible, it is unfair for the burden of removing such serious unclear points in a statute, and in such an extent in which they appear in

§183i to 183n of the Com. Code, to be borne by the person whose rights, in contrast, the legislature should have preserved, under Art. 4 par. 4 of the Charter. The petitioner is convinced that it is impermissible, and inconsistent with Art. 4 par. 4 of the Charter, for all the risks connected with the legal regulation of the right to buy out securities to be borne by the person whose rights were supposed to have been preserved when passing the provisions on the limitations of fundamental rights, i.e. the minority investor.

21. Finally, it is necessary to set forth the petitioner's objections about the role of the Czech National Bank (originally that of the Securities Commission – the petitioner did not change the name). In its opinion, the amendment of the buy-out regulation by the Act on Financial Conglomerates does not remove the objection that there is no objective determination of the amount of consideration (which would be capable of objectively replacing the process of negotiating a purchase price), for these reasons:
a) the Securities Commission itself publicly announced that it is not capable of evaluating the adequacy of the settlement, in particular in the case of companies whose shares are unlisted (see the Securities Commission's press releases);
b) under the amendment implemented by Act no. 377/2005 Coll., the fiction set forth in §183e of the Com. Code applies proportionately to actions by the Securities Commission. Under that provision: if the Securities Commission does not send its opinion on the takeover bid to the bidder by the deadline provided in paragraph 8 (i.e. within a period of 8 days – extended to 15 business days), or does not grant the required consent to the acquisition of the securities of the target company or prohibit the takeover bid within that time period, it is deemed to consent to the takeover bid. Thus, this is not a measure that would effectively solve the problem of objective determination of the amount of consideration, because in a number of cases (in particular with companies whose shares are unlisted) review by the Securities Commission need not take place at all;

c) the Commentary to the Commercial Code – supplement to the 10th edition, C. H. Beck, Prague, 2005, p. 83, states that with unlisted shares it is not necessary to obtain the prior consent of the Securities Commission. Thus, for these securities there would be no objective evaluation of the amount of consideration. However, even if the Securities Commission had the authority to review the amount of consideration for unlisted shares, it has no authority at all to require from companies with unlisted shares any information whatsoever, based on which it could conduct a review.

22. As regards the petitioner's objections regarding the regulation of the commercial register registration proceeding, the Constitutional Court separated that out to be treated in the proceeding conducted under file no. Pl. ÚS 43/05, and refers to the conclusion therein.

II.
Statements from the Parties to the Proceeding

23. In view of the course of proceedings in the adjudicated matter, the Constitutional Court twice requested position statements from the parties to the

proceeding on the petition to annul §183i to §183n of the Com. Code. The first time was in the proceeding under pod file no. Pl. ÚS 43/05, and then, in view of the gradual supplementing of arguments by the petitioner, the parties were asked for a second position statement.

24. In the position statement of 16 November 2005, the chairman of the Chamber of Deputies of the Parliament of the Czech Republic described the process of passing Act no. 216/2005 Coll., and stated that in discussing the contested Act, the legislative assembly acted in accordance with legal procedures, and that its vote expressed the belief that the Act is not inconsistent with the constitutional order of the Czech Republic. He attached the text of the amending proposal by Deputy Doležal, amending proposals – publication 566/4, the approved text of the Act- publication 566/5, the stenographic transcript of the third reading from 9 February 2004, and resolutions of the Chamber of Deputies, no. 1457 and no. 1626.
25. In the position statement of 16 November 2005, the chairman of the Senate of the Parliament of the Czech Republic described the process of discussion of the draft Act by the Senate of the Parliament of the Czech Republic. As regards the contested provisions, §183i to §183n of the Com. Code, he pointed to the fact that a number of the criticized inadequacies were already removed in part nine of Act no. 377/2005 Coll., on Supplemental Supervision of Banks, Savings and Credit Cooperatives, Electronic Funds Institutions, Insurance Companies, and Securities Brokers in Financial Conglomerates, and Amending Certain Other Acts (the Act on Financial Conglomerates). Here he pointed to the role of the Securities Commission (now of the Czech National Bank), which is supposed to guarantee minority shareholders just compensation for their shares, in the name of the state. Likewise, consideration is now ensured by transferring the funds to be paid to a securities broker or a bank. Regarding the failure to respect the principle of proportionality, he stated that the securities broker or bank is required to provide the consideration to entitled persons without unnecessary delay after ownership is registered in an asset account in the appropriate securities register. At the same time, he pointed to a number of unclear points in the regulation – the commercial register does not guarantee the legality of the squeeze-out process, the unclear circle of parties in the review proceeding, unclear kind of proceeding (adversarial – non-adversarial), kind of complaint, and unfair allocation of costs of the review proceeding. In discussion amendments of the Commercial Code, the Senate of the Parliament of the Czech Republic did not consider these issues in detail, because it started with the position that the regulation interferes in the rights of minority shareholders, and thus violates rights guaranteed by the Charter. He also emphasized that the Thirteenth Directive does permit a squeeze-out, but, in Art. 16 also requires the right of a sell-out, which is a mirror institution of the buy-out right. He also addressed the contested provision of §200da par. 3 of the CPC.

26. The position statement from the Securities Commission pointed to foreign regulations and to the Thirteenth Directive, which permits a decision on a squeeze-out only in the event that such a decision by the principal shareholder is preceded by a takeover bid, and requires member states to ensure that owners of the remaining securities receive a fair price. The legal character of the shareholder meeting resolution is disputable; the Securities Commission inclines to the opinion that this is not expropriation, but that there is a palpable interference in the rights of minority shareholders which, however, is not necessarily unconstitutional, if it

takes place with reference to public values, with legislative arbitrariness in the construction of the regulation being ruled out, and if the principle of proportionality was respected (with reference to judgment no. 181/2005 Coll.). The Commission agreed with the petitioner in its arguments on the requirement of a proportionate, fair compensation (full compensation). This must also be manifest in the actions of the expert, who should first conduct a strategic analysis of the company, analysis of revenues, strengths and weaknesses (SWOT analysis), and financial analysis. Only after that can the expert choose the most suitable appraisal method, which is usually the discounted cash flow method, and determine the present value of the company. The Commission believes that, in view of the uniqueness of each valued company, the rules for forming an expert appraisal can not take the form of a binding legal regulation. In that regard, the Securities Commission considers the rules in §183i par. 5 of the Com. Code to be consistent with the requirement for full compensation. Likewise, it did not agree with the petitioner regarding the expert being dependent on the principal shareholder. It referred to its methodology for setting an appropriate price in takeover bids. This methodology can also be used in a squeeze-out. The Commission sees a problem in the short time period under §183i par. 5 of the Com. Code, when it can review only the suitability and justifiability of the expert methods applied, the correctness of calculations, and perhaps distortion and manipulation. In the Czech Republic, in view of the illiquid market, the price on the regulated marked can differ substantially from the adequate value; with unlisted companies it is not possible to apply the criterion of a market price at all. The question of interest is also a problem, as is the lack of determining a time as of which the value of consideration is to be set. As regards the procedural regulation of the buy-out, in the Securities Commission's opinion the requirements based on which the constitutionality of a squeeze-out can be evaluated include the opportunity to turn to a court, clear definition of rules of the proceeding, addressing the information deficit on the part of minority shareholders, securing the position of minority shareholders who did not turn to a court, and regulating the costs of the proceeding so that they are not an obstacle to filing a complaint.

III.
New Facts and Supplemental Statements by the Parties to the Proceeding

27. After the issue of the buy-out was separated out into the proceeding conducted under file no. Pl. ÚS 56/05, several points were added to the original filing, and it was further expanded. Therefore, the judge rapporteur asked for supplements to the original position statements, so that parties to the proceeding would have an opportunity to respond to the petitioner's complete arguments. Also, a position statement was requested from the Czech National Bank, which had in the meantime taken over the tasks previously fulfilled by the Securities Commission, based on the Act on Financial Conglomerates.

28. The chairman of the Chamber of Deputies of the Parliament of the Czech Republic, Ing. Miloslav Vlček, first stated that the Chamber had already stated its position on the legislative process (see point 24). The measures governing the right to buy out securities were introduced into Act no. 513/1991 Coll. through an amendment implemented by Act no. 216/2005 Coll., based on a proposal from

deputies, in the second reading. Another amendment to these provisions was contained in Act no. 377/2005 Coll., on Financial Conglomerates. Amending proposals were made in the second reading, and, according to the justification, they were presented in order to take into account European Parliament and Council Directive 2004/25/ES of 21 April 2004, on takeover bids. He did not comment on the manner in which these amending proposals were submitted, which was criticized by the petitioner. As regards the alleged defects in the legal regulation of a forced buy-out, i.e. the deadline for calling a shareholder meeting, questioning the guarantee of legality of the transaction through the institution of registering the shareholder meeting resolution in the commercial register, in connection with §220da of the CPC (the correct section is §200da of the CPC), the impossibility of setting the amount of consideration in an objective manner, lack of clarity concerning who bears the obligation to pay the consideration to the minority shareholder, defects in the provision on the review proceedings, and preclusion of the right to appeal based on inadequate consideration or unfair allocation of the costs of the review proceeding, he stated generally that these legal regulations were approved in the Chamber of Deputies of the Parliament of the Czech Republic with the intention of simplifying a company's shareholder structure and permitting more effective decision-making in the company's affairs. The proposed changes were also supposed to be a response to a number of actual cases where minority shareholders, in a manner verging on chicanery, abused the exercise of their rights to the detriment of the company as a whole and its growth. All this, despite the fact that ownership of a majority share carries not only greater responsibility for administration and management, but also the greater economic risk that the principal shareholder undertakes, compared to the minority. He stated that a number of leading Czech experts in the field also incline toward this opinion in their analyses. Minority shareholders are a group of shareholders whose influence on the operation of a company with a principal shareholder that meets the conditions for exercising the buy-out right is negligible. Therefore, the proponent of the amendment considered the squeeze-out to be a standard institution for balancing the rights and responsibilities of the majority shareholder vis-à-vis minority shareholders in the administration and management of the company, and also argued that there is a need to respond in a timely manner to the provisions of European directives, i.e. the already existing European Parliament and Council Directive 2004/25/ES of 21 April 2004 on takeover bids. This Council directive imposes an obligation on member states to ensure that the squeeze-out bidder hold (or be about to hold) at least 90% of the registered capital holding voting rights, and 90% of the voting rights of the target company. In view of the regulation of the number of votes (based on voting rights), contained in §180 par. 2 of the Com. Code, the number of votes should correspond to the proportion held of the company's registered capital. Thus, the requirements for the takeover bidder are de facto met cumulatively – although it does not seem that way at first glance under the formal wording of §183i par. 1 of the Com. Code. He stated again that, when passing this regulation, the legislative body acted in the belief that the statute was consistent with the constitutional order and with international treaties by which the Czech Republic is bound.

29. The chairman of the Senate of the Parliament of the Czech Republic, MUDr. Přemysl Sobotka, in the supplementary position statement of 18 September 2007, responded to the new facts that the supplemented petition contains. He stated

that, as regards the objection of an "add-on," Constitutional Court judgment file no. Pl. ÚS 77/06 states that an "add-on" is described as a procedure "where the mechanism of an amending proposal to a statute attaches a change to a completely different statute, not related to the legislative proposal." The contested statute is more a case of a "legislative rider," because Deputy Doležal's supplement does not implement a new statute into the legislative proposal, but merely deviates from the narrow space defined for amending proposals by the legislative proposal. He stressed the fundamental importance of evaluating this issue for the creation of future laws. As regards the other objections, he stated that, because a corporation is a capital company, where the rights and obligations of shareholders are incorporated in individual shares, it is natural that a shareholder holding the majority of shares also has greater rights, if these rights are not limited by statute. However, the petitioners consider the limitations in the Commercial Code to be insufficient. The failure to respect the "principle of equal weapons," which they allege, can be considered disputable, because respecting it fully would go against the spirit of capital companies, and lead to useless equalizing in business corporations. As regards the objection that nothing is reviewed in proceedings before the commercial register court, he stated that, all registration in the commercial register is based on that principle since the amendment of the Commercial Code by Act no. 216/2005 Coll. A shareholder meeting is declared invalid by an independent court, which applied §131 of the Com. Code. The law clearly and unambiguously defines the cases where the court will not declare a meeting invalid. Therefore, he did not agree with the petitioners' objections. He also pointed to the decision of the German Constitutional Court of May 2007, which concluded that squeezing out minority shareholders is not a violation of the right to own property, if the interests of minority and majority shareholders are reasonably balanced out, in particular if the squeezed-out shareholders receive adequate compensation for their shares and are given effective legal protection.

30. The governor of the Czech National Bank, doc. Ing. Zdeněk Tůma, CSc., responded on its behalf. He primarily emphasized that the squeeze-out regulation in the Commercial Code can not be considered an implementating regulation. In the opinion of the Czech National Bank, individual inconsistencies between the current Czech legal framework and European law do not justify a conclusion that the entire squeeze-out regulation is unconstitutional, unless it is found to be inconsistent with the constitutional order on other grounds, even if some of the current provisions governing the buy-out right were annulled due to inconsistency with European law, on the basis of the decision by the European Court of Justice on a preliminary issue under Art. 234 of the Treaty Establishing the European Communities (the "TEC"). The currently valid legal regulation can not be considered a preliminary transposition of the Thirteenth Directive, which would, moreover be inconsistent with community law, for the following reasons:
a) the legal regulation of the buy-out of securities, passed on the basis of the deputies' proposal, was not intended to implement the Thirteenth Directive, and therefore one can not speak of an implementing regulation of the squeeze-out in the Commercial Code;
b) the current legal regulation of the buy-out of securities is within the bounds of TEC (Art. 10 par. 2, Art. 249), as it is interpreted by the European Court of Justice (decision in the matter Wallonie v Région wallone, C - 129/96 Inter-Environnement Wallonie ASBL v Région wallone, [1997] European Court Reports I - 7411.1);

c) in the Commercial Code, unlike in the Thirteenth Directive, the right to a forced buy-out of securities is conceived as a general right, and thus applies to a wider circle of cases than that provided in Art. 1 of the Directive. The Directive applies only to a squeeze-out after a takeover bid for listed securities, and, in the opinion of the Czech National Bank, Art. 1 merely indicates that other domestic rules governing the buy-out of securities are not affected by the Thirteenth Directive. Here he pointed to recital 24 in the preamble to the Thirteenth Directive, from which one can not conclude that the exception would apply only to states that permitted a forced buy-out of securities at the time the Thirteenth Directive was passed. Therefore, the objections submitted have a community dimension only in relation to a squeeze-out that follows a successful takeover bid in a listed company, which is of fundamental importance for evaluating whether the valid Czech legal regulation is capable of seriously endangering the aims set by the Thirteenth Directive. Regarding the conditions that must be met for exercising the right of a forced buy-out (alleged to be inconsistent with Art. 15 of the Thirteenth Directive) the governor of the Czech National Bank stated that in practice such a case has not yet happened. Nonetheless, it must be admitted that the Czech legal regulation is inconsistent with the Thirteenth Directive, but with the reservation of what was stated above under points a) to c). As regards the objection that the right to a buy-out of securities is not related to the right to a sell-out, at the request of a minority shareholder, he stated that §183h of the Commercial Code governs an offer to redeem shares, even though it can not be confused with the institution described by the English term “sell-out.” He also pointed to the preparation of a new regulation of a “supplemental” takeover bid. Regarding the objection that the principles for setting the price in situation where, after a takeover bid, the threshold is reached for exercising the right to a buy-out of securities are not consistent with the Thirteenth Directive, the governor of the Czech National Bank stated that the valid legal regulation is not unambiguously directly inconsistent with the Thirteenth Directive. He pointed to §183i par. 5 of the Com. Code and stressed that the Czech National Bank always evaluates whether the amount of consideration is adequate to the value of the securities, and in cases of doubt it takes into account the interest of the owners of the securities. Thus, the Commercial Code permits an interpretation whereby the aims pursued by the Thirteenth Directive are not marred or endangered. In addition, the Czech National Bank already has an obligation to take into account the price in a takeover bid that preceded the squeeze-out, an obligation that arises for the bank from the obligation to interpret domestic law in a manner that conforms to European law. In addition, he pointed to the amendment being prepared of §183n par. 1 of the Com. Code, where this issue is to be expressly addressed on the basis of Art. 15 par. 5, second sub-paragraph of the Thirteenth Directive.

31. The Constitutional Court received an amicus curiae brief from the Association for Protection of Small Shareholders (the APSS) that basically contains the same arguments as those presented by the petitioner, and documents it with practical examples. At the organization’s request this was included in the file.

IV.
Formal Prerequisites for Reviewing the Petition and Constitutionality of the Legislative Process

32. On this basis it was possible to turn to addressing whether the conditions for proceedings before the Constitutional Court have been met. The petition was filed by a group of seventeen senators, the minimum number required for submitting such a petition. Under the case law of the Constitutional Court (judgment file no. Pl. ÚS 1/92, Collection of Decisions of the Constitutional Court of the CSFR, judgment no. 14) for this issue it is sufficient for the condition to be met at the time the petition is filed. The expiration of a senator's term in office (in that case the condition had to be met for all members of the petitioning group) or the termination of the office in some other manner (under Art. 25 of the Constitution of the CR) do not affect evaluation of whether there is an entitled petitioner under §64 par. 1 let. a) of the Act on the Constitutional Court.

33. In view of the formulation of the petition, the Constitutional Court first addressed clarifying the question of what, according to the petition, is the subject matter of the proceeding. The petitioner filed a petition seeking the annulment of "part of a statute, §183i to §183n of Act no. 513/1991 Coll., the Commercial Code." In technical legislative terms, the Commercial Code does not contain any such provisions. Nonetheless, it was possible to conclude from the individual filings that the petition intended these provisions of the Commercial Code, i.e. of Act no. 513/1991 Coll., as amended by Act no. 216/2005 Coll., Act no. 377/2005 Coll., and finally (considering the last, summary filing, though not expressly) as amended by Act no. 57/2006 Coll. The text of the Commercial Code provisions contested by the petition is as follows:

Right to Buy Out Securities (Squeeze-Out)

§183i
(1) A person who owns in a company,
a) securities whose total nominal value is equal to at least 90% of the company's registered capital, or
b) securities that replace securities whose total nominal value is equal to at least 90% of the company's registered capital, or
c) securities to which at least 90% voting rights are attached with regard to the voting in such company, (the "principal shareholder,"),
is entitled to ask the board of directors to call a shareholder meeting that will decide to transfer all the other securities in the company to it (the principal shareholder).
(2) At least nine tenths of the votes of all the shareholder are necessary for the shareholder meeting to adopt such a resolution, and in the owners of preference shares and the principal shareholder are entitled to vote. A notarial deed on the shareholder meeting's resolution shall be prepared, and an expert's appraisal on the amount of consideration in cash for the securities shall be attached to it.
(3) The shareholder meeting's resolution shall also include the identification of the principal shareholder, documentation that such shareholder is in fact the principal shareholder, the amount of consideration determined under §183j par. 6 and the time-limit for providing the consideration.
(4) For purposes of determining a business share under par. 1, the company's securities that are part of the company's assets [held by the company] shall be

divided among owners of securities in the ratio of the nominal values of their securities.
(5) The prior approval of the Czech National Bank, not older than 3 months, is required for the adoption of the shareholder meeting's resolution on transfer of all the company's other securities to the principal shareholder, otherwise the shareholder meeting's resolution is invalid. The provisions of section 183e shall apply as appropriate; the time-limit provided in section §183e par. 8 shall be extended to 15 business days. The principal shareholder is a party to the proceeding. The Czech National Bank shall always consider whether the amount of consideration is adequate to the value of the securities, and when evaluating the adequacy of the amount of consideration it shall always take into account the fact that a shareholders is deprived of the opportunity to choose whether and when to transfer to securities to the principal shareholder; if in doubt, the Czech National Bank shall take into account the interest of the shareholders.
(6) Before the shareholder meeting is held, the principal shareholder is required obliged to transfer to a securities brokerage firm or a bank funds in an amount necessary to pay the consideration, and shall document that fact to the shareholder meeting. The payment of the consideration shall be effected by the bank or brokerage firm.

§183j
(1) The board of directors shall call a shareholder meeting with 15 days of delivery of a request under §183i par. 1 to the company.
(2) The invitation to the shareholder meeting, or notice of the shareholder meeting, must include the decisive information on the determination of consideration, the conclusions of an expert appraisal, if required, and a call on lien creditors, who are known to the company or who should be known to the company if acting with due care, to inform the company of any liens on securities issued by the company, and the opinion of the board of directors as to whether it considers the amount of consideration determined under par. 6 to be fair.
(3) The company shall make available at its registered address, for every shareholder to view, identification of the principal shareholder, the expert appraisal under paragraph. 6, and the Czech national Bank's ruling (decision) under §183i par. 5; §184 par. 8, second and third sentences, shall apply as appropriate. A company with listed shares shall also disclose information regarding the procedure under section §183i par. 1 and the conclusions of the expert appraisal, if it is required, in a manner that permits remote access.
(4) The draft (wording) of the shareholder meeting's resolution with regard to determination of the amount of consideration may not diverge from the justification of the amount or from the expert appraisal under par. 6.
(5) After learning of the convening of the shareholder meeting, the owners of pledged securities shall communicate to the company, without undue delay, the fact that their securities are subject to a lien and who is the relevant lien creditor (pledgee); a notice of this duty (to inform the company) shall be included in an invitation to the shareholder meeting or in a notice publicizing that the shareholder meeting will be held.
(6) Together with the request under §183i par., the primary shareholder shall deliver to the company justification for the determination of the amount of consideration, an expert appraisal and the Czech National Bank's ruling under §183i

par. 5; the principal shareholder shall bear the cost for the preparation and delivery of these documents.

§183k
(1) As of the time they receive an invitation to the shareholder meeting or a notice of the shareholder meeting, shareholders may ask a court to review the adequacy of the consideration; if this right is not exercised within one month of the day when the record of the shareholder meeting resolution is published by entry in the Commercial register under section §183l, this right shall expire.
(2) If a shareholder does not exercise his right under par. 1, he may no longer invoke the inadequacy of consideration.
(3) A court ruling which has accorded the right to a different amount of consideration shall be binding on the principal shareholder and the company with regard to the basis of such accorded right vis-à-vis the other shareholders. The period of limitations shall start to run as of the day when the ruling comes into legal force, for all entitled persons, regardless of whether they were parties to the proceeding.
(4) A determination of inadequacy of the amount of consideration shall not invalidate the resolution of a shareholder meeting under §183i par. 1.
(5) A petition to declare invalid a resolution of a shareholder meeting under section §131 may not be based on the inadequacy of the amount of consideration.

§183l
(1) After the adoption of the shareholder meeting resolution, the board of directors shall file, without undue delay, an application to enter the resolution in the Commercial Register.
(2) At the same time, the board of directors shall publish the shareholder meeting resolution and the conclusions of the expert appraisal, if required, in the manner prescribed for calling a shareholder meeting, and shall deposit the notarial deed at the company's registered address for inspection; this fact shall also be stated in the published notice.
(3) One month after the resolution is published by being entered in the Commercial Register under par. 1, the title to securities of the minority shareholders shall pass to the principal shareholder.
(4) If the transferred securities were subject to a lien (pledged securities), the lien shall extinguish at the time of the transfer. Paragraphs 5 and 6 shall apply, as appropriate, to a lien creditor who holds a pledged security.
(5) The previous shareholders of certificated securities shall present them to the company within 30 days after the transfer of title; during any time when they are in default with this obligation, they may not demand consideration under section §183m. Within the same time-limit, the company shall instruct the person authorized keep the relevant records of securities under a special legal regulation to record in the asset accounts the change of shareholders of uncertificated (book-entry) securities; the basis for recording the change is the shareholder meeting resolution under §183i par. 1.
(6) If the previous shareholders do not present their securities to the company within one month, or within an additional time-limit determined by the company,

which may not be shorter than 14 days, the company shall proceed pursuant to section §214 par. 1 to 3.
(7) The company shall deliver the returned securities to the principal shareholder without undue delay. To replace securities that have been declared invalid, the board of directors shall issue to the principal shareholder, without undue delay, new securities of the same form, nature, class and nominal value.

§183m
(1) Entitled persons are entitled to receive consideration in cash; the amount of consideration shall be determined by the principal shareholder, and its adequacy shall be supported by an expert appraisal, which may not be older than 3 months as of the day a request under §183i par. 1 is delivered. The amount shall be reviewed by the Czech National Bank.
(2) As of the entry of title to an asset account in the relevant securities register, the previous shareholders of uncertificated (book-entry) shares has a right to be paid the consideration; the previous shareholders of certificated shares have the same right as of the delivery of the shares to the company uhder §183l par. 5 a 6.
(3) The brokerage firm or bank shall provide consideration to the entitled person without undue delay after the conditions under paragraph 2 have been fulfilled.
(4) The brokerage firm or bank shall always provide consideration to the shareholder from whom the securities have been bought out unless it is proved that such securities are subject to a lien (pledged securities), in which case the brokerage firm or bank shall provide consideration to the lien creditor (pledgee); this shall not apply if the owner proves that the lien has expired or that the agreement between him and the lien creditor provides otherwise.

§183n
(1) Upon publication of the shareholder meeting resolution, the securities are removed from trading on the official market if they were listed; §186a par. 1 and 2 shall not apply. In accordance with a special legal regulation, the company shall inform the organizer of the regulated market on which the securities were traded under §186a (1) of the removal, and ask that it be reflected in the relevant listings.
(2) The organizer of the regulated market shall, without undue delay, inform the relevant depositary and the Czech National Bank that the securities have been removed from trading on the regulated market.
(3) The right of the principal shareholder under section §183i par. 1 that is not exercised within 3 months after the day of acquiring a decisive business share shall extinguish.

34. The Constitutional Court, pursuant to §68 par. 2 of the Act on the Constitutional Court, first considered the manner in which the contested §183i to §183n of the Com. Code were passed and promulgated. These provisions were inserted into the Commercial Code by Act no. 216/2005 Coll., Amending Act no. 513/1991 Coll., the Commercial Code, as amended by later regulations, Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, Act no. 189/1994 Coll., on Higher Court Officials, as amended by later regulations, and Act no. 358/1992 Coll., on Notaries and their Activities (the Notarial Code), as amended by later regulations. The Act was promulgated on 3 June 2005, in part no.

77/2005 of the Collection of Laws of the Czech Republic. They were subsequently partly amended by Act no. 377/2005 Coll., on Supplemental Supervision of Banks, Savings and Credit Cooperatives, Electronic Funds Institutions, Insurance Companies, and Securities Brokers in Financial Conglomerates, and Amending Certain Other Acts (the Act on Financial Conglomerates). That Act was promulgated on 29 September 2005 in part no. 132/2005 of the Collection of Laws of the Czech Republic. The second amendment took place in connection with the new regulation of supervision of the financial market by Act no. 57/2006 Coll., on the Amendment of Acts in Connection with Unifying Supervision of the Financial Market. As a result of this amendment in §183i par. 5 and §183 par. 2 of the Com. Code, the role of the Securities Commission was transferred to the Czech National Bank.

35. The digital library of the Chamber of Deputies of the Parliament of the Czech Republic yields this basic information. The draft of Act no. 216/2005 Coll. was originally submitted as a deputy proposal by Deputy Pospíšil (Publication no. 566. Chamber of Deputies. IV. term of office, 2005). The first reading of the bill in publication no. 566 took place in the Chamber of Deputies of the Parliament of the Czech Republic on 2 April 2004. The bill was assigned for review to the constitutional law committee and the economics committee. The constitutional law committee discussed the bill on 20 October 2004 and passed resolution no. 143 (set forth in publication no. 566/2), containing a comprehensive amending proposal. The economics committee reviewed and approved the bill on 11 November 2004 in resolution no. 269 (set forth in publication no. 566/3), as amended by a comprehensive amending proposal matching the constitutional law committee. In the second reading on 24 November 2004, at the 38th session of the Chamber of Deputies of the Parliament of the Czech Republic, the bill was, among other things, expanded to include a proposal by Deputy Doležal. Deputy Doležal had already given it to both committees, but they did not agree with it, and did not include it in their comprehensive amending proposal. The bill was passed in the 3rd reading, and included in a final bill (vote no. 32, results 120 in favor, 53 against, with 186 members of the Chamber of Deputies of the Parliament of the Czech Republic present and voting). The final bill was approved on 9 February 2005, at the 41st session of the Chamber of Deputies of the Parliament of the Czech Republic in vote no. 39, by 182 votes out of 185 deputies present.

36. The Senate of the Parliament of the Czech Republic discussed the bill on 31 March 2005 at its 4th session, and passed resolution no. 104, in which it returned the bill to the Chamber of Deputies of the Parliament of the Czech Republic with amending proposal. Out of 69 senators present, 64 voted in favor, and none were against. The Chamber of Deputies of the Parliament of the Czech Republic discussed the bill again on 5 May 2005 at its 44th session, and in resolution no. 1626 kept the original wording of the bill by 135 votes out of 193 present; two members of the Chamber of Deputies of the Parliament of the Czech Republic were against. It must be noted that one of the amending proposals from the Senate of the Parliament of the Czech Republic was directed specifically at deleting the newly-inserted provisions of §183i to §183n of the Com. Code (the proposal by Deputy Doležal). However, that proposal received only 91 votes out of 189 present. The president of the republic signed the Act, and it was promulgated on 3 June 2005 in part no. 77/2005 of the Collection of Laws of the Czech Republic. It did not go into

effect all at once; some of the provisions went into effect on the day they were promulgated, and some on 1 July 2005.

37. Shortly after that, the Commercial Code was amended again by Act no. 377/2005 Coll., on Supplemental Supervision of Banks, Savings and Credit Cooperatives, Electronic Funds Institutions, Insurance Companies, and Securities Brokers in Financial Conglomerates, and Amending Certain Other Acts (the Act on Financial Conglomerates). This was done by a government bill (Publication no. 835. Chamber of Deputies. IV. term of office, 2005). The government bill, apart from its own subject matter (financial conglomerates) contained amendments to laws in certain sectors in the area of supervision of the activities of banks, insurance companies, and securities brokers, i.e. the Act on Banks, the Act on the Czech National Bank, the Act on Insurance Companies, the Act on Doing Business in the Capital Market, and the Act on Savings and Loan Cooperatives, but not an amendment of the relevant part of the Commercial Code. In the first reading, which took place on 14 December 2004 at the 39th session of the Chamber of Deputies of the Parliament of the Czech Republic, the bill was sent for review to the budget committee. The budget committee reviewed the bill on 11 March 2005, and in resolution no. 496 of 2 March 2005 it postponed discussion of that point until 9 March 2005. At the 41st meeting of the budget committee, which took place on 9 March 2005, in resolution no. 520 the committee recommended to the Chamber of Deputies of the Parliament of the Czech Republic, that it approve the government draft of the Act on Supplemental Supervision of Banks, Savings and Credit Cooperatives, Electronic Funds Institutions, Insurance Companies, and Securities Brokers in Financial Conglomerates, and Amending Certain Other Acts (the Act on Financial Conglomerates), as amended by the passed amending proposals (see Chamber of Deputies publication no. 835/2). At the 42nd session of the Chamber of Deputies of the Parliament of the Czech Republic, after general discussion in the 2nd reading (on 23 March 2005), the bill was sent back to the budget committee for further review. The budget committee reviewed the bill at its 45th meeting on 8 June 2005, and in resolution no. 597 it approved the bill, with comments that became part of the resolution (see Chamber of Deputies publication no. 835/3). The bill again went through general discussion at the 45th session of the Chamber of Deputies of the Parliament of the Czech Republic, on 17 June 2005, where more amending proposals were made (see Chamber of Deputies publication no. 835/4). In the third reading, which took place on 1 July 2005, at the same session of the Chamber of Deputies of the Parliament of the Czech Republic, the bill was approved in vote no. 690 by 152 votes out of 158 deputies; no one was against. This Act was also expanded by a number of amending proposals that did not concern its main subject matter, i.e. supplemental supervision. The original six parts of the bill were changed, but in addition a further 28 parts were inserted, including part nine, which amends certain provisions of the Commercial Code on the buy-out right. The Senate of the Parliament of the Czech Republic returned the bill to the Chamber of Deputies of the Parliament of the Czech Republic with amending proposals that also concerned changes in the regulation of the buy-out right. The bill returned by the Senate of the Parliament of the Czech Republic was put to a vote on 19 August 2005 at the 46th session of the Chamber of Deputies of the Parliament of the Czech Republic. The Chamber of Deputies of the Parliament of the Czech Republic, with 180 deputies present, kept the original version of the Act (resolution no. 1835) by the votes of 147 deputies; there was one vote against.

38. The last amendment of the provisions in question was implemented by Act no. 57/2006 Coll., on the Amendment of Acts in Connection with Unifying Supervision of the Financial Market, in Art. XLII, part 23. This involved replacing the Securities Commission with the Czech National Bank, which also acquired the Securities Commission's role in the buy-out right (§183i par. 5 and §183n par. 2 of the Com. Code). No other changes were made to the right of a forced buy-out. This change was originally not in the bill (Publication no. 997. Chamber of Deputies. IV. term of office. 2005). It was included in the comprehensive amending proposal from the budget committee (Publication no. 997/5). Because the proposal was not delivered orally, it is not possible to determine from the stenographic transcript when it was made. However, there is no doubt that this was a proposal that was substantively related to the subject matter under discussion, as it was only in the course of reviewing the bill that the budget committee proposed that the Securities Commission be dissolved and its role taken over by the Czech National Bank. The Chamber of Deputies of the Parliament of the Czech Republic approved the bill at its 51st session on 7 December 2005, in vote no. 696, where 181 deputies were present, 163 voted in favor, and one vote was against. The bill was approved by the Senate of the Parliament of the Czech Republic on 2 February 2006 at the 9th session of its 5th term office, by the votes of 43 senators to 17, out of 69 senators present.

39. The above-described approval process for the contested legal regulation indicates primarily that the part of Act no. 216/2005 Coll. that is the subject matter of this proceeding, i.e. the part on the right of a forced buy-out, is not the result of a legislative initiative under Art. 41 par. 1 of the Constitution of the CR. Deputy Pospíšil submitted the original bill on 20 January 2004, as a standard deputy initiative, in publication no. 566. That bill passed the first reading. In the 2nd reading, on 24 November 2004, in general discussion, Deputy V. Doležal said: "I hate to disrupt the idyll that arose during discussion of this bill, but I would like to announce the submission of an amending proposal concerning the so-called "squeeze-out." To tell the truth, I want to tell you that it was reviewed both with the proponent, who has accepted it, and with the minister, who agrees with it. It was even submitted to the constitutional law committee and the economics committee, sufficiently in advance so that the committees could study it. I do not know whether they failed to find the strength, courage and inclination to consider it, but it did not appear in their resolutions. Therefore, I am submitting it. You all received it on the table yesterday in written form; I won't read out the entire proposal. I would just like to point out that it is an amendment to the Commercial Code, that follows from the Thirteenth Directive of the European Union, and it is one of the things that await us sooner or later, so it is better to include it right away. As it was placed on everyone's desk yesterday, together with justification of all the changes, I don't want to disrupt the idyll here any further. I will hereby only sign up for detailed discussion, where I would change my amending proposal so that it could be included in the comprehensive amending proposal from the constitutional law committee." This proposal was approved as part of the amending proposals (publication 566/4, point C). It was on the agenda of the Chamber of Deputies of the Parliament of the Czech Republic again during the repeat discussion of the bill that was returned to the Chamber of Deputies of the Parliament of the Czech Republic by the Senate of the Parliament of the Czech

Republic. Because the Senate of the Parliament of the Czech Republic proposed deleting the right of a forced buy-out, there was a danger that the law as a whole would not be passed. That is documented by the statement of the bill's original proponent, Deputy Pospíšil, who at the 44th session, on 3 May 2005, in an attempt to preserve the meaning of the original bill, declared: "Ladies and gentlemen, in conclusion I would like to repeat the words of Deputy Vrbík, and call upon you. The material that we are discussing has been discussed by the Chamber of Deputies for almost a year. Teams of experts, and the legal teams of the Civic Democratic Party, together with the legal teams of ex-Minister Bureš, worked on it. Few materials are discussed in such detail in the legislative process. Few materials achieve such agreement in the Chamber of Deputies across the political spectrum. Few materials will help the Czech entrepreneurial public this much. Therefore, I ask you, ladies and gentlemen, when discussing this material – we will vote on the Senate version and then the Chamber of Deputies version – whatever your opinion of the squeeze-out is, I beg you to remember that the statute itself regulates the proceedings before the commercial registers, and that this bill is very important for the Czech entrepreneurial public." Thus, the very discussion in the Chamber of Deputies of the Parliament of the Czech Republic, as in the Senate of the Parliament of the Czech Republic (see the speeches by the proponent, Deputy Pospíšil and Senators Kubín, Paukrtová, Stodůlka, and Sefzig at the 4th session of the Senate of the Parliament of the Czech Republic, on 31 March 2005) documents that Deputy Doležal's amending proposal was seen as something unrelated to the originally presented proposal to amend the Commercial Code and the Civil Procedure Code (commercial register proceedings). A similar situation arose during the passage of the first amendment to the right of a forced buy-out by Act no. 377/2005 Coll., where amendment of this regulation was inserted in the form of an amending proposal from Deputy Doležal.

40. The Constitutional Court is of the opinion that evaluating the manner in which the contested provisions of the Act were proposed, discussed, and approved is part of evaluating whether the Act was passed in a constitutionally prescribed manner (§68 par. 2 of the Act on the Constitutional Court). The proposal by Deputy Doležal does not change or supplement the proposal submitted by Deputy Pospíšil. That concerns a different issue, though it also presupposes the existence of the commercial register and registration in it. Therefore, the Constitutional Court first had to deal with the question of whether passing Act no. 216/2005 Coll., did not involve a serious violation of the rules of legislative procedure, which should lead to annulling the Act on those grounds (see judgment Pl. ÚS 77/06, no. 37/2007 Coll.).

41. In the Constitutional Court's opinion (see judgment no. 37/2007 Coll.), deviating from the limited space reserved for amending proposals can acquire the character of exceeding the purpose of a given proposal, or exceeding the scope of the subject matter defined by a bill. This requirement of a close relationship or immediate connection between the content and purpose of a bill and an amending proposal to it is part of the foundations of parliamentary methods and orderly law. It brings a necessary order into the discussion of laws and parliamentary procedure in general. However, every state, and within it, often every legislative assembly, often seeks its own means for how to ensure that this requirement be met, or sets special rules for deviation from its bounds (e.g. a higher, qualified majority, the

support of a certain number of other deputies, a response or consent from the proponent, or new discussion of a bill). Likewise, the intensity of judicial review of observance of these rules differs among individual states. Therefore, there is no universal position on this issue. The Constitutional Court outlined its approach in the above-cited judgment, where it emphasized that there is an "add-on" in a case where the method of an amending proposal to a bill is used to attach to the bill a regulation of a completely different statute, not related to the legislative proposal. In the Constitutional Court's opinion, constitutional interpretation of the provisions governing the right to file amending proposals to a bill under discussion requires that "the amending proposal truly only amend the proposed legal regulation, i.e., in accordance with the requirements of the so-called close relationship rule, under which the amending proposal must concern the same subject matter as the proposal currently being discussed in the legislative process, the particular amending proposal should not deviate from the limited space reserved for amending proposals by extensively exceeding the subject matter of the bill being discussed." The right to submit amending proposals is part of the constitutional formation of will by the parliament of a democratic state. However, an amending proposal is, by its nature, an accessory to a bill that was submitted in the form of a constitution-forming initiative under Art. 41 of the Constitution of the CR. Therefore, §63 par. 1 point 5 let. a) of the rules of procedure of the Chamber of Deputies of the Parliament of the Czech Republic requires that it delete, expand, or amend certain parts "of the original proposal." The foundation for parliamentary discussion is that original proposal, on which comments are made by the government, under Art. 44 par. 1 of the Constitution of the CR, committees to whom the bill was sent, or individual deputies, under §91 par. 4 of the rules of procedure of the Chamber of Deputies of the Parliament of the Czech Republic. If that is not the case, then in the Constitutional Court's opinion the separation of powers is violated. That has consequences for the principle of creating harmonious, understandable, and foreseeable law, which the Constitutional Court has previously connected to the attributes of a democratic, law-based state. Further, it circumvents the institution of a legislative initiative under Art. 41 of the Constitution of the CR, and violation of the right of the government to express its view on a bill under Art. 44 of the Constitution of the CR.

42. Of course, the situation in this case is not completely identically to the one that the Constitutional Court considered in the cited judgment. Publication no. 566 contained Deputy Jiří Pospíšil's proposal to pass a law amending Act no. 513/1991 Coll., the Commercial Code, as amended by later regulations, and Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations. in terms of content, it concerned §3 of the Com. Code, which was to be repealed, and §27 to §34o of the Com. Code, where part one, chapter three, concerning the commercial register, was to be revised, and finally §200a to §200df of the CPC, concerning proceedings in matters of the commercial register. It could not substantively concern the right of a forced buy-out (§183i to §183n of the Com. Code), because that only entered the Commercial Code in the abovementioned proposal from Deputy Doležal. Of course, that is not important for the evaluation of whether Deputy Doležal's proposal is permissible. In that case, in contrast, the question is evaluating the substantive relationship of an amending proposal to the original proposal. The starting point for evaluating the cited narrow relationship, or relationship on the merits, is the "original proposal," .i.e. the legislative initiative

(the amending statute) under Art. 41 of the Constitution of the CR, not the statute that is the target of the initiative (the statute to be amended). Therefore, the decisive question is not whether the subject matter of the amendment is the Commercial Code (broad relationship), but whether this involves amendment of the regulation of the commercial register in the Commercial Code and commercial register proceedings in the Civil Procedure Code (narrow relationship).

43. Thus, the connection between Deputy Pospíšil's original proposal and Deputy Doležal's amending proposal is only formal, not substantive. It is primarily the seriousness of such a proposal that speaks against its permissibility. The government did not have an opportunity to express its views on the proposal, although it is responsible to the Chamber of Deputies of the Parliament of the Czech Republic on issues of the conduct of domestic and foreign policy. The Thirteenth Directive involves fulfillment of an obligation arising from membership in the European Union. An amending proposal is not ruled out, but it affects the status of the government as the representative of the Czech Republic in its relationship to the European Union. The amending proposal concerns matters regulated by the Commercial Code, and does not insert in the original proposal a regulation that would affect a completely different statute. However, if affects Deputy Pospíšil's original proposal only indirectly, and only because these matters are registered in the commercial register, in a manner that does not permit judicial review. Deputy Pospíšil himself said (at the 4th session of the Senate on 31 March 2005) that "the submitted bill did not aim to significantly change the valid substantive law regulation in the Commercial Code concerning commercial registers. In lay terms, our proposal does not basically change the facts that are registered in the commercial register under the present commercial law."

44. Of course, the Constitutional Court pointed out in judgment no. 37/2007 Coll., that it will connect past evaluation of analogous violations of principles of the legislative process with the test of proportionality, in connection with principles of protecting the citizens' justified confidence in the law, legal certainty, and acquired rights, or in connection to other constitutionally protected principles, fundamental rights, freedoms, or public values. Therefore, the Constitutional Court also had to evaluate other circumstances in the case, so that its role would not be limited to review of hundreds of procedural errors in both chambers and their managing bodies, without that having any effect on the evaluation of substantive constitutionality of the legal order. If the Constitutional Court began granting similarly justified petitions to annul statutes simply on procedural grounds on the border between the constitutional order and orderly law, a state of considerable legal uncertainty would arise, especially where there were otherwise no substantive grounds on which to criticize the contested statute. Therefore, it was also necessary to evaluate the circumstances that should lead the Constitutional Court to not limit itself merely to reviewing observance of a close relationship between the original proposal and the amending proposal.

45. The fact that a forced buy-out is registered in the commercial register (§183l par. 1 of the Com. Code), and that the manner of that registration under §200da of the CPC is the subject of proceedings before the Constitutional Court conducted under file no. Pl. ÚS 43/06, speak in favor of that relationship. If this regulation were found unconstitutional, that would also have consequences for that

proceeding. We also can not overlook the fact that judgment no. 37/2007 Coll. concerned a statute that had not yet been passed. In the initial case of Art. II and Art. III of Act no. 443/2006 Coll., which amend Act no. 319/2001 Coll., which amends Act no. 21/1992 Coll., on banks, as amended by later regulations, the statute had not yet been applied. In addition, application of the state would have been basically a one-time matter. In contrast, the present matter concerns regulation of the right to a forced buy-out, which has already been amended twice. Thus, the government had an opportunity to express its opinion and exercise its own legislative initiative. In contrast to the initial case, this regulation has already been applied many times in practice, where – as in theory – it provoked a number of disputes, which the Constitutional Court is expected to resolve, both by the public, and, especially, by the courts dealing with commercial law. This also applied to the legislature, which is to transpose the Thirteenth Directive into domestic law, in the form of an act on takeover bids (Chamber of Deputies. Publication no. 358 of 14 November 2007), and to the judicial branch. Here we must point out that in judgment file no. Pl. ÚS 23/04 (č. 331/2005 Coll.), the Constitutional Court favored restraint in evaluating the legislative process itself. In such a case, formal annulment of the regulation of the right to a forced buy-out as a whole (nothing else comes into consideration in this case) would mean the danger that the same regulation would be passed again, but simply with the difference that all the requirements of the legislative process would be observed. The Constitutional Court concluded that in the present matter, in view of the principle of proportionality, the formal and procedural aspects of the review cede to the requirements of the principles of a material law-based state, legal certainty, and effective protection of constitutionality.

V.
Evaluation of the Constitutionality of the Regulation of the Right to a Buy-Out

46. In its summary filing of 28 February 2007, the petitioner states that the Czech legal regulation of the buy-out of securities demonstrates a great number of defects, the combined effect of which is that the regulation is inconsistent with the right to peaceful enjoyment of property and with the right to a fair trial, as well as with European community law and international law. However, as the above summary of the criticisms indicates, in most cases it does not make them specific in terms of the requirements that arise from Art. 87 par. 1 let. a) of the Constitution of the CR. In contrast to the previous filings, it ranked in first place the alleged conflict with community law, without specifying in more detail how that would also mean that intervention by the Constitutional Court under Art. 87 par. 1 let. a) of the Constitution of the CR was necessary. Therefore, it was also necessary to turn to the petitioner's earlier filings, which more distinctly included a certain constitutional law analysis (points 13 to 22).
47. A fundamental question is evaluation of the constitutionality of the institution of a forced buy-out, both in terms of the constitutional order of the Czech Republic [Art. 87 par. 1 let. a) of the Constitution of the CR], and in terms of the Czech Republic's international obligations under Art. 1 par. 2 of the Constitution of the CR. In this regard it was necessary to deal with the alleged violation of Art. 11 par. 4 of the Charter, and, in particular, with the question of possible interference in property rights under Art. 11 par. 1 a 3 of the Charter, even though the petitioner

does not based its petition on those provisions. In this regard, it was necessary to evaluate whether:

a) regardless of the Thirteenth Directive, the constitutional order permits such interference in property rights, and whether the criterion for defining the principal and minority shareholders satisfies the principle of proportional interference;

b) whether the interference is legitimate and rational, when the law does not set forth the grounds for exercising the right to a forced buy-out, and whether it corresponds to the nature and idiosyncrasies of relationships in a corporation;

c) by enshrining the right of a forced buy-out, the state fulfilled its protective role and did not permit disproportionate interference in property rights;
d) the interference meets the conditions set forth in Art. 4 par. 2 and Art. 11 of the Charter and Art. 1 of the Protocol to the European Convention;
e) there was not interference in acquired rights and violation of the principle of legitimate expectation.

48. Before the Constitutional Court formed an opinion on the foregoing questions, it was necessary to deal with the last version of the petitioner's filing, which is based primarily on an alleged conflict between the regulation of the right to a forced buy-out and the Thirteenth Directive (points 6 and 7). Here we can not but state what the Constitutional Court has already stated several times (in particular, judgments Pl. ÚS 50/04, no. 154/2006 Coll. and Pl. ÚS 36/05, no. 67/2007 Coll.). The reference point for review of the constitutionality of statutes under Art. 87 par. 1 let. a) and Art. 88 par. 2 of the Constitution of the CR is the constitutional order. The Constitutional Court does not have jurisdiction, in such proceedings, to review whether domestic law is consistent with community law. The application of community law as directly applicable law (see decision of the European court of Justice, matter 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA. Reference a preliminary ruling: Pretura di Susa - Italy. The non-use of a statute that is inconsistent with the law of the Community, known to the domestic court as Simmenthal II, available in the Collection of Decisions, vol. 1978, p. 629, e.g. at http://eur-lex.europa.eu) is in the jurisdiction of the ordinary courts, which, in cases of doubt about the application of the law, have the opportunity, or obligation, to turn to the European Court of Justice with a preliminary issue under Art. 234 of the TEC. From the point of view of the reference criteria for decision-making by the Constitutional Court this changes nothing. An obligation arises from Art. 1 par. 2 of the Constitution of the CR for the Constitutional Court, as a state body, of the Czech Republic, to make an interpretation of the constitutional order consistent with European law (see also judgment file no. Pl. ÚS 66/04, no. 434/2006 Coll., in relation to European Union law) in those areas where community law and the legal order of the Czech Republic meet (the undertaking of loyalty under Art. 10 of the TEC). Of course, it has to be a matter of interpretation of the constitutional order in relation to domestic law. However, the petitioner asks that the Constitutional Court decide on its allegations concerning defective transposition of community law. Therefore, the Constitutional Court left them aside. If the petitioner limited itself only to those allegations, the petition would have to be denied due to lack of jurisdiction of the Constitutional Court. Of course, in cases of annulling legal regulations, the Constitutional Court must take European

Union membership into account in terms of Art. 1 par. 2 of the Constitution of the CR, and weigh the possible use of the opportunities given to it by §70 par. 1 of the Act on the Constitutional Court.

49. The same applies to the allegation of not respecting unspecified international treaties on the protection of investments. This is also a question of application of such treaties in the decision-making of the ordinary courts, which are bound by such treaties, provided that they meet the requirements of Art. 10 of the Constitution of the CR. If such a treaties contains a different legal regulation, it is necessary to apply the principle that the treaty takes precedence. Because this is not a problem of a hierarchy of relationships (according to legal force), but a hierarchy of application, we must refer to the rules enshrined in Art. 10 and Art. 95 par. 1 of the Constitution of the CR.

50. The Constitutional Court likewise set aside those of the petitioner's allegations that are merely aimed at the request to interpret ordinary law. Lack of clarity in a statutory regulation must be eliminated by the case law of the ordinary courts, and eliminating lack of unity in the decision-making of the ordinary courts falls under the jurisdiction of the Supreme Court. The Constitutional Court has already stated several times that it can intervene in this area only if there is simultaneously a violation of the constitutional order, and the lack of precision, uncertainty, and lack of foreseeability of a legal regulation extremely violates the fundamental requirements of a statute in the context of a law-based state.

51. Therefore, the fundamental issue is the constitutional permissibility of a forced buy-out of shares in a law-based state (Art. 1 par. 1 of the Constitution of the CR) in terms of the requirement of legality, rational justification (prohibition of arbitrariness), necessity, legal certainty, foreseeability, and the certainty of law. Only after answering that question is it possible to evaluate whether the individual features of the buy-out regulation meet constitutional criteria. On that basis it was possible to decide whether the regulation would be annulled as a whole, or only individual parts of it. In judgment file no. Pl. ÚS 59/2000 (no. 278/2001 Coll.) the Constitutional Court stressed the importance of economic actors for the interpretation of provisions of the constitutional order that govern issues of the functioning of a market economy. Therefore, it is necessary to approach the interpretation of provisions on a forced buy-out from the standpoint of the idiosyncrasies of the area to which they are to be applied, and from which the problems arise that are to be legally regulated. A corporation has a different character than a trade union, association, political party, or religious society. Likewise, the same standards can not be used to evaluate the fulfillment of constitutional requirements on the creation, functioning, and termination of such a company. Membership in it, based on owning shares, can not be compared with paying membership fees, nor a squeeze-out of minority shareholders with the expulsion of a member from a society or a political party. For that reason, the understanding of shareholders as owners, compared to owners of other property, is also the subject of discussion, especially in the case of minority owners (so-called passive owners – see further, Lee, J.: Four Models of Minority Shareholder Protection in Takeovers. European Business Law Review, vol. 2005, no. 4, p. 809). The purpose of a corporation is the concentration of capital, investment, conduct of business, and earning profits. If one of the shareholders reaches the specified

proportion of shares under §183i par. 1 and 4 of the Com. Code, a situation arises in the corporation where the remaining shareholders may (but need not) cease to be a benefit for the company. This applies both in terms of the importance of their proportion of the company's total capital, and in terms of their ability to affect decision-making in the company. On the contrary, their involvement may burden the company in terms of costs for its operation, calling shareholder meetings, and its decision-making with regard to the rights of those shareholders. A high number of small shareholders may (but need not) represent unnecessarily increased costs of administration and management for the company. A corporation has an unchanged obligation toward such shareholders, even though their possible contribution to further development, to making strategic and other decisions, is practically zero. Most of these arguments are part of a background report by a group of experts to the Thirteenth Directive, known as the Winter Report (after the chairman of the group, Jaap Winter – text of the Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids. Available at http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf, p. 60-61). At present the dominant opinion is that corporations require a flexible legal framework to attain their strategic goals, which can not always be achieved by entering into agreements. Therefore, the legislature should create the necessary conditions (van der Elst, Ch., van den Steen, L.: Squeezing and Selling-out – a Patchwork of Rules in Five European Member States. European Company Law, vol. 2007, no. 1, p. 25). Another important factor in the conditions in the Czech Republic is the coupon privatization, which created a substantially different type of corporate shareholder structure than exists in the states whose experience and legal frameworks the petitioner cites. For that reason, comparison with states where such a mass event did not take place is not wholly appropriate. The Constitutional Court merely points out this aspect, without stating an opinion on the suitability of coupon privatization (see judgment file no. Pl. ÚS 38/01, Collection of Decisions of the Constitutional Court of the CR, vol. 29, p. 357). The same applies to deliberation in terms of the need to implement the institution of a forced buy-out on grounds of competitiveness and increasing the interest of foreign investors in doing business in the domestic market.

52. The status of shareholders can not be compared with membership rights in other kinds of associations and societies. A shareholder's business share results from the size of his investment and the risk that he bears on that basis. Therefore, shareholders have different rights (for an overview, see Dědič, J. a kol.: Akciové společnosti [Corporations]. 6th ed., Prague 2007, pp. 235-238) and different obligations. If a shareholder owns 90% of a company's shares, the influence of the remaining shareholders on the company's operation is negligible, and their opportunity to participate in basic decisions about the company's direction is illusory. The right to an explanation and the obligation to inform may complicate the principal shareholder's strategic decisions. Such decisions can also be contested as a form of abuse of the majority votes in a company to the detriment of a minority (§56a of the Com. Code). The mere possibility of such disputes can impede the business aims of the principal shareholder. It is impossible not to see that the prohibition on abuse of position can objective limit the principal shareholder in view of the presence of the remaining shareholder. In contrast, a reference to the possible abuse of their rights is not decisive in this regard. Whereas, in the case of a 90% share, the elements of participation, business, and

capital apply in full in the case of the principal shareholder, a minority shareholder (or shareholders) takes part only in terms of capital, as an investor, while the decision-making element is, in practice, suppressed. If minority shareholders are ensured adequate compensation for such an investment, it is not possible to object on constitutional grounds to a forced buy-out under such conditions. Likewise, it can not be ruled out that such a provision can also benefit minority shareholders, because under certain conditions their shares lose value and become un-sellable, because there is no interest in them. Therefore, in a certain situation creating a legal framework for a forced buy-out of shares can also be seen as giving an advantage to minority shareholders in terms of increasing the interest for a takeover of the corporation. A potential buyer is generally interested only in acquiring the company as a whole, which can have a beneficial effect on the share price (e.g.. Münchener Kommentar zum Aktiengesetz [Munich Commentary on the Shares Act]. 2nd ed., Bd. 9/1, §327a – §327f, Vorbemerkung, AktGWpĂśG. SpruchG. Munich 2004, Note no. 3). Therefore, interpretation of a legal regulation as part of an abstract review does not clearly lead to a conclusion that the regulation is unconstitutional. The use of a forced buy-out does not rule out interference in the constitutionally guaranteed rights of shareholders, but that possibility alone does not make the regulation unconstitutional. That could happen only if the state, within its protective function, did not provide minority shareholders means for legal protection. The fact that constitutionally guaranteed rights may be violated on the basis of the legal regulation of a particular institution (e.g. detention, expulsion, expropriation, expulsion from a society) does not make the regulation unconstitutional. That would happen only if the constitutional "guarantees" were shown to be fictitious.

53. Regarding the general objection that this is a form of expropriation, it must be stated that the subject that deprives the minority shareholders of their rights is not a public authority acting in the public interest. The forced buy-out of shares under §183i of the Com. Code, just like the transfer of business assets to a shareholder under §220p of the Com. Code, is a certain manner of settling property relationships that is approved by the state, and is comparable with other forms of property settlements in marriage, in a housing cooperative, or between co-owners in general. Therefore, the Constitutional Court is of the opinion that, just like the minority shareholder, in a different position, the principal shareholder could also turn to it. The principal shareholder is also an owner, and is also entitled to protection of its property, company, and entrepreneurial rights under the Charter (Art. 11 par. 1 and 3, Art. 26 par. 1 and 2), a fact that the petitioner overlooks. If every shareholder has the right to contest a shareholder meeting resolution in court (§183 together with §131 par. 1 of the Com. Code), the risk of the company's ability to act being paralyzed is borne to a far greater extent by the principal shareholder. Therefore this is a matter of addressing a conflict of fundamental rights and freedoms, not of expropriation under Art. 11 par. 4 of the Charter. The issue is to create opportunities for the shareholder meeting to change the structure of private property relationship between the shareholders (analogously, see the opinion of the German doctrine, Schmidt-Aßmann, E.: Der Schutz des Aktieneigentums durch Art. 14 GG [Protection of Share Ownership through Art. 14. of the Basic Law]. In: Der Staat des Grundgesetzes [The State of Basic Laws]. Festschrift für Peter Badura. Tübingen 2004, p. 1023), but under the supervision of the Czech National Bank and with a guaranteed opportunity for judicial protection.

The fact that the state fulfills its protective role does not yet mean that interference in the rights of minority shareholders can be ascribed to it as in the case of expropriation. This is not an isolated measure in the legal order (cf. §142 of the Civil Code). However, if the state permits a forced buy-out of the shares of a certain group of corporate shareholders by another shareholder in a legally regulated manner, that regulation must meet criteria that are analogous, although not identical to the case of expropriation, because it is not a matter of expropriation. This applies primarily to the protection of the constitutionally guaranteed rights of minority shareholders, such as, first, protection of property rights under Art. 11 par. 1 and 3 of the Charter, and the right to associate with others for purposes of conducting business under Art. 2 par. 3, Art. 20 par. 1 and Art. 26 par. 1 and 2 of the Charter.

54. Therefore, it was on that basis that the Constitutional Court had to evaluate, in terms of the principle of proportionality the suitability and necessity of this possible course of action for the principal shareholder, because this case does not primarily involve a conflict of the public interest and a fundamental right, but a conflict of two fundamental rights, where two subjects of private law (owners) are opposed to each other, not a public power, acting under the rules in Art. 2 par. 2 of the Charter, and a subject of private law, acting under the rules in Art. 2 par. 3 of the Charter. The right to a forced buy-out, sometimes imprecisely called a squeeze-out or freeze-out (on the various meanings of these terms see Garza, J. J.: Rethinking Corporate Governance: The Role of Minority Shareholders – A Comparative Study. St. Mary's Law Journal, vol. 1999-2000, p. 621-625) is recognized in the legal orders of a number of countries; in the European Union it is even presumed to exist, on the basis of transposition of the Thirteenth Directive. In some countries the forced buy-out is limited to corporations, e.g. in the Czech Republic, Germany, France, Italy, the Netherlands, Great Britain, and Poland; in some it is applied generally (in Austria, Bundesgesetz über den Ausschluss von Minderheitsgesellschaftern [Federal Law on the Squeeze-Out of Minority Shareholders] – GesAusG. BGBl. I., no. 75/2006). In some countries it applies only to companies with listed shares, in some also to other companies. The conditions under which a squeeze-out is possible also differ. However, the measure for the Constitutional Court's review is not conflict or inconsistency of the contested legal regulation with foreign regulations, but the constitutional order. The fact that the domestic legal regulation may provide a lower standard for protection of minority shareholder rights does not necessarily mean that it is unconstitutional. However, nothing prevents foreign experience from becoming a source of inspiration for perfecting the regulation. Arguing merely on the basis that this institution exists in other states is not in and of itself important for the present matter, unless it merely supplements constitutional law arguments. We can not begin with a presumption that the regulation in one state is a binding model for other states. That, after all, is also documented by efforts at a certain unification within the European Union, which, after more than ten years, resulted in passing the Thirteenth Directive in 2004.

55. The economic and legal grounds for the regulation of this institution are mutually dependent. Originally a corporation made decisions on the principle of consensus, and it was assumed that statutes can not interfere in the relationships in the company. The vested rights theory was applied, which was based on the

position that a shareholder can not lose certain rights without his consent. By the end of the 19th century that theory proved to be quite unsustainable in terms of economic needs. Therefore, it was replaced by the principle of majority decisions (see further, Carney, W. J.: Fundamental Corporate Changes, Minority Shareholders and Business Purposes. American Bar Foundation Research Journal, vol. 1980, pp. 69, 77n.). With the development of the economy, the growth of corporations and shareholders, on the basis of the original ideas of the social nature of a company and acquired rights (conflict between the strategy of the members and the strategy of the investment), the tyranny of a minority with a veto power began to appear (see further, Weiss, E. J.: The Law of Take Out Mergers: A Historical Perspective. New York University Law Review, vol. 1981, no. 4, pp. 627-657, for Great Britain, p. 685n.). Therefore, the original ideas were gradually replaced, and developments led to the present situation not only in the USA, but also in individual developed European states, and, after 2004, also within the European Union. The important thing is that the process is regulated legally and clearly, whereby it differs from a so-called "wild" squeeze-out, where different means are used for the same aim, to squeeze out minority shareholders; they are not regulated transparently, and make it possible to affect minority shareholders who own even considerably more than 5% to 10% of shares, the standard for the right to a forced buy-out. This institution is understood as a legitimate supplement to the regulation of mandatory takeover bids governed by §183b par. 1 of the Com. Code (see Dědič, J. a kol.: Akciové společnosti [Corporations]. 6th ed., Prague 2007, p. 307).

56. For the Constitutional Court, in the case of a forced buy-out, it is essential that this economically based procedure (rationality and suitability of interference) be legally regulated as is required in a law-based stated (legality of interference). Therefore, it is not necessary to consider the question of the public interest in the same procedure as for expropriation (see also, point 66 in connection with setting the amount of compensation). The public interest is manifested in the principal of a market economy and freedom to do business in a different manner, and is exercised through different means, including the creation of suitable legal conditions for the functioning of corporations. The principal shareholder is not guided by the public interest under Art. 11 par. 4 of the Charter, because it is a matter for its discretion, made possible by the Commercial Code, to decide whether to buy out the remaining shareholders and thus become the only shareholder, who will decide in its own discretion, without shareholder meetings and other institutions of corporate law ("going private" in Anglo-Saxon law). The right to a forced buy-out does not involve the usual decision-making at a shareholder meeting. There is a qualified majority so large that possibly objections about abuse of position are already practically suppressed. When the qualified-majority shareholder makes decisions, minority shareholders can not even block the actions of a shareholder meeting under §185 par. 1 of the Com. Code, let alone prevent the passing of basic resolutions, whether those require a simple majority (§186 par. 1 of the Com. Code), a super-majority (§186 par. 2, 3 and 4 of the Com. Code) or are combined with a prohibition of a simple majority requirement [requirement of a three-fourths majority] (§186 par. 4 of the Com. Code). Given a ratio of nine to one, there is in fact no opportunity for minority shareholders to influence the company's decision-making; there is only the possibility of complicating its functioning. The requirement of a 90% qualified majority far exceeds what is considered control of the company under §66a of the Com. Code.

In terms of the principle of proportionality, in view of such a ratio, it is difficult to make any objections, if other safeguards for protecting property rights are observed in the regulation of the forced-buy out procedure (adequate consideration, legal protection).

57. Permitting a forced buy-out in the Commercial Code does not mean that a qualified-majority shareholder will always consider it necessary to buy out the remaining shareholders. That is a matter for its business decision, where it is limited by the deadline and conditions which, although they will not protect the membership of minority shareholders (the aspect of the right to association, freedom to do business, and opportunity to decide) in the corporation, will protect their existing business share, as expressed in the form of shares, which is a condition for such a regulation to be constitutional (Art. 4 par. 4 of the Charter). In the first place, the regulation must lead the principal shareholder to weigh whether it is even worth making use of the right provided by §183i par. 1 of the Com. Code, in a situation where it is in full control of the company. However, as emphasized above, that arises from the economic nature of the transaction, so on the legal side there is no need to justify the decision to use the right to a forced buy-out (in contrast to compensation for a buy-out). This follows from the present concept of a market economy (compared to the situation to the middle of the 20th century, where membership was protected), where it is expected that the majority shareholder will itself consider whether the costs of implementing a forced buy-out will bring it profit (see, e.g., Schön, W.: Der Aktionär im Verfassungsrecht [The Shareholder in Constitutional Law]. Festschrift für Peter Ulmer. Berlin 2003, pp. 1387-1388). The role of the state and its bodies (the Czech National Bank, a court) is not to review the outlook for whether the business decision is correct, but to evaluate whether the statutory conditions for taking such a step were met, and, if appropriate, provide legal protection to the bought-out shareholders. Likewise, the connection to an investor's strategic aim can be concluded from §183n par. 3 of the Com. Code, which indirectly assumes that an investor will have such an aim when seeking to acquire a 90% share. If it does not do so at once (a three-month deadline), it loses the opportunity.

58. The 90% threshold is the result of legislative discretion; the legislature could have set a lower or higher threshold (it is 95% in Germany, Poland, the Netherlands, France and Belgium, and 98% in Switzerland). That was the case in the Czech Republic for cases of winding up a company without liquidation in the period from 31 December 2001 to 11 July 2002 (when Act no. 308/2002 Coll., amending the Commercial Code, went into effect). In terms of the constitutional order and maintaining the state's protection role in the regulation of the positions of shareholders, the 90% threshold is an expression of a necessary limit, and does not raise any doubts, in view of the European standard, which can be considered to be the threshold contained in the Thirteenth Directive and used in a number of other states. Insofar as the petitioner alleges (point 6a) that this threshold is inconsistent with the Thirteenth Directive, we must refer to what was stated under points 28 and 48. From the point of view of the Constitutional Court, this is a matter or ordinary law, and fulfillment of the conditions of §183i par. 1 of the Com. Code is a matter for the ordinary courts, not the role of the Constitutional Court in an abstract review of the constitutionality of a statute.

59. Regarding the petitioner's allegation (point 7), that there is a violation of the European Convention, we must state that this is a general allegation, not explained in detail from the point of view of the position of minority shareholders, and merely repeats what is stated in other points in the petition. It relies on the decision in the matter Bramelid and Malmström v Sweden of 1982, decisions nos. 8588/79 and 8589/79, and, in particular, James and Others v. the United Kingdom (point 15). Of course, the latter case concerns not the ownership of shares, but the setting of the price involved in the right to buy flats in a long-term agricultural settlement. The European Court of Human Rights, just like the former European Commission of Human Rights, in terms of Art. 1 of the Protocol to the European Convention, includes corporate shares under the term "property" (expressly, the decision Sovtransavto Holding v. Ukraine of 25 July 2002, in point 91). Of course, in the present cases that is not disputed, and none of the parties denies it. The fundamental issue is also not the forced buy-out of minority shareholders (for a review of decisions concerning corporations, see Schreuer, Ch., Kribaum, U.: The Concept of Property in Human Rights Law and Interantional Investment Law. In: Human Rights, Democracy and the Rule of Law. Liber amicorum Luzius Wildhaber. Zürich etc. 2007, in particular pp. 752-758; Frowein, J. A., Peukert, W.: Europäische Menschenrechtskonvetion [The European Human Rights Convention]. 2nd ed. Kehl etc. 1996, p. 784), but protection from arbitrariness by the principal shareholder and adequate legal protection (the decision Bramelid and Malmström v. Sweden, of 12 October 1982, in fine). We have already expressed above an opinion on the possibility of the right of a forced buy-out itself and its relationship to expropriation. Insofar as the petitioner continues to point to problems related to an unclear regulation and inadequate legal protection, they will be attended to below.

60. Finally, it was necessary to consider an issue that the petitioner does nto raise, but that is nevertheless relevant in terms of the nature of a corporation itself, in particular in terms of the manner in which the right of a forced buy-out entered the legal order of the Czech Republic. Because the right to a forced buy-out is a relative new institution in commercial law, it was necessary to evaluate whether there had been interference in acquired rights or violation of the principle of legal certainty. In its case law, the Constitutional Court has several times considered the protection of acquired rights and the principle of legal certainty, and stated that the principle of legal certainty and citizens' confidence in the law are an inherent part of the elements of a law-based state, and that that procedure includes a prohibition of retroactivity (cf. judgment file no. IV. ÚS 215/94, Pl. ÚS 33/01). Legal theory and practice distinguish between true and false retroactivity, because each of these kinds is viewed differently in terms of permissibility. In the case of false retroactivity, a legal norm leaves to the old legal regulation the issue of the creation of already existing legal relationships, legal actions taken in the past, and entitlements arising from them, and only changes the rights and obligations connected with these already existing legal relationships for the future. While true retroactivity is impermissible, with a few exceptions, false retroactivity is basically acceptable. The present case involves a generally accepted false retroactivity. The regulation of a forced buy-out does not in any way affect the acquisition of securities and the entitlements connected with them, created before the regulation was passed; the regulation only establishes, as of the moment it went into effect, i.e. into the future, the obligation of a minority shareholder to tolerate

interference in his property rights, on the assumption that the conditions foreseen by the statute, which will guarantee the permissibility of the interference from a constitutional standpoint, are fulfilled. The annulment of the old and passage of the new legal regulation brings with it a violation of the principle of preserving acquired rights and interference in the confidence of an individual in the law (cf. judgment file no. Pl. ÚS 21/96, no. 63/1997 Coll.). Under Art. VI of Act no. 216/2005 Coll., provisions concerning the forced buy-out went into effect on 1 July 2005, with the exception of §183i, §183k, §183l, §183m and §183n, which went into effect on the day the Act is promulgated, i.e. on 3 June 2005. In terms of the constitutional rules for promulgating statutes under Art. 52 of the Constitution of the CR, there was no violation of the constitutional order. In this regard the Constitutional Court concluded that non-amendment of a legal regulation for the entire existence of a legal relationship is unquestionably not part of the principle of legal certainty. The law is a dynamic system which responds to developments and trends in society, and therefore it is necessary that the law acknowledge changes, depending on the needs of society, in this case in commercial law, which is gradually developing in the Czech Republic based on the received experience of legal regulations in developed economies. This also applies to shareholders who acquired shares before 3 June 2005 and who could expect the possibility that their shares would be taken over by the principal shareholder under §220p of the Com. Code, if they became shareholders as of the date that Act no. 370/2000 Coll. went into effect. The legal framework of a forced share buy-out was not retroactive, and arose in a situation where the Commercial Code already contained an analogous regulation of a so-called “false” squeeze-out.

61. In conclusion, the Constitutional Court stresses in this matter that the legitimate expectation of a shareholder does not reach the same intensity as the legitimate expectations of owners of other property, in view of the fact that the very nature of share ownership does not guarantee shareholders an unchanging position, nor an absolute equality of shareholders, because the scope of property rights is derived from the number of shares of the same nominal value, and the nature of a corporation gives rise the possible “risk” of a change in status of its shareholders, especially minority shareholders (cf. decisions file no. IV. ÚS 324/97 and IV. ÚS 720/01). Evaluation of this issue, on the basis of tests used abroad (e.g. the fair market value price, the net asset value method, the Delaware block method, the earnings value method, the reasonable expectations test, the defeated expectations argument, etc. – also in point 66, a distinction is also made between buy-outs in open or closed companies), is ruled out as part of a proceeding on abstract review of constitutionality, because it can include evaluating an investor’s expectations only at a general level. In practice, however, there is no such investor – there is always a particular corporation in a particular situation (at the time of purchasing shares and at the time of exercising a forced buy-out, for a buyer outside the company or inside the company, a market price and a revenue price) and a particular situation on the capital market (the share value depends not only on the condition of a particular corporation). That question can be addressed only as part of a procedure under §183i par. 5 of the Com. Code (review by the Czech National Bank) and §183k of the Com. Code (judicial protection of the owners of securities). In an abstract review of the constitutionality of a statute we can only evaluate in terms of proportionality whether interference is possible, necessary, and desirable in terms of another

fundamental right, whether protection exists at all, and whether it is adequately guaranteed. Therefore, the institution itself of a forced share buy-out under §183i to 183n of the Com. Code can be considered a measure whose implementation is within the bounds of the constitutional order of the Czech Republic.

62. As regards the relationship between the main and minority shareholder, in terms of respecting equality, it must be emphasized that the concept of equality appears at many different levels. Therefore, a blanket reference to the equality of shareholders, without regard to the nature of ownership of securities, is virtually meaningless. As stated above, very nature of share ownership does not guarantee shareholders an unchanging position, nor an absolute equality of shareholders, because the scope of property rights is derived from the number of shares of the same nominal value, and the nature of a corporation gives rise the possible "risk" of a change in status of its shareholders, especially minority shareholders (cf. decision file no. IV. ÚS 720/01). The rules that apply in other associations, or in other forms of decision making (e.g. voting rights) can not be mechanically transferred to the position of shareholders in this kind of capital company. A shareholder's voting rights are tied to shares (§180 par. 2 of the Com. Code). Because the sign of a corporation and, and one of its specific features is the possibility for one member to have more shares (not one member – one share of the same nominal value), the positions and opportunities of the members in such a company also differ. There is equality primarily in terms of the size of a share in a corporation's basic capital (shares of the same nominal value have the same number of votes - §180 par. 2 of the Com. Code), so from that point of view we can not speak of inequality. That would be possible only in situations where the Commercial Code enshrines the rights of shareholders regardless of the number of shares they own, such as, e.g., the right to take part in a shareholder meeting, the right to vote, the right to information, the right to make proposals and counterproposals (§180 par. 1 of the Com. Code), and the right to their protection (§182, §183 of the Com. Code). From that point of view, of course, there is often, on the contrary, a greater burden on the position of the principal shareholder, whose investment may be threatened by the exercise of such rights. Precisely because of that, as analyzed above, it is constitutionally permissible for the principal shareholder to consider whether or not to use the opportunity of a forced buy-out. Therefore, the Constitutional Court did not find the principle of equality to be violated in this regard. Reference to Art. 3 par. 1 of the Charter, under which the fundamental rights and freedoms are guaranteed to all, without regard to property, would be absurd in the present matter, in view of the nature of a corporation, and the petitioner does not even attempt it. Nor can it be concluded from Art. 26 of the International Covenant on Civil and Political Rights, or from Art. 14 of the European Convention, that a distinction in the position of shareholders, based on the criterion of owning nine-tenths of shares, could be considered unreasonable or non-objective, in view of the consequences described above. From the point of view of applying the prohibition on discrimination, it is important that the Commercial Code, in defining the principal shareholder and minority shareholders, does not provide any exceptions. The possibility of a forced buy-out conducted by the principal shareholder can not be considered an unjustified advantage, because it is based on rational and objective grounds (see above). Likewise, we can not determine that comparable groups of minority shareholders are in an unequal position in terms of the same possibility to apply their shares in

the same scope, as can be done under the same conditions (defined by the statute) by a comparable group of other minority shareholders (cf. judgment Pl. ÚS 38/01, Collection of Decisions of the Constitutional Court of the CR, vol. 29, p. 355, no. 87/2003 Coll.). The effects of the legal regulation of a forced buy-out are the same for all minority shareholders. Similarly, in such a situation the obligation to make a takeover bid if a certain threshold of ownership of a corporation's basic capital is reached can not be considered interference in property rights. In that regard, however, the Constitutional Court emphasizes that it would help balance out the legal regulation of the position of minority shareholders if the legislature also regulated their right to have the principal shareholder in that situation have not only the right, but also the obligation, at their request, to buy their shares (a "sell-out" or obligation to offer to buy shares).

63. In the same way we must address the issue of preserving Art. 11 par. 1 of the Charter, under which each owner's property rights have the same content and enjoy the same protection. Here too we can not see differences in the content of the rights of shareholders. Decision making at a shareholder meeting, based on owning shares of a particular nominal value, is fully in accordance with the nature of this kind of entrepreneurial association under Art. 11 par. 1 and 3, Art. 20 par. 1 and Art. 26 par. 1 and 2 of the Charter. Insofar as the Commercial Code provides different levels of minority protection in a corporation, based on the importance of a decision being made (unanimity, nine tenths, three fourths, two thirds, a simple majority – §183i par. 1, §186 of the Com. Code) and ties this to the relationship between the shareholders (§66a of the Com. Code), there can be no objections to this on constitutional grounds.

64. Observance of the rule in Art. 11 par. 1 of the Charter on equal protection of property rights can be evaluated only by evaluating the position of owners in the same situation. Therefore, statutory means of protection from other areas (e.g. ownership of real estate) can not be mechanically transferred to the protection of share ownership. Of course, the petitioner argues only on the basis of comparing the legal positions of the principal shareholder and minority shareholders, which, however, is only one point of view for evaluation (point 64). Evaluating the position of minority shareholders in similar situations is equally important, but the petition lacks such arguments. Therefore, in further evaluation of the petitioner's individual objections, the Constitutional Court, under Art. 11 par. 1 of the Charter, also took into account the position of minority shareholders in proceedings to wind up a corporation and transfer the business assets to the principal shareholder (§220p of the Com. Code).

65. Most of the petitioner's objections are tied to the alleged inadequate protection of the rights of minority shareholders during the preparation of a forced buy-out, in particular in terms or protection from abuse by the principal shareholder. The Constitutional Court must stress that the petitioner's claims are general, and would have a place in proceedings on a constitutional complaint by a minority shareholder, if they were supported by the facts of a particular case. Of course, in proceedings on the abstract review of constitutionality, the Constitutional Court acts in a different role. Under §68 par. 2 of the Act on the Constitutional Court, in addition to issues of jurisdiction and procedure, it evaluates primarily the content of a statute in terms of its possible conflict with

the constitutional order [Art. 87 par. 1 let. a) of the Constitution of the CR], not its possible implementation by shareholders or application by the Czech National Bank and courts in practice. Therefore, in evaluating these objections, we must emphasize that the Constitutional Court does not consider it ruled out that interference in the constitutionally guaranteed rights of shareholders, as well as of the corporation itself, as a legal entity subject to private law may occur or be occurring. However, that is not the subject matter of this proceeding. A statute can be annulled only when the bodies applying it are already using a different interpretation (e.g., judgment file no. Pl. ÚS 48/95, no. 121/1996 Coll.), whereby they violate this constitutional obligation, and a constitutionally consistent interpretation is not possible. The mere possibility of another interpretation does not, in and of itself, establish that a petition is or is not justified (cf. resolution Pl. ÚS 6/03, vol. 30, p. 579). Therefore, the Constitutional Court must respect the type of the proceeding in which constitutionality is being reviewed (abstract review, specific review at the request of a ordinary court under Art. 95 par. 2 of the Constitution of the CR, or accessorial evaluation under §74 of the Act on the Constitutional Court, where the alleged interference has already happened, and a court has made a decision with legal effect).

66. The petitioners arguments, despite the total length of the petition (58 pages and other extensive attachments), can be summarized in several main points (point 63), the first of which is the objection of the regulation and procedure in setting the consideration for shares in a forced buy-out. As stated above, the issue of commercial register proceedings has been separated and is addressed in the proceedings conducted under file no. Pl. ÚS 43/05. The petitioner objects primarily to the fact that the price is set on the basis of an expert appraisal that is determined by the principal shareholder. Therefore, the Constitutional Court first considered the question of the manner in which the amount of consideration is defined. The constitutional criterion is not Art. 11 par. 4 of the Charter. In this case, in view of what was stated above about the nature of a corporation, the nature of shares, and the nature of the right to a forced buy-out, we must start with Art. 4 par. 4 of the Charter and take into account the essence and significance of share ownership. As the Constitutional Court stated in the already cited resolution file no. IV. ÚS 324/97, share ownership is tied to a certain risk. Therefore, the constitutional imperative of protecting property and possible compensation for lost property naturally differs in the case of protecting property of real estate used for housing, savings in a bank, or, as in this case, share ownership. Therefore, a shareholder must accept that this is an investment which is essentially tied to the right to conduct business (and only then with the freedom of association), and thus also with business risk. It can bring profit of several times the investment, but equally can completely lose value, all at various times. Therefore, in a general legal regulation it is extremely difficult to specify all possible criteria for setting a share price. Therefore, in several places the Commercial Code uses the term ‘adequate” price, which the petitioner criticizes when it stresses that the basic attributes of compensation per share is unclear, because the terms “adequate” and “fair consideration” are, in its opinion, subjective. The Constitutional Court did not agree with this opinion. The Commercial Code uses this term in connection with share prices in several places (§156 par. 4, §183c par. 5, §183g par. 1, §186a par. 4, and §190c par. 1). Both terms, on the contrary, respect the possibilities of the statutory regulation. The

legal regulation of a forced buy-out speaks of an adequate price (§183k par. 1 and §183m par. 1 of the Com. Code) in connection with setting it. The provision of §183j par. 2 of the Com. Code sets forth the obligation to present, in the notice of a shareholder meeting, a statement by the board of directors as to whether it considers the amount of consideration to be fair. Regardless of justified doubts about the legislative manner of expressing the opinion of the board of directors (see Štenglová, I.: Obchodní zákoník. Komentář. [The Commercial Code. Commentary.] 11th ed., C. H. Beck, Prague 2006, p. 672) there is no doubt that the Commercial Code assumes that the price set may differ from what the company's bodies expect. Proportionality means a requirement to take into account all important circumstances in connection with the forced buy-out. That means that, from the point of view of the law, it may not be set subjectively. Only that could lead to a decision that the legal regulation is unconstitutional. The fact that the Commercial Code takes this term as a guide for objective appraisal follows from the fact that it anticipates judicial review; a price not set on the basis of objective criteria would not be subject to judicial review. Finally, ruling out unconstitutional subjective criteria can also be concluded from Act no. 36/1967 Coll., on Experts and Interpreters, in the form of the requirement that an expert be impartial, have expert knowledge, and not be used in the event of bias (§4, §6, §11). We can also point to the case law of the Constitutional Court in questions of expert bias (e.g., judgment II. ÚS 35/03) which, in specific cases, defined strict criteria for evaluation expert appraisals. The fact that the costs of an expert appraisal are paid by the principal shareholders can not, in and of itself, lead to the general conclusion that such appraisals are therefore, defective, because the same objection could be raised if the costs were paid by a minority shareholder. Although the petition in this proceeding, as is also done in other countries (cf. resolution of the 2nd panel of the German Federal Court of 25 July 2005, file no. II ZR 27/03, also the statement in point 32), points to bad experiences with some experts, that can not lead to a general conclusion that every expert will thus act in conflict with the requirements of the Act on Experts and Interpreters. The Constitutional Court is aware that in practice violations of these rules can and do occur. However, that is not a reason to declare unconstitutional a legal regulation that may be interpreted and applied unconstitutionally. The Constitutional Court would then have to annul on the same grounds, e.g., the institution of detention, expropriation, dissolution of a political party, etc.. It is precisely because violation of a constitutionally consistent legal regulation can happen in practice that the right to judicial protection is guaranteed. Whether a price is adequate is a matter for expert and impartial evaluation. Because the opinions of the buyer and seller may differ, a procedure is provided for review of that price by an independent and impartial body, the Czech National Bank, which, of course, in view of its nature, would not be sufficient. Therefore, under Art. 4 and Art. 81 of the Constitution of the CR, additional protection is guaranteed in the form of a court decision. Finally, we must note that other countries do not differ from this process. For example, the most recent Austrian regulation (see §1 Bundesgesetz über den Ausschluss von Minderheitsgesellschaftern [Federal Act on Squeeze-Out of Minority Shareholders], BGBl. I., no. 75/2006) speaks of "Gewährung einer angemessenen Barabfindung," i.e. provision of an appropriate severance payment in cash, without providing anything further (likewise, §327a par. 1 of the German Shares Act, although it provides certain criteria in other provisions). The attempt to find another way of setting this price in Germany, based on an irrefutable presumption of adequacy if it

is accepted by at least 90% of the bought-out shareholders, failed (see Stumpf, Ch.: Grundrechtsschutz im Aktienrecht. Neue Juristische Wochenschrift [Protection of Fundamental Rights in Share Law. New Legal Weekly], vol. 2003, no. 1, p. 9). Therefore, on this point the Constitutional Court did not find the Commercial Code to be unconstitutional. It is a question of practice, what criteria will develop here. In this regard the position of the former Securities Commission is significant (point 27). Likewise, the term "fair market value," used in the USA, is criticized for its multiple possible meanings and ways of determining it (see Fischel, D. R.: The Appraisal Remedy in Corporate Law. American Bar Foundation Research Journal, vol. 1983, pp. 885-898). Therefore, in practice the courts look for a number of "tests" (see sub 61), which also change over time. In the USA, the laws of the state of Delaware are considered key in the area of corporate law. Delaware's Supreme Court, in a precedential decision, states that, regardless of the number of possible tests, it will accept generally accepted techniques used in the financial community and the courts – Weinberger v. UOP, Inc., 457 A.2d 701 (Del) 1983, available. e.g., at www.nyls.edu/pdfs/WeinbergervUOP.pdf, where the court also considered the purpose of a merger].

67. A share, as an expression of a proportion of a certain property value, is the subject of property rights. Of course, it is difficult to compare protection of that form of property with protection of real estate (expropriation), on which the dogma of Art. 11 par. 4 of the Charter is based. The market situation and relationships in a particular corporation have a fundamental influence on its value (e.g., so-called starving out of small shareholders by not paying dividends, loss of value as a result of non-marketability, prosperity at a particular period of time, etc.). The fact that this does not involve expropriation, with a prerequisite of demonstrating public interest, as the petitioner claims, means that the public interest is not taken into account when setting the amount of consideration. This was already decided by the legislature in a generally binding manner. We must add that in cases of expropriation in the public interest, by the nature of the matter there is a certain sacrifice required for the benefit of the whole; in the case of a forced buy-out, in view of the foregoing, the Constitutional Court does not find such grounds to exist. Instead, there is economic deliberation by the purchasing principal shareholder, as to whether the transaction is worthwhile. However, taking into account the purely economic dimension of this issue, reduced to investment, that also means that, for example, in contrast with the expropriation of a family house, the principal shareholder will not consider emotional aspects, or social ties and consequences, although such aspects are not indirectly ruled out (a pension fund as a minority shareholder, defenders of the environment in a corporation that is a threat to the environment). The relationship to a share in business assets defies evades such appraisal. It involves an uncertain investment, which is supposed to bring profits, but in view of the nature of a corporation, it is an investment that does not necessarily guarantee profit.

68. What is an adequate price can be determined by an expert procedure, independent of the parties, under the supervision of the Czech National Bank, with a possibility of judicial review. In view of the circumstances of a buy-out, connected to interference in property rights, the adequacy of a price for listed shares can never go below the threshold of the market price. From that point of view the term "different amount of consideration" in §183k par. 1 of the Com.

Code must be understood only as a threshold below which one may not go in judicial review. In other words, the court may not lower the amount of consideration contested by a minority shareholder. This also applies to the actions of the Czech National Bank under §183i par. 5 of the Com. Code. In terms of Art. 11 par. 1 of the Charter any other interpretation would be disadvantaging the minority shareholder (reformatio in peius). Therefore, §183j par. 4 of the Com. Code, under which the proposal for a shareholder meeting resolution may not deviate, when setting the amount of consideration from documentation under §183j par. 6 of the Com. Code, must be interpreted in this constitutionally consistent manner. Otherwise, it would have to be annulled for being unconstitutional. In terms of the proportionality of interference, the expert appraisal does not serve to protect the principal shareholder, and the principal shareholder can not turn to a court to question it; that is possible only for minority shareholders. If the principal shareholder offers more, that is its business decision. As was already emphasized (point 59), the principal shareholder does not need to justify its decision, because it is based on the assumption that the investment into buying out the remaining shares will be worth it, despite the increased costs. This is not because it acquires them for a better price, but also because, in view of the circumstances, it can also pay a higher price, which the board of directors, in view of the company's overall situation, could have doubts (§183j par. 2 of the Com. Code). The law certainly can not exhaustively specify the criteria for evaluating adequacy (proportionality). That is a matter for expert appraisal using financial and economic instruments approved by the Czech National Bank (see opinion of the former Securities Commission no. STAN/13/2005 of 9 November 2005 on the issue of adequacy (proportionality) and documents demonstrating adequacy (proportionality). We note that this Opinion was not subject to proceedings before the Constitutional Court, just like the practices of the Czech National Bank based on it.

69. The law prescribes a procedure for setting an adequate price, which the petitioner also objects to. Under §183m par. 1 of the Com. Code, entitled persons have a right to consideration in cash, the amount of which is determined by the principal shareholder; the principal shareholder shall document the adequacy of the consideration with an expert appraisal, which may not be older than 3 months as of the day the application is delivered under §183i par. 1 of the Com. Code, and the amount is reviewed by the Czech National Bank. The principal shareholder selects the expert and pays the costs (§183j par. 6 of the Com. Code). In this regard we must emphasize that impartial, expert determination of an adequate price must be considered part of the protection of the minority shareholder's property rights (point 67). Therefore, his position must be comparable to that of other owners in a similar situation, as indicated by Art. 11 par. 1 of the Charter (the right to equal protection).

70. In such a case, it is the role of the Constitutional Court to evaluate whether this process provides protection at all (point 68 a 69), and whether the level of that protection is comparable to the protection of other owners in a similar situation. As a measure, the Constitutional Court could use the process for winding up a corporation and transferring the business assets to the principal shareholder, because the prerequisites for the transfer are the same as in the case of a forced buy-out. In that case, however, §220p par. 2 of the Com. Code provides that the principal shareholder is obligated to provide other shareholders an adequate

settlement in cash, the amount of which must be documented by an expert appraisal. It points to the analogous application of §59 par. 3 and 4 of the Com. Code. Under that provision, the amount of adequate settlement is set according to an appraisal prepared by an expert "independent of the company, appointed for that purpose by a court." Therefore, the Constitutional Court had to weigh whether the difference in appointing an expert is not so discriminatory in the case of a forced buy-out that it violates the right to equal protection under Art. 11 par. 1 of the Charter.

71. The Constitutional Court concluded that this obligation of the principal shareholder can make the position of minority shareholders more difficult, but not in such a manner as to make the regulation unconstitutional. We have already referred to the position of an expert in preparing an expert appraisal, and the need for impartiality. Of course, that alone would be absolutely insufficient, if it were not accompanied by the obligatory supervision of the Czech National Bank under §183i par. 5, in connection with the appropriate application of §183e of the Com. Code. This process applies to corporations with listed and unlisted securities, otherwise the rule of equal protection under Art. 11 par. 1 of the Charter would be violated. Even though, in the case of the Czech National Bank, in view of its position, the required distance from the shareholders is presumed, it is nevertheless not a body that meets the requirements of Art. 4 of the Constitution of the CR and Art. 36 of the Charter. Because this involves protection of a fundamental right, including the Czech National Bank in the process of a forced buy-out is not sufficient from a constitutional viewpoint. However, because §183k of the Com. Code regulates the process from the point of view of judicial protection of minority shareholders, the Constitutional Court concluded that although the selection of the expert by the principal shareholder is a problem, it is compensated for by other measures on the part of the state. Nonetheless, there is no doubt that a different process must be considered, for the reason that the role of a legal regulation should be to eliminate, to the maximum extent possible, the possibility that court disputes will arise, and this regulation will often lead to such disputes. However, we must stress, that in Germany, to whose regulation the petitioner refers, in practice the situation is that an expert is appointed by the regional court according to the company's registered address, as a rule at the proposal of the principal shareholder, and case law has not criticized that process (cf. fundamental decision of the German Federal Court of 18 September 2006, file no. II ZR 225/04, especially points 14 to 17), although it is an objection frequently raised in complaints.

72. The petitioner also criticizes the regulation of the forced buy-out because only the principal shareholder is a party to proceedings on the prior consent of the Czech National Bank under §183i par. 5 of the Com. Code. In view of the Czech National Bank's distance from the shareholders, and the nature of the proceedings, where it is not reasonably possible to arrange the participation often thousands of minority shareholders, some of whom are "anonymous" (see Kotásek, J.: Vytěsnění anonymního akcionáře. [Squeeze-out of Anonymous Shareholders] Časopis pro právní vědu a praxi [Journal for Legal Theory and Practice], vol. 2006, no. 3, p. 258-259), that can hardly be considered unconstitutional in and of itself, when the Czech National Bank does not directly rule on a forced-buy in administrative proceedings (only in that case would this be analogous to expropriation

proceedings). That is in the jurisdiction of the shareholder meeting. The actions of the Czech National Bank, in the position of an administrative body in proceedings under §183i par. 5 of the Com. Code, can result in state liability for damages under Act no. 82/1998 Coll. Likewise, the petitioner's objection criticizing the fiction of a positive opinion by the Czech National Bank will not stand in terms of the constitutional order. This measure against the inactivity of an administrative body is not unusual. It does not rule out the possibility for minority shareholders to turn to a court, because the amount of consideration is always subject to judicial review, regardless of whether or not the state met its obligations regarding supervision of the preparation of a forced buy-out through the Czech National Bank. In addition, the petitioner did not even contest this provision (§183e par. 9 of the Com. Code) in the statement of claim in the petition.

73. It was then necessary to evaluate the remaining objections, concerning the setting of adequate compensation. Here the petitioner primarily alleges insufficient guarantees of payment of the consideration for the bought-out shares (point 20), as, in its opinion, even the additions of §183i par. 6 of the Com. Code to the regulation does not eliminate the fully justified requirement that payment of the amount of consideration set by the principal shareholder be sufficiently ensured. The Constitutional Court did not agree with this objection. Although the obligatory deposit of funds to meet contractual obligations is not constitutionally required anywhere, nor is it completely routine in statutory regulation, in this case we must begin with the fact that this does not involve a contractually established legal relationship, but the ownership of shares passes by law. Therefore, this obligation too forces the principal shareholder to consider whether to use a forced buy-out, because it understandably means increased expenses for the services of a bank or a securities broker. Therefore, from a constitutional viewpoint, this regulation must be considered adequate, regardless of liability for not complying with it, including possible criminal liability. We must also point out that depositing funds under §183i par. 6 of the Com. Code comes only after confirmation of calling a shareholder meeting by the Czech National Bank under §183i par. 5 of the Com. Code. Therefore, the funds are secured after a possible increase in the consideration, by a process under §183e par. 8 of the Com. Code. The legislature can change this regulation, if the kind of situation that the petitioner hypothetically construes were ever to occur.

74. Finally, we must mention the objection of lack of penalty, whereby, in the petitioner's opinion, the legal regulation does not motivate the principal shareholder to behave honestly, because it is not in any way penalized for conduct in conflict with good morals (point 12). Its only risk is that it might have to pay additional amounts to some shareholders who have sufficient funds to bring a lawsuit for review of consideration before a formalistically thinking judge. The requirement of legality and that of proportionality is not respected in the transfer of shares, in the proceedings to review the legality of measures leading to the transfer, or in setting and reviewing the amount of consideration. The Constitutional Court could not agree with this objection either, because it does not see any reason why it would be necessary to specify additional special means of liability for violation of obligations by the principal shareholder. In terms of the constitutional order, the essential thing is that such means are provided at all.

If the principal shareholder uses the opportunity for a forced share buy-out that the law provides for the abovementioned reasons, it behaves permissibly and does not abuse the right. The rules prohibiting abuse of position by a shareholder under §56a of the Com. Code, with the ability to proceed under §131 of the Com. Code (invalidity of shareholder meeting resolution), also naturally apply to a forced share buy-out. Of course, the statutorily permitted buy-out of shares upon reaching the specified percentage of ownership of a company's securities, in and of itself, can not be abuse of position. One can not say that such situations do not occur in the business environment in the Czech Republic, and that, compared to developed economies, the use of means of judicial protection is completely sufficient. It is only the use of means of judicial protection that provides, in these countries, a true picture of corporate law, which can not be understood at all without case law [Conard, A. F.: The Law of Corporations. Michigan Law Review, vol. 1973, no. 4, p. 648, states that without case law corporate law would be a sad rag]. Likewise, we can not deny that the legislature must seek other means (among the newest research, see, e.g., overview of liability after winding up a company in the study by Miller, S. K., Greenberg, P. S., Greenberg, R. H.: An Empirical Glimpse into Limited Liability Companies: Assessing the Need to Protect Minority Investors. American Business Law Journal, vol. 43/2006, no. 4, p. 609n., overview of solutions pp. 639-646), nonetheless only the effective use of judicial protection can have a preventive effect on attempts to abuse position in a corporation. This is not a very frequent event, not only here, but also in other countries, where the review of abuse also still exists more as a theory than a practice. This is also related to the fact that the law itself permits a forced buy-out, and such a transaction does not need to be materially justified (regarding Germany, e.g., Kort, M.: Squeeze-out-Beschlüsse: Kein Erfordernis sachlicher Rechtfertigung und bloß eingeschränkte Rechtsmissbrachuskontrolle. Zeitschrift für Wirtschaftsrecht, vol. 2006, no. 33, esp. p. 1520n.; regarding Austria, Althuber, F., Krüger, A.: Squeeze-out in Österreich. Aktiengesellschaft: Zeitschrift für das Gesamte Aktienwesen, vol. 2007, no. 6, p. 197n.). Therefore, as regards the objection of abuse of position, the Constitutional Court must state that in such a situation the motives of the principal shareholder basically do not matter, because even the attempt to obtain the required 90% would have to be considered abuse. Even in the USA, regardless of the possibility of suing for compensation of damages, such proceedings are not very successful, in view of the expenses for expert analyses, experts, and, especially, legal representation (Seligman, J.: Reappraising the Appraisal Remedy. George Washington Law Review, vol. 52/1984, p. 860-864).

75. In this regard, the petition also pointed to the lack of regulation of another aspect of setting the amount of consideration and possible abuse of a forced buy-out, i.e. the lack of a specified interest rate for late payment of consideration under §183m of the Com. Code. It can not be concluded that this obligation has to be expressly stated for every case, simply in view of the fact that this is still a private law relationship. In contrast, it would be necessary if the law wanted to rule out application of the legal regulation of commercially binding relationships for relationships arising between shareholders [e.g., §369 of the Com. Code, or §340 par. 2 of the Com. Code, together with §261 par. 3 let. a) of the Com. Code]. Therefore, in the event of late payment, overdue interest is applied (as the value of money to which there is an entitlement by law) under §1 of government Directive no. 142/1994 Coll., which provides the amount of overdue interest and

overdue fees under the Civil Code, as amended by Directive no. 163/2005 Coll. This can also be seen as a penalty on the principal shareholder, as overdue interest is, in private law, considered a form of liquidated damages (cf. Knappová, M., Švestka, J. a kol.: Občanské právo hmotné. [Substantive Civil Law] part 3. 3rd ed. Prague 2002, pp. 74, 125, 131).

76. As regards objections of insufficient judicial protection, one must realize that differences between individual countries, in view of the regulation of other aspects of a forced buy-out, lead to differently established rights to judicial protection. The process itself of deciding to conduct a forced buy-out is limited by the abovementioned lessons from practice (point 79 and 80) as regards protection from potential abuse. Setting a 90% threshold rules out doubts in that regard, so limiting judicial review to other issues is acceptable. This is proved by experience in states where these matters can be questioned in court. In Great Britain there used to be considerable numbers of court cases that were completely unsuccessful (the now classic work, Davies, P. L.: Gower and Davies' Principles of Modern Company Law. 7th ed., London 2003, p. 746, cites only three examples where a 90% shareholder abused rather than used the right). Therefore, the number of lawsuits gradually declined, despite the fact that Art. 430 of the Companies Act 1985 supported the filing of such lawsuits, because it was to be a proceeding in which minority shareholders were not required to pay fees, unless the complaint was unnecessary, impermissible, or vexatious. Essentially the same regulation was used in the new British Companies Act 2006, in Art. 983. Similarly, the key decision in the USA, Weinberger v. UOP, Inc. (see point 66) states that if, in the case of an entire fairness (the entire fairness test includes review of fair treatment and a fair price), fraudulent conduct is not found, essentially only the question of fair price remains for the court to decide. The continent legal system provides most of the requirements derived by case law in the USA as general requirements directly in the law. The petitioner's objections relating to judicial protection of minority shareholders concerning the lack of opportunity for preliminary review of the legality of the process in exercising the buy-out right must be evaluated from this point of view. We note that the question of constitutionality of registration in the commercial register (§200da par. 3 of the CPC) was separated out into a separate proceeding conducted under file no. Pl. ÚS 43/05.

77. Among the defects of the review proceeding under §183k of the Com. Code, the petitioner includes the unclear definition of the circle of parties, the kind of proceeding, the complaint, and the expiration of the right to appeal the lack of adequate consideration (for detail, see point 19). Regarding the first three objections, the Constitutional Court states that they involve interpretation or ordinary law. It is up to the courts to resolve imagined or actual unclear points. Insofar as the petitioner points to the different positions of the two high courts in terms of the nature of the proceedings, and thus the status of parties, it is up to the Supreme Court, as part of its role in unifying case law, to settle such issues. The Constitutional Court can not fulfill that role. It could do so in exceptional circumstances, if the Supreme Court ceased to fulfill the role (cf. actions of the Constitutional Court at the time when the Supreme Administrative Court did not exist, in relation to the case law of regional courts in matters of the administrative judiciary). The Constitutional Court can consider this issue if the petitioner claims that one of the possible interpretations is unconstitutional. However, if it only

alleges that there are two possible interpretations, without considering either of them unconstitutional, there is no opportunity for the Constitutional Court to intervene. It is the obligation of the ordinary court to protect the fundamental rights under Art. 4 of the Constitution of the CR by choosing a constitutionally consistent interpretation, and, in cases of doubt, to turn to the Constitutional Court. The same applies to the petitioner's allegations that the provision on a forced buy-out are inconsistent with other provisions of the Commercial Code.

78. The petitioner also alleges failure to respect the principles of equal weapons, protection of the weaker party, and access to the courts. It states that even if a minority shareholder's complaint were justified, the original state of affairs may not be restored, as there is a certain fait accompli, created by the registration in the commercial register. The court that will rule in the matter will have that existing situation as its starting point, and, in view of the principle of legal certainty and protection of the rights of third parties, will be inclined to deny a petition to review the shareholder meeting resolution. Therefore, the review should take place before the transfer of ownership, as in a number of other states. In the Czech Republic such review is ruled out under §131 par. 3 of the Com. Code, because, using §131 of the Com. Code, a reason for stopping proceedings or denying the complaint is always sought.

In this regard, of course, the petitioner does not specify where exactly §131 par. 3 of the Com. Code is unconstitutional, nor does it actually propose annulling it. The provisions themselves, §131 par. 1 and 2 of the Com. Code, do not rule out annulling a shareholder meeting resolution on the transfer of securities to the principal shareholder. Likewise, the petitioner overlooks the procedure under §131 par. 4 of the Com. Code, which a minority shareholder can apply regardless of the application of §131 par. 3 of the Com. Code. In any case, however, that procedure can not cast doubt on the institution of the share buy-out itself, which is established directly by the law, nor on the non-participation of the minority shareholder in commercial register registration proceedings. The Constitutional Court believes that the legal regulation, thus construed, i.e. the inability of a shareholder to take part in the commercial register proceedings, with reference to the other opportunities cited to exercise his rights in different independent proceedings, has a constitutionally acceptable justification, in terms of the proportionality of competing property rights and other derived rights of the principal shareholder and of minority shareholders, as well as their differing interests, arising from the nature of the matter, as has already been stated several times (the first time in decision file no. IV. ÚS 324/97, Collection of Decisions of the Constitutional Court ČR, vol. no. 10, p. 365, and in file no. IV. ÚS 720/01). The inability to invalidate a shareholder meeting resolution on the grounds of inadequate consideration (§183k par. 4 and 5 of the Com. Code) can be considered a measure that does not conflict with the structure of the buy-out right, and is rational, because it prevents this method beign used in fact to introduce judicial review of the institution of the buy-out itself, if every time the principal shareholder failed in the proceeding (e.g., CZK 1,000 Kč per share instead of CZK 990) it meant that the shareholder meeting would be declared invalid, with consequences for preserving the rights of third parties and legal certainty (cf. §131 par. 3 of the Com. Code).

79. According to the petitioner, in proceedings to review the amount of consideration the principle of protecting the weaker party is not observed, because in that review, under §183k of the Com. Code the minority shareholder gets to have his say only when he already has against him obstacles such as the expert appraisal, position statement from the Czech National bank, and registration in the commercial register, without having had an opportunity to be involved or be a party to the proceeding. These objections can not by themselves be considered to violate the equality of parties to a proceeding under Art. 37 par. 3 of the Charter, nor does the petitioner claim such violation. These "obstacles" are merely the prerequisites for conducting a forced buy-out. They can equally serve to protect the interests of minority shareholders. The Constitutional Court only points out, in the spirit of the foregoing analysis of the nature of a forced share buy-out, that the equality of parties to proceedings before a court lies in their equal procedural rights, not in their position in a corporation. This is derived from their proportion of the shares of the same nominal value, and guarantees of procedural equality in court proceedings can not change anything about that. This also applies to another alleged violation – as the petitioner calls it – of the principle of equal weapons, in the form of a considerable information deficit on the part of minority shareholders concerning the condition of the company's assets and likely future business results, as most of the evaluations are based on documentation supplied by the company's board of directors. This claim can not stand in the context of an abstract review of the constitutionality of a statute. These are specific conditions for the conduct of a trial, and the violation of procedural principles would have to be proved as part of evaluation of a particular case (e.g., as part of proceedings on a constitutional complain).

80. The petitioner considers another defect in judicial protection to be the principle that in review proceedings the court is guided only by the complaint of the plaintiff, which has little information enabling it to calculate the correct amount of consideration in a short period of time. It insists that the court is not forced to do this in, e.g., Germany. Moreover, there is the danger of paying court fees for whichever party loses the dispute. The court fee will become higher as the disputed amount of consideration increases. The Constitutional Court states that foreign legal regulations may well be friendlier to minority shareholders, but that does not automatically mean that the domestic legal regulation is inconsistent with the constitutional order. Merely arguing on the basis of a foreign legal regulation is not sufficient; moreover, it would require a far more detailed analysis than a mere reference without further arguments (see further, in particular, the commentary to §4 and §15 in: Münchener Kommentar zum Aktiengesetz [Munich Commentary on the Shares Act]. 2nd ed., vol. 9/1, §327 a – §327f. AktG. WpÄśG SpruchG. Munich, 2004). Undoubtedly it can be made use of in further amendments to the institution under review. However, in terms of judicial protection under Art. 4 of the Constitution of the CR and Art. 36 par. 1 of the Charter, the important thing in this regard is that judicial protection is guaranteed, not whether it is provided preventively or not. The state has a certain amount of room for discretion as to whether the opportunity to file a complaint will be available in advance of the shareholder meeting itself. It is likewise entitled to decide on the conditions under which protection will be provided; however, it must set the conditions so as not to render its use impossible. One must realize that shifting judicial review to the final phase also means a considerable danger for the principal shareholder, who may, as

a result of an unfavorable decision, suffer far greater losses than in the event of a decision in the early phase of a buy-out. The court fees that the petitioner mentions also can not be considered an obstacle, even though there are states where they are not required from the minority shareholder under certain conditions (Art. 983 Companies Act 2006, previously Art. 430 Companies Act 1985 and, on that same model, §15 par. 2 Gesetz über das gesellschaftsrechtliche Spruchverfahren. [Act on Company Law Administrative Actions] BGBl, vol. 2003, vol. I., part 25, p. 838). it is up to the legislature whether to consider that possibility, taking into account the fact that court fees play a certain regulatory role in connection with the growth of lawsuits and taking into account the structure of minority shareholders in the Czech Republic. In addition, the claim that this regulation motivates the principal shareholder to set the amount of consideration as low as possible will not stand even at a general level. The lower that price is set (in view of the expert appraisal and the opinion of the Czech National Bank that can not be assumed), the greater the danger it faces of losing in court proceedings, including paying court fees and compensation of damages.

81. We also can not agree with the allegation of insufficient protection of the rights of minority shareholders who did not turn to the court. The state can not be criticized for not providing protection to someone who did not turn to it with a request for protection. The Constitutional Court believes that an emancipated individual living in a free, democratic society, should be spared excessive protectionist intervention on the part of the state, and a sign of his maturity is precisely the capacity to guard one's rights in the spirit of the principle vigilantibus iura scripta sunt, of course, on the presumption that the state provides the requisite means of protection. Therefore, this approach was not found to be unconstitutional in principle. A forced buy-out is a right of the principal shareholder, which does not need to provide justification for its business aims. It is up to its judgment whether to conduct the buy-out (point 57). However, it must expect that it will buy out the shares of all minority shareholders at a price that will be set in an objective, expert, and impartial manner, not only the shares of those who will challenge the amount of consideration in court. Likewise, it must be assumed that a court can rule on the amount of consideration the same way for each individual minority shareholder filing a complaint. If our legal regulation did not assume that, the structure of the economic basis of the buy-out would be cast in doubt as a form of exercising the fundamental right of an owner and entrepreneur. Likewise, §183k par. 3 of the Com. Code, which the petitioner also alleges to be incomprehensible must be interpreted the same way, because otherwise such shareholders would not be provided protection of their property rights. Likewise, the missing mechanism for publicizing a court decision under §183k par. 3 of the Com. Code can not be considered interference in the shareholder's property rights under Art. 11 par. 3 of the Charter, or the right to judicial protection under Art. 38 par. 2 of the Charter. It is up to the minority shareholder to guard his rights, as he is also informed about possible interference in them in the Commercial Bulletin under government Directive no. 503/2000 Coll., on the Commercial Bulletin, as amended by later regulations.

82. The petitioner presents a number of other objections that consist of, e.g., lack of clarity concerning the deadline for calling a shareholder meeting, insufficient time to prepare for a shareholder meeting, a missing reference to §181 of the Com.

Code. (see point 16), etc. According to the petitioner, some important experts have completely opposite opinions. In its opinion, the legal regulation is, in this regard, unclear, uncertain, and deceptive, and does not meet the requirements imposed on a law-based state in Art. 1 of the Constitution of the CR. Here, too, what was said above regarding the role of the Constitutional Court in interpreting ordinary law applies. The petitioner also did not explain how the unclear points that it cites can be a violation of Art. 4 par. 4 of the Charter, as it claims. In terms of the essence and significance of the position of a shareholder in the constitutional order, it was already explained above that this involves a conflict of several fundamental rights and freedoms. In terms of proportionality, in this case priority is given to the principal shareholder's property rights and right to do business (Art. 11 par. 1 and Art. 26 par. 1 and 2 of the Charter) over the right to be a shareholder in a corporation where 90% is held by the principal shareholder, with the provision that the essence and significance of the minority shareholder's position as an investor are preserved. In this regard, adequate consideration, in view of the grounds for a forced buy-out, preserves the value of shares as a special kind of uncertain investment. From this point of view, Art. 4 par. 4 of the Charter also can not be considered to have been violated; we must also point out that Art. 26 par. 1 and 2 of the Charter are applied under the regime of Art. 41 par. 1 of the Charter.

83. The same applies to judicial protection, where its essence and significance are also preserved, although there is no doubt that the legislature could have been more sympathetic to minority owners. However, the state fulfills its protective role in this manner, and under the case law of the European Court of Human Rights (cf. the decision in the matter Sovtransavto Holding v. Ukraine of 25 July 2002, no. 48553/99, §96), one can not claim that it did not meet its obligation to protect the human rights and freedoms of individuals in its jurisdiction. This undertaking can also mean a positive obligation that includes the necessary measure to protect property rights, even in cases concerning disputes between individuals and companies (with reference to the decisions Airey v. Ireland, of 9 October 1979, Series A no. 32, §25 and López Ostra v. Spain, of 9 December 1994, Series A no. 303-C, §55). According to the European Court of Human Rights that means that the state is required to establish court proceedings providing sufficient procedural guarantees and thus permit the domestic courts to effectively and fairly adjudicate disputes between private parties. The other rights of minority shareholders are tied to the conduct of the shareholder meeting (in particular, §180, §182 and §183 of the Com. Code), at which the transfer of business assets to the principal shareholder is to be decided. The requirement of correct procedure by the principal shareholder is also strengthened by the obligation to have a notarial record made of the shareholder meeting's decision on the transfer of securities to the principal shareholder (§183i par. 2 and 3 of the Com. Code), to which the expert appraisal and other information must be attached. In terms of constitutionality of the regulation, provision of information is adequately ensured, in view of the fact that shareholders have the right to view and make copies not only of the board of directors' report, but also of the expert appraisal. Thus, we can state that the Commercial Code imposes a number of obligation on the corporation and the principal shareholder to ensure that minority shareholders are appropriately informed, and at the same time permits the option of subsequent filing of a complaint to declare the shareholder meeting invalid, as a means

available to minority shareholders to start the process of judicial review of the fairness and honesty of the actions of the principal shareholder. Likewise, it protects the rights of lien creditors (objection point 10c), even though not in terms of the process under §183k par. 3 of the Com. Code. However, the legal regulation of the buy-out can not be criticized on constitutional grounds for that, because it does not concern shareholders who could take part in a shareholder meeting and exercise the right of a deciding vote. It primarily concerns a relationship governed by the Civil Code.

84. In conclusion, we must state that the legal regulation of a forced buy-out of securities is not, and not only in terms of the process of introducing it into the Commercial Code and amending it, an example of a legal regulation that does not raise a number of questions of a constitutional nature. These objections can be overcome through a constitutional interpretation. However, that does not mean that interference in the constitutionally guaranteed rights of minority shareholders under Art. 4 par. 4, Art. 11 par. 1, Art. 20 par. 1, Art. 26 par. 1 and 2, Art. 36 par. 1, Art. 37 par. 3 and Art. 38 par. 2 of the Charter can not occur in particular cases. In this case, however, the Constitutional Court did not evaluate a particular situation in a forced buy-out of securities in a particular corporation, but whether the constitutional requirements for passing a statute were met, and its consistency with the constitutional order. Therefore, in a review of the individual components of a forced buy-out it is the role not only of the Constitutional Court, but in the first instance of the ordinary courts (under Art. 4 of the Constitution of the CR), to protect the fundamental rights of plaintiffs.

85. As regards the request for the Constitutional Court to give priority to reviewing the petition, in view of the denial of the petition containing that request, reviewing it has become moot.

Instruction: Decisions of the Constitutional Court can not be appealed.

Brno, 27 March 2008