2007/03/01 - PL. ÚS 8/06: EXECUTOR´S COMMISSION

HEADNOTES

According to Art. 1 para. 1 of the Constitution, the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens, one of the main pillars of which is legal certainty. It is from this point of view that the content of legally normative acts, including implementing legislation, must be adjudicated (the unclear and indefinite construction of which might also lead to the violation of the right to fair process protected in Art. 36 para. 1 of the Charter of Fundamental Rights and Basic Freedoms), as must the operation of legal enactments upon past time periods, alternatively their influence upon past legal facts, since even potential impermissible retroactivity is in conflict with the postulate of the democratic, law-based state.

It is in accordance with the principle of legal certainty for new legal rules to have such an impact on existing legal relations, if their coming into existence, and the legal claims and the performance of legal transactions related thereto, established prior to the new rule coming into effect, are governed by the repealed norm. The transitional provisions of Government Regulations Nos. 233/2004 Coll. and 291/2006 Coll. constitute a violation of this principle, as they apply the new principle for the formation of an enforcement official‘s base commission even to proceedings commenced before the changes came into effect. There is no doubt at all that the selected construction has shaken confidence in the legal order, because enforcement officials‘ commissions are governed by legal rules which did not come into effect until after the enforcement officials had already performed all of the legal acts directed at the satisfaction of collected claims.

According to the Constitutional Court’s constant jurisprudence, both in proceedings on constitutional complaints and in abstract norm control proceedings, the principle of proportionality provides the mechanism for the resolution of a conflict between fundamental rights, or public goods protected by the constitutional order. Without calling into question the right of enforcement officials to fair remuneration for enforcement activities actually carried out, the Constitutional Court considers the fact that an enforcement official‘s base commission also includes an amount paid by the obliged person, even if the enforcement official had not directly participated in levying execution, must be considered as unjustified preferential treatment as against those enforcement officials who actually levied execution (as such a differentiation is not rationally justifiable). Moreover, in the Constitutional Court’s view the adopted construction lacks even an „educational“ component, since no possibility is provided de jure to acknowledge that the obliged debtor has himself satisfied his obligation (without direct action to enforce it), even if only at the last possible moment. Although the Regulation’s provisions indicate that enforcement officials are entitled, in such a case, to a commission at a 50% rate, however, only in cases where the enforcement official waives the levying of execution, whereas the Enforcement Code enables them to do so only in the case that the costs of enforcement activities, which includes also the

enforcement official's commission, are also paid. It follows therefrom that, in accordance with the literal wording of the Act, if the obliged person fails to pay the enforcement official her commission in the full amount, she cannot waive the levying of execution, even if the claim sought has been paid; therefore, enforcement officials have the right, against the sense of logic, to a commission in the full amount (this is movement in a circle). The Constitutional Court considers this construction to be in conflict with Art. 1 para. 1 of the Constitution, as the creation of unfulfillable conditions for a reduced rate to apply is in conflict with the principle of the law-based state. In its ultimate consequences, such a legal framework also constitutes an interference with the obliged person's fundamental right to the protection of property enshrined in Art. 11 para. 1 of the Charter of Fundamental Rights and Basic Freedoms.

The constitutional conformity of the rules governing enforcement officials' commissions should not be based on a direct correlation between the commission and the value of the exacted performance, rather should reflect the complexity of the enforcement officials' activity according to individual types and the manner of levying execution, as well the enforcement official's responsibility and the amount of work required for it.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court in its Plenum, composed of its Chairman Pavel Rychetský and judges Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kurka, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, in the matter of the petition, submitted by the Constitutional Court's Panel I, proposing the annulment of § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., as subsequently amended, and in the matter of the petition of P. s. b. d., represented by Mgr. L. H., an advocate, proposing the annulment of Art. II., point 1. of Regulation No. 233/2004 Coll., which amends Regulation No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials, with the participation of the Ministry of Justice and the Public Protector of Rights, decided as follows:

I. The provisions of § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials, as

subsequently amended, is annulled as of the day this Judgment is published in the Collection of Laws.
II. The provisions of Art. II., point 1. of Regulation No. 233/2004 Coll., which amends Regulation No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials, is annulled as of the day this Judgment is published in the Collection of Laws.
III. The provisions of Art. II., point 1. of Regulation No. 291/2006 Coll., which amends Regulation No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials, as amended by Regulation No. 233/2004 Coll., is annulled as of the day this Judgment is published in the Collection of Laws.

REASONING

A.

1. In its constitutional complaint, delivered to the Constitutional Court on 29 September 2004, the complainant, a commercial company, E.-S., s.r.o., represented by Mgr. M. Z., an attorney, sought the annulment of the 20 July 2004 ruling of the District Court for Prague 3, No. E-Nc 1895/2002-52, which affirmed the order to pay the costs of enforcement activities, issued in an enforcement proceeding in which it had the status of an obliged person. It asserted that, as a result of the contested ruling, its right enshrined in Art. 36 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter“) had been violated, which contention it substantiated by a description of the course of the enforcement proceeding, especially its concluding phase concerning the determination of the costs of enforcement activities and their payment. Above all, it reproved the court for failing to take into consideration § 11 para. 2 of Regulation. No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials, as amended by Regulation No. 233/2004 Coll., which amends Regulation No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials. The complainant inferred that, if it voluntarily pays off the entire debt, without any action in execution playing any part therein, then the execution of the writ has been waived, hence the enforcement official’s commission should be determined in accordance with § 11 para. 1 lit. a) of the cited Regulation, that is only at a 50 % rate. It adds thereto, that in the case of a claim to a commission in the full amount in accordance with § 11 para. 2 of the cited Regulation, the necessary conditions were not satisfied, alternatively that the

conditions laid down in § 11 para. 2 lit. a) were not satisfied. This proceeding is being conducted as No. I. US 639/04.

2. The Constitutional Court ascertained from the file of the District Court for Prague 3, No. E-Nc 11895/2002, that a motion against the complainant had been filed at that court to issue a writ pursuant to Act No. 120/2001 Coll., on Judicial Enforcement Officials and Enforcement Activities (Enforcement Code) and on Amendments to further Act (hereinafter „the Enforcement Code"), to exact a claim in the amount of 2,303,588 Czech Crowns with ancillary rights. By its 24 October 2002 ruling, No. E-Nc 11895/2002-9, a writ of execution was issued and a judicial enforcement official, JUDr. D. K., from the Prague 4 Office of Enforcement Officials, with its seat at Novodvorská 1010, Prague 4, was charged with executing the writ. As follows from the file, the resulting warrant of distress was issued to the obliged person, decreeing that enforcement be effected by enjoining two claims from an account, by the sale of immovable property and the sale of movable items. On 1 December 2003 the judicial enforcement official issued an order to pay the costs of enforcement activities, No. Ex 236/02-59, in which he set 278,467 Czech Crowns as the total amount (of which 276,408.60 Czech Crowns was the enforcement official's commission for executing the writ, 1585.90 Czech Crowns was the reimbursement of cash outlays, and 472.50 Czech Crowns the costs of delivery). The complainant filed an objection to this order, based on the assertion that the amount of the payment collected by the enforcement official served as the basis for the determination of the commission for executing the writ, yet the enforcement official had merely issued warrants of distress affecting the obliged person's property interests and the obliged person had performed the obligation entirely voluntarily, in part directly to the entitled person and in part to the enforcement official's account. The enforcement official referred the objection to the court which, by its 16 February 2004 ruling, No. E-Nc 11895/2002, quashed the order at issue, as it concurred with the complainant's position that the amount of the collected debt had served as the basis for determining the commission, so that it would be necessary for the enforcement official to state, in its substantiation of the order to pay the costs of enforcement activities, the amount that was exacted thereby (and not merely collected) and in what manner the resulting commission was subsequently calculated. On 2 May 2004 the judicial enforcement official issued a new order to pay the costs of enforcement activities, No. E 236/02-89, which set, as the costs of enforcement action, the total amount of 384,040 Czech Crowns (of which 382,796.50 Czech Crowns represented the enforcement official's commission, 708 Czech Crowns the reimbursement of cash outlays, 535.50 Czech Crowns the costs of delivery – Note: the enforcement official used the amount of 2,144,517 Czech Crowns as the basis in his determination of the amount of his commission), and the complainant once again filed objections against this order. After they had been referred to the court, it affirmed the order to pay the costs of enforcement activities, finding the objections to be unfounded. The court based that decision on the amended wording of § 5 para. 1 of Regulation No. 330/2001 Coll., which was applicable as well to enforcement proceedings initiated before the day the amendment had come into effect (unless a decision on an enforcement official's commission had already become final). As follows therefrom, any performance which had been effected after the court's writ of execution has been delivered to the obliged person is deemed to be an exacted performance, which serves as the basis for determining the commission for

executing the writ. In view of the fact that the obliged person paid the collected amount the day after the writ of execution had been delivered to him, the court found that the enforcement official's commission, as well as further amounts demanded, are in conformity with the amended wording of Regulation No. 330/2001 Coll. The Constitutional Court further ascertained from the court file that the entitled person, in response to the query of the District Court for Prague 3, had informed it that the payment of the claims proceeded as follows: after the writ of execution had issued, 1,819,975 Czech Crowns were paid by 21 January 2004, 324,542 Czech Crowns were paid on 13 February 2004 (that is, a total of 2,144,517 Czech Crowns, from which the sum of 770,000 Czech Crowns were paid through the judicial enforcement official), and on 16 February 2004 the fee for delay, in the amount of 159,071 Czech Crowns, was waived.

3. In the course of the proceeding on the constitutional complaint, Panel I of the Constitutional Court found that the case under adjudication concerned the application of § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials (hereinafter „the Regulation"). The Regulation was issued by the Ministry of Justice on the basis of the empowerment inserted into § 131 lit. a) to c) of the Enforcement Code and came into force on 18 September 2001. The provisions of § 5 para. 1, the second sentence, in their original wording, read as follows: „Unless hereinafter provided otherwise, the basis for the determination of the commission for the enforcement of an obligation involving the payment of a sum of money shall be the amount of the payment exacted by the enforcement official." Regulation No. 233/2004 Coll., with effect from 30 April 2004, supplemented this provision such that it then read: „Unless hereinafter provided otherwise, the basis for the determination of the commission for the enforcement of an obligation involving the payment of a sum of money shall be the amount of the payment exacted by the enforcement official. The exacted performance is deemed to be any performance, effected after the obliged person has received delivery of the court's writ of execution, in satisfaction of the obligations stated in the writ of execution, any performance in satisfaction of the obligation to pay the costs of enforcement activities or to pay the entitled person's costs." According to the algorithm inserted into § 6 of the Regulation, the enforcement official's commission is calculated on the basis of the tax base:
1) The commission for the enforcement of an obligation involving the payment of a sum of money shall be calculated at the rate of

up to a 3,000,000 Czech Crowns of the base	15 %
from the remaining amount, up to 40,000,000 Czech Crowns of the base	10 %
from the remaining amount, up to 50,000,000 Czech Crowns of the base	5 %
from the remaining amount, up to 250,000,000 Czech Crowns of the base	1 %

2) Any amount over 250,000,000 Czech Crowns shall not be counted as part of the base.
3) Commissions under para. 1 shall amount to at least 3 000 Czech Crowns.

In Regulation No. 233/2004, the following rule was introduced into the transitional provisions:
„1. Enforcement officials are entitled to the commission provided for in this

Regulation even in enforcement proceeding which commenced prior to the day this Regulation entered into effect, with the exception of proceedings in which the judicial enforcement official's commission has already been finally decided."

4. In both versions, the Regulation takes into account the debtor's „voluntary" performance of his obligation during the first phase of enforcement activity, that is, even before the writ is executed. In the original wording, according to § 11 para. 1, lit. a), if the enforcement official waives levying execution on the writ (in accordance with § 46 para. 3 of the Execution Code), in the case of the enforcement of an obligation requiring the debtor to pay a monetary sum, he is entitled to a commission in the amount of 50 % of the commission according to § 6, with the proviso that the amount of the claim which should be exacted is considered the base for the commission. According to the amended wording, in the case of the enforcement of an obligation requiring the debtor to pay a monetary sum, enforcement officials who waive the execution of a writ are entitled to a commission in the amount of 50 % of the commission in accordance with § 6. The second paragraph was also supplemented with the following text: „The enforcement official is entitled to a commission in the full amount, if he waives the execution of the writ after having
a) called upon the obliged person in writing to voluntarily perform the obligation which the power of distress imposes upon her, and
b) the obliged person voluntarily performs that which the power of distress imposes upon her, and reimburses the costs of enforcement activities after the expiration of a commensurate period of time laid down by the enforcement official in accordance with lit. a)."

5. According to § 46 para. 3 of the Enforcement Code, the enforcement official can waive the execution of the writ only in the case that the obliged person voluntarily performs that which is imposed upon him by the power of distress, and covers the costs of enforcement activities; pursuant to § 87 para. 1 of Enforcement Code, the costs of enforcement activities comprise the enforcement official's commission, the reimbursement of cash expenditures, compensation for time lost in executing the writ, compensation for the delivery of documents, the commission and the payment of the costs of the administrator of an enterprise, and, if the enforcement official or administrator of the enterprise is a taxpayer of value-added tax, then the relevant value-added tax is also a cost of enforcement activities.
6. In adjudicating whether the constitutional complaint is well-founded, the First Panel of the Constitutional Court made the finding that the applied provision, § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., as amended by Regulation No. 233/2004 Coll., is in conflict with constitutional acts; accordingly, in the sense of § 78 para. 2 of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended (hereinafter „Act on the Constitutional Court"), it decided in its 8 February 2006 ruling, No. I.US 639/04-12, to suspend the proceeding and to submit a petition to the Constitutional Court Plenum for the adjudication of its constitutionality.

7. By its petition delivered to the Constitutional Court on 30 November 2004, the complainant, P. s. b. d., represented by Mgr. L. H., an attorney, sought the quashing of the 13 September 2004 ruling of the District Court for Prague 5, No. Nc 733/2003-134, and the 29 January 2003 order to pay the costs incurred in

enforcement activities, No. EX 1651/03-248, issued by JUDr. J. P., PhD., the judicial enforcement official, as corrected by its 29 March 2004 rulings, No. 1651/03-264. The complainant simultaneously submitted a petition proposing the annulment of Art. II., point 1. of Regulation No. 233/2004 Coll., which amends Regulation No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials. It is asserted in the petition that the contested decisions violated the petitioner's constitutionally protected rights enshrined in Art. 1 of the Constitution and Art. 2 para. 2 and Art. 40 para. 6 of the Charter; therefore, it proposed their annulment. The petition substantiates the proposal to annul Art. II, para. 1 of the Regulation in view of its alleged prohibited retroactive effect. That proceeding is being conducted as No. I. US 752/04.

8. The Constitutional Court ascertained from the file of the District Court for Prague 5, No. Nc 733/2003, that a motion had been filed seeking the issuance against the complainant of a warrant of execution, in accordance with Act No. 120/2001 Sb, to exact a claim in the amount of 5,261,822.42 Czech Crowns with ancillary rights. By its 21 May 2003 ruling, No. Nc 733/2003-6, writ of execution was issue and a judicial enforcement official, JUDr. J. P., from the Prague 5 Office of Enforcement Officials, with its seat at U Šalamounky 41/769, was charged with levying execution. As further appears from the file, on 19 August 2003, the judicial enforcement official issued a warrant of distress for the sale of joint property interests in immovable property and, on 23 November 2003, delivered to the obliged person the warrant of distress enjoining claims upon the account and an order of the same day, No. EX 1651/03-208, to pay the costs of enforcement activities in the amount of 1,016,493 Czech Crowns (of which the enforcement official's commission was 926,550 Czech Crowns, the costs of enforcement activities were 41,538 Czech Crowns, and 48,405 Czech Crowns represented value-added tax). The complainant filed an objection to this order in which he drew attention to the fact that he had voluntarily paid the debt. By its ruling of 16 January 2004, No. Nc 733/2003-60, the District Court quashed the order to pay the costs due to being unverifiable and unintelligible. In the meantime, on 19 December 2003, the judicial enforcement official issued a further order to pay the costs of enforcement activities, No. EX 1651/03-230, in which he quantified further costs of enforcement activities in the amount of 2,496,784.50 Czech Crowns, which represent the costs connected with the administration of the enterprise, that is, the expenses of the administrator of the enterprise and his remuneration. The complainant also filed an objection to this order, in which he expressed the view that the remuneration of the administrator of the enterprise lacks any basis, as the warrant of distress to sell the enterprise was issued in conflict with the Enforcement Code, because the previously elected method of levying execution – the sale of the obliged person's immovable property – was entirely sufficient to cover the amount of the outstanding debt. By its 6 February 2004 ruling, No. Nc 733/2003-69, the District Court quashed the order due to being unverifiable. On 29 January 2004 (with the incorrect date, „29 January 2003", which he corrected, by giving the right date in his 29 March 2004 ruling, No. EX 1651/03-264) the judicial enforcement official issued an order to pay the costs of enforcement activities, No. EX 1651/03-248, in the amount of 1,173,775.40 Czech Crowns (of which 926,550

Czech Crowns represented the enforcement official's commission, 35,561 Czech Crowns the costs of enforcement activities, 203,841 Czech Crowns of value-added tax on the commission, at the 22 % rate, and 7823 Czech Crowns was the value-added tax on the costs, at the 22 % rate). The complainant filed an objection against this order, as he considered the commission without basis and the costs as undocumented and unproven. Concurrently, by its 5 March 2004 ruling, NC 733/2003-102, the District Court for Prague 5 halted execution of the writ, as regards the amount of 5,261,822.42 Czech Crowns with interest due to delay and the expenses of the antecedent proceeding, when it deemed as proven that the obliged person had settled the claim voluntarily, without the need for enforcement, and the right to performance thus ceased to exist; the execution of the costs of enforcement activities was meant to continue. By its subsequent 13 September 2004 ruling, No. Nc 733/2003-134, the District Court revised the order to pay the costs of enforcement activities by determining the amount of costs at 1,119,944.60 Czech Crowns, while it based its decision on the amended wording of § 5 para. 1 of Regulation No. 330/2001 Coll., and in conformity therewith calculated the enforcement official's commission to be 917,830 Czech Crowns with 201,922.60 Czech Crowns in value-added tax and cash outlays of 60 Czech Crowns with 132 Czech Crowns in value-added tax.

9. In the course of the proceeding on the constitutional complaint, Constitutional Court Panel I established that (just as in the proceeding on the constitutional complaint in matter I. US 639/04) this case also concerned the application of § 5 para. 1, the second sentence, of the Regulation, including the transitional provision, the annulment of which the complainant - P. s. b. d., - proposed in that case, and, by its 2 November 2006 ruling, No. I.US 752/04-26, on the identical grounds it suspended the proceeding and submitted to the Constitutional Court Plenum a petition proposing the adjudication of the constitutionality of these provisions, as it was persuaded that they are in conflict with constitutional acts.

10. Both petitions proposing the annulment of a legal enactment concern the legal arrangements for the commissions of enforcement officials, thus the subjects of the proceeding are identical in content and factually connected. In view of this finding and in the interests of judicial economy, the Constitutional Court decided, in its 14 November 2006 ruling No. Pl. US 8/06-18, in conformity with § 63 of the Act on the Constitutional Court, with the application of § 112 of the Civil Procedure Code, to join these matters for a common proceeding, with the proviso that this proceeding will subsequently be conducted as No Pl. US 8/06.

B.

11. In the course of the subsequent phase of the proceeding, the Constitutional Court submitted the petition in the matter conducted as No. I.US 639/04 to the Minister of Justice for his statement of views and to the Public Protector of Rights (and, at the same time, asked him to inform it whether he is intervening into the proceeding). In view of the fact that the matter being conducted as No. I. US 752/04 is a matter with identical content and one that proceeds from the same line of argument, on grounds of procedural economy, the Constitutional Court did not

consider it as indispensable to send this petition to the interested persons.

12. In its statement signed by the former Deputy Prime Minister of the Czech Republic and the Minister of Justice, JUDr. P. N., the Ministry of Justice first expressed doubt on whether it is appropriate, within the framework of an enforcement proceeding, to reward the obliged person for voluntary fulfillment otherwise than as is provided for in the valid legal framework; in this connection, it emphasized that an enforcement proceeding generally takes place due to the fact that the obliged person had not fulfilled, duly and in time, his obligation from a mandatory legal relation and not even, following the issuance of a court decision, on the strength of that decision. In a further part, it recapitulated the content of § 46 para. 3, § 87 para. 1 and § 88 para. 1 of the Enforcement Code and cited three model situations which may come about in connection with the waiver of execution of the writ. First of all, the obliged person can voluntarily perform that which a power of distress imposes upon him, on the basis of the enforcement official‘s formal written requests that he voluntarily perform the obligation by a deadline set by the enforcement official. In such a case, the judicial enforcement official can tie in the order to pay expenses with the mentioned request, and he is entitled to a commission (if it is an enforcement of an obligation involving the payment of a monetary sum) at a 50 % rate. In such a case, the judicial enforcement official can deduce the amount of the commission based upon the presupposition that, in reaction to the official’s request, the obliged person will voluntarily fulfill his obligation within the set period. A further possibility is the voluntary performance of the duty without a prior written request from the judicial enforcement agent; in that case the enforcement official may, after the obligation has been satisfied, issue an order to pay the costs of enforcement activities and, following payment of these costs (the commission again at the rate of 50 %), waive levying in execution of the writ. Finally, if the situation anticipated in § 11 para. 2 of the Regulation comes about, that is, if the obliged person meets the obligation voluntarily only after the deadline set in the written request has passed, the judicial enforcement official is entitled to a commission in the full amount, an outcome which the Ministry considers to be appropriate.

13. As to the objection that there is a hidden increase in the base for the calculation of commissions implemented by the Regulation, the Ministry stated that it is necessary to take as the starting point the empowerment to issue regulations, which is contained in § 131 lit. a) of the Enforcement Code, and expressed the opinion that, in view of this fact and taking into account Art. 4 para. 1 of the Charter, the Regulation is in conflict neither with the constitutional order nor with the statute for the implementation of which it was issued.
Note. The following is the relevant language of § 131 lit. a) of the Enforcement Code:
„The Ministry is empowered to set by regulation
a) the amount of and the manner for determining the commissions of enforcement officials, cash expenditures, the reimbursement for the delivery of documents, and the loss of time, including a cash deposit in an appropriate amount.“

14. The Public Protector of Rights informed the Court that, in conformity with § 69 para. 2 of the Act on the Constitutional Court, he is intervening into the proceeding. As to the petition itself, he stated that could not but express his

agreement with the view of the Constitutional Court's First Panel concerning the annulment of § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll.; he considers its arguments to be persuasive and exhaustive, and he agrees with the petition proposing the annulment.

15. In the course of the proceeding on the petition submitted by the Constitutional Court's Panel I, the Ministry of Justice proceeded to further amend the provision in question, with effect from 1 August 2006 (see Regulation, . 291/2006 Coll., which amends Regulation of the Ministry of Justice No. 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials, as amended by Regulation No. 233/2004 Coll.). As of that date, § 5 para. 1 reads as follows: „Unless hereinafter provided otherwise, the base for the determination of the commission for the enforcement of an obligation involving the payment of a sum of money shall be the amount of the payment exacted by the enforcement official. The exacted performance is deemed to be any performance effected after the court has issued a decision pursuant to § 44 para. 2 of the Act." At the same time, the following rule was included among the transitional provisions:
„1. Enforcement officials are entitled to the commission provided for in Regulation No. 330/2004 Coll. (note., the correct number is „No. 233/2004 Coll.") and this Regulation even in enforcement proceedings which commenced prior to the day this Regulation entered into effect, with the exception of proceedings in which the judicial enforcement official's commission has already been finally decided." In connection with this amendment, the Council of Enforcement Officials submitted to the Constitutional Court an initiative proposing that the proceeding be discontinued in the sense of § 67 para. 1 of the Act on the Constitutional Court.

16. In this situation the Constitutional Court concerned itself with the assessment of whether grounds have arisen for dismissing the proceeding in accordance with § 67 para. 1 of the Act on the Constitutional Court. It is true that formally § 5 para. 1, the second sentence, has been repealed; however, it was replaced by a provision which makes use of an absolutely identical construction, the change consisting solely in the designation of the start of the time period, from which the rendering of performance is considered as exacted performance; in its essence, the new determination of the start of this time period was even more in favor of the enforcement official. For this reason, the Constitutional Court's First Panel continued to adhere to its position that § 5 para. 1, second sentence of Regulation. No. 330/2001 Coll., as subsequently amended, is in conflict with constitutional enactments, and adds that the two above-mentioned transitional provisions also conflict with constitutional principles.

17. Overview of relevant provisions of enforcement enactments:
The rule waiving execution § 46 para. 3, the first sentence of the Enforcement Code The enforcement official can waive levying in execution of the writ only in the case that the obliged person voluntarily performs that which is imposed upon him by the power of distress, and covers the costs of enforcement activities.

The rule on the costs of an enforcement action § 87 para. 1 of the Enforcement Code The costs of enforcement activities comprise the enforcement official's commission, the reimbursement of cash expenditures, compensation for time lost in levying execution of the writ, compensation for the delivery of documents, the commission and the payment of the costs of the administrator of an enterprise, and, if the enforcement official or administrator of the enterprise is a taxpayer of value-added tax, then the relevant value-added tax is also a cost of enforcement action under separate legal enactments 20) (hereinafter "costs of the enforcement activities").
Rules for the basis for enforcement officials' commissions (in the case of monetary amounts) § 5 para. 1 of Regulation No. 330/2001 Coll., in the version valid until 29 April 2004 Unless hereinafter provided otherwise, the base for the determination of the commission for the enforcement of an obligation involving the payment of a sum of money shall be the amount of the payment exacted by the enforcement official.

§ 5 para. 1 of Regulation No. 330/2001 Coll., as amended by Regulation No. 233/2004 Coll. Unless hereinafter provided otherwise, the base for the determination of the commission for the enforcement of an obligation involving the payment of a sum of money shall be the amount of the payment exacted by the enforcement official. The exacted performance is deemed to be any performance, effected after the obliged person has received delivery of the court's writ of execution, in satisfaction of the obligations stated in the writ of execution, any performance in satisfaction of the obligation to pay the costs of enforcement activities or to pay the entitled person's costs.

§ 5 para. 1 of Regulation No. 330/2001 Coll., as amended by Regulations No. 233/2004 Coll. and No. 291/2006 Coll. Unless hereinafter provided otherwise, the base for the determination of the commission for the enforcement of an obligation involving the payment of a sum of money shall be the amount of the payment exacted by the enforcement official. The exacted performance is deemed to be any performance effected after the court has issued a decision pursuant to § 44 para. 2 of the Act.
The rule for enforcement officials' commissions in the case execution of the writ is waived § 11 para. 1 of Reg. No. 330/2001 Coll., in the wording valid until 29 April 2004 If the enforcement official waives levying in execution of the writ (§ 46 para. 3 of the Act), she is entitled to a commission:
a) in the case of the enforcement of an obligation involving the payment of a sum of money, in the amount of 50 % of the commission as calculated pursuant to § 6, where the basis for the commission is deemed to be the amount of the claims that must be exacted,
b) in the case of the enforcement of an obligation other than one involving the payment of a sum of money, in the amount of 30 % of the commission as calculated pursuant §§ 7 to 10.
§ 11 paras. 1 and 2 of Reg. No. 330/2001 Coll., as amended by Reg. No. 233/2004 Coll. (Reg. No. 291/2006 Coll. unaffected thereby) (1) Unless hereinafter provided otherwise, an enforcement official who has waived levying in execution of a writ (§ 46 para. 3 of the Act), is entitled to a commission:
a) in the amount of 50 % of the commission as calculated pursuant to § 6, if it concerns the enforcement of an obligation involving the payment of a sum of

money;
b) in the amount of 30 % of the commission as calculated pursuant §§ 7 to 10, it concerns the enforcement of some obligation other than the payment of a sum of money.
(2) The enforcement official is entitled to a commission in the full amount, if he waives the execution of the writ after having
a) called upon the obliged person in writing to voluntarily perform the obligation which the power of distress imposes upon her, and
b) the obliged person voluntarily performs that which the power of distress imposes upon her, and reimburses the costs of enforcement activities after the expiration of a commensurate period of time laid down by the enforcement official in accordance with lit. a).

C.

18. In norm control proceedings the Constitutional Court is obliged, in accordance with § 68 para. 2 of the Act on the Constitutional Court, to assess whether the contested legal enactment was adopted and issued within the confines of the powers set down in the Constitution and in the constitutionally prescribed manner.

19. The competence of ministries to issue legal enactments for the implementation of statutes is founded on Art. 79 para. 3 of the Constitution, on the assumption that an express statutory empowerment has been made. The Constitutional Court has already expressed its view in its judgments (for ex., No. Pl. US 45/2000) on the issue of the constitutionality of a statutory empowerment, as well as the interpretation of statutorily-prescribed limits to sub-statutory norm creation. Implementing legal enactment must, in the first place, be issued by the authorized person. The state body which is authorized to issue sub-statutory legal enactment must proceed on the basis of the statute and within its bounds (secundum et intra legem), not beyond the statute (praeter legem). Stated simply, if according to a statute, X should be, the empowered state body is entitled to provide that X1, X2, X3 should also be, but not that Y should be. The barrier of matters that are reserved to regulation solely by statute (the „reservation of a statute“) then protects against the excesses of executive power; the state body in question cannot lay down primary rules and obligations. From the theoretical perspective, a further requirement is placed upon sub-statutory (implementing) enactments, namely, that they be general and, thus, affect an uncertain group of addressees, as the Constitution provides for empowerment to make legal rules, not to issue individual legal acts.

20. In this matter, § 131 lit. a) of the Enforcement Code is the empowerment to issue regulations, according to which the Ministry of Justice is empowered to lay down by regulation the amount and manner of determining the commissions of enforcement officials, cash expenditures, the reimbursement for the delivery of documents, and the loss of time, including a cash deposit in an appropriate amount.

21. Regulation No. 330/2001 Coll. was issued by the Ministry of Justice on 5 September 2001, promulgated on 18 September 2001 in Issue 128/2001 of the

Collection of Laws and, in accordance with its § 28, came into force on the day of its promulgation. The amending Regulation 233/2004 was issued by the Ministry of Justice on 20 April 2004, promulgated on 30 April 2004 in Issue 77/2004 of the Collection of Laws and, in accordance with its Art. III, came into force on the day of its promulgation. Regulation No. 291/2006 Coll., which amends Regulation of the Ministry of Justice 330/2001 Coll., on the Commissions for and Reimbursement of Court Enforcement Officials, on the Commissions for and Reimbursement of Expenditures of the Administrator of an Enterprise, and on the Conditions for Indemnity of Responsibility for Damage Caused by Enforcement Officials, as amended by Regulation No. 233/2004 Coll., was issued by the Ministry of Justice on 2 June 2006, promulgated on 19 June 2006 in Issue 92/2006 of the Collection of Laws, and Art. III thereof designated 1 August 2006 as the day of its coming into force.

22. The Constitutional Court has ascertained that the contested provisions were issued by the Ministry of Justice, which is a state body that is explicitly and specifically empowered by law (competent), and is related in its content to the determination of the amount of compensation of enforcement officials, so that it did not stray from the confines laid down in the empowering provision, § 131 lit. a) of the Enforcement Code. In view of what has been stated, the Constitutional Court came to the conclusion that the contested regulation was adopted and issued within the confines of the powers set down in the Constitution. It also ascertained that it had been adopted in the constitutionally prescribed manner.

D.

23. After weighing the given arguments and positions, especially the position of the Ministry of Justice formulated in its final petition, the Constitutional Court came to the conclusion that it is imperative to annul § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., as well as the transitional provisions to the amending rules. In reaching that conclusion, it was guided by the following considerations.

24. The Constitutional Court assessed (also in the sense of the first objection put forward by the Ministry of Justice) whether grounds have arisen for dismissing the proceeding in accordance with § 67 para. 1 of the Act on the Constitutional Court. It is true that § 5 para. 1, the second sentence, has been repealed; however, it was replaced by a provision which makes use of an absolutely identical construction. In this context, the Constitutional Court refers to its case law, in which it reacted to similar situations (Judgment in the matter No. Pl. US 50/04, especially Part VI., published as No. 154/2006 Coll.).

25. As regards the Ministry of Justice‘s proposal, in eventum, to reject the petition submitted by Panel I due to the loss of standing brought about by the fact that the amendment to the contested provision resulted in the subject of the constitutional complaint no longer having any connection to the wording of § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., the Constitutional Court does not concur with this objection either, as the commencement of the proceeding is

the relevant time for determining the petitioner‘s standing.

26. As to the Ministry of Justice‘s substantive objections, concentrated on an emphasis on the status of the obliged person (there is no individual right either to educational effects or to a reduction, so that it is only a matter of appropriateness, not of constitutional law) and the relation between enforcement officials (non-linear relation between the commission and the work, no possibility to quantify it) the Constitutional Court would add: According to Art. 1 para. 1 of the Constitution, the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. Legal certainty is one of the main pillars of the law-based state, and the content of legally normative acts, including implementing legislation, must be adjudicated with this in mind. The unclear and indefinite construction of legal enactments also represents the violation of the right to fair process protected in Art. 36 para. 1 of the Charter. The operation of legal enactments upon past time periods, alternatively their influence upon past legal facts, must also be adjudicated from the point of view of the principles of the law-based state, and potential impermissible retroactivity may, from this perspective, be in conflict with Art. 1 para. 1 of the Constitution.

27. In its jurisprudence, the Constitutional Court has constantly and repeatedly recalled the connection between the principle of predictability of the consequences of a legal enactment and the principle of the law-based state. Without doubt the predictability of legal enactments must be assessed also from the dynamic perspective; that is, in amending legal regulations, the legislature must take the existing legal situation into account, including the situation of the course of legal relations, and the changes must be carried out sensitively and only to the degree essential to attain the object of regulation. It is necessary to insist the legislature conduct itself in such a manner, for the stability of the sphere of free conduct is guaranteed thereby, as is the legal certainty of parties to legal transactions (in details, Judgment in matter No. Pl. US 38/04). There is no doubt that these requirements apply even in the field of derived norm creation; hence, their satisfaction can be demanded of all subjects engaged in the issuance of legal enactments.

28. According to the Constitutional Court’s constant jurisprudence, the principle of proportionality allows for the resolution of a conflict between fundamental rights, or public goods protected by the constitutional order. This principle appears both in proceedings on constitutional complaints and, as in the case currently under adjudication, that is, in abstract norm control proceedings. In the cited 20 June 2006 Judgment, No. Pl. US 38/04 (published in the Collection of Laws as No. 409/2006 Coll.), or in the 13 August 2002 Judgment, No. Pl. US 3/02 (published in the Collection of Laws as No. 405/2002 Coll.), the Constitutional Court declared the following concerning cases where fundamental rights or freedoms are in conflict with a public interest or with other fundament rights or freedoms: „ . . . it is necessary to evaluate the objective (aim) of such interference in relation to the means employed, and the measure for this evaluation is the principle of proportionality (proportionality in the wider sense), which can also be designated a ban on excessive interference with rights and freedoms. This general principle contains three criteria for evaluating the permissibility of interference. The first

of these is the principle of the capability to effectuate the objective (or suitability), under which the relevant measure must be capable of achieving the intended aim, which is the protection of another fundamental right or public good. Next is the principle of necessity, according to which, of several possible means, it is permitted to employ – in relation to the affected fundamental rights and freedoms – only the least intrusive one. The third principle is the principle of proportionality (in the narrower sense), according to which the detriment to a fundamental right may not be disproportionate in relation to the intended aim, that is, in the event of a conflict between a fundamental right or freedom with the public interest, the negative consequences of measures restricting fundamental human rights and freedoms may not exceed the positive elements represented by the public interest in these measures." The obligation to respect the principle of proportionality does not apply only to administrative bodies in their decision-making, but also to the legislature, in a broader perspective to the norm-creator, which the Ministry of Justice doubtless is, so far as concerns the creation of sub-statutory norms.

29. Without denying the right of enforcement officials to fair remuneration for enforcement activities actually carried out, the Constitutional Court considers the fact that an enforcement official‘s base commission also includes an amount paid by the obliged person, even if the enforcement official had not directly participated in levying execution, must be considered as unjustified preferential treatment as against those enforcement officials who actually levied execution (as such a differentiation is not rationally justifiable). Moreover, in the Constitutional Court’s view the adopted construction lacks even an „educational“ component, since no possibility is provided de jure to acknowledge that the obliged debtor has himself satisfied his obligation (without direct action to enforce it), even if only at the last possible moment. Although the Regulation’s provisions indicate that enforcement officials are entitled, in such a case, to a commission at a 50% rate, however, only in cases where the enforcement official waives the levying of execution, whereas the Enforcement Code enables them to do so only in the case that the costs of enforcement activities, which includes also the enforcement official’s commission, are also paid. It follows therefrom that, in accordance with the literal wording of the Act, if the obliged person fails to pay the enforcement official her commission in the full amount, she cannot waive the levying of execution, even if the claim being collected has been paid; therefore, enforcement officials have the right to a commission in the full amount (this is movement in a circle). The Constitutional Court considers this construction to be in conflict with Art. 1 para. 1 of the Constitution, as the creation of unfulfillable conditions for a reduced rate to apply is in conflict with the principle of the law-based state (see the mentioned Judgment in the matter, Pl. US 38/04). In its ultimate consequences, such a legal framework also constitutes an interference with the obliged person’s fundamental right to the protection of property enshrined in Art. 11 para. 1 of the Charter (see also one of the basic principles of execution – the principle of the legal protection of the obliged person, the purpose of which consists in the fact the execution can serve only to satisfy the entitled person’s right and to reimburse the costs of the enforcement proceeding, including an appropriate commission for the enforcement official; however, it may not cause the obliged person disproportionate detriment due to the fact that it does not properly take into account a certain measure of „voluntariness“ in satisfying the

enforced obligation, even if only after a warrant of execution is issued, however, still prior to being compelled to perform the obligation; the legal framework under adjudication denies the preventive function of execution, that is, as a mechanism, the purpose of which is not to liquidate the obliged person's property – see also the purpose of an insolvency proceeding). A reduced-rate commission can, therefore, be considered as an equivalent corresponding to the effort expended by the enforcement official, an option which is also in conformity with the principle of proportionality, weighing the suitability of the interference with the obliged person's property against the objective of protecting the property of the entitled person (collecting his claims). The Constitutional Court concludes that, in order to be constitutionally conforming, the rules governing enforcement officials' commissions should not be based on a direct correlation between the commission and the value of the exacted performance, rather should reflect the complexity of the enforcement officials' activity according to individual types and the manner of levying execution, as well the enforcement official's responsibility and the amount of work required for it. Until such a legal arrangement is adopted, it will be up to the ordinary courts, when deciding on enforcement officials' commissions, to interpret „the extent of performance exacted by the enforcement official" in conformity with the indicated principles.

30. The Ministry of Justice's conviction (see para. 12) that an enforcement official can make calculations with the presupposition that the obligation will be satisfied, and charge a reduced commission, is based on the „willingness" of enforcement officials and does not correspond to the statutory text (nor with the way enforcement officials proceed in practice). After all § 46 para. 3, the first sentence, of the Execution Code enables enforcement officials to waive the levying of execution only in the case that the obliged person voluntarily performs that which the power of distress imposes upon him, and cover the costs of enforcement activities (of which the enforcement official's commission also constitutes a part) and the enforcement official is entitled to a reduced commission only in the case that he or she waives the levying of execution (§ 11 para. 1 of the Regulation). It is also evident that the enforcement official cannot, alternatively must not, waive the levying of execution if the commission is not paid, and that the obliged person cannot pay the commission until the time that he is billed for it, since its amount is not yet known.

31. In this connection and with reference to the fact that enforcement officials cannot refuse to execute a writ, the Constitutional Court would note that the existing rules concerning the amount of commissions for enforcement officials cannot be justified and that the reimbursement of the costs of the proceeding can be awarded them as against an obliged person even in the case that the execution of the writ is halted due to insufficient assets on the part of the obliged person (see Position of the Constitutional Court, No. Pl. US – st. 23/06). Compensation in this sense of „disadvantaged" enforcement officials must be found in the advantages directly connected with his profession, for ex., in his nearly exclusive status in exercising the power of distress, in which respect only judicial enforcement officials can partially compete with them. It cannot be accepted that the commission charged against one group of obligated persons can be markedly increased merely due to the fact that, in the case of other obligated persons, which have no functional relationship with the first group of obligated persons,

(hence, they can bear no responsibility for the first group's debts and lack of assets), execution of the writ had to be discontinued due to insufficient assets. Accordingly, the Constitutional Court has annulled § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., as subsequently amended (the first statement of the judgment).

32. The transitional provisions also violate the principle of legal certainty, as the unconstitutional principle (i.e., that the base for an enforcement official's commission is established without taking into account in any way the situation of the enforcement proceeding) applies to proceedings initiated before the changes came into effect. It is generally known that legal science distinguishes „genuine retroactivity", which includes cases where the legal norm regulates the creation of legal relations created prior to their coming into effect, as well as the claims arising therefrom, from „non-genuine retroactivity", which consists in the fact that legal relations, which came into being while the old law was in effect, are governed by that law up until the time the new law takes effect, after which it is governed by the new law. However, the creation of legal relations, existing prior to the entry into effect of the new legal arrangement, legal claims which arise from these relations, and the legal transactions already carried out are governed by the repealed legal norm. In both cases under adjudication, the claims being collected had already been satisfied while the preceding legal rules were still in effect, and the judicial enforcement officials also gave a statement of account of the costs of enforcement activities (including the commission); their orders were cancelled, however. Their new orders were assessed from the perspective of the amended rules, hence the courts could view as unfounded any objection made with reference to the preceding legal rules. There is no doubt at all that such a construction has shaken confidence in the legal order, because the commissions are governed by legal rules which did not come into effect until after the enforcement officials had already performed all of the legal acts directed at the satisfaction of collected claims. On these grounds, the Constitutional Court has annulled the transitional provisions (the second and third statements of judgment).

33. In the spirit of these rules, the Constitutional Court appeals to the Ministry of Justice to respect, when setting the amount of commissions in the context of its statutory empowerment to issue implementing legislation, the fundamental principles of justice and the law-based state, including the principle of proportionality, which is a modern constitutional principle (which, according to the Constitutional Court's constant jurisprudence, also applies – cf. Judgment in matter Pl. US 33/97, and calls upon the legislature to satisfy it when creating legal enactments - cf. Judgment in matter, Pl. US 61/04). Inspiration therefor can be found in an overview of the course of determination by the Ministry of the level of the commission of advocates and notaries.

34. Nor is the inconsistent judicial practice in relation to „waiver of levying in execution of the writ" (§ 46 para. 3, the first sentence, of Act No. 120/01 Coll.) conducive to legal certainty. The wording of this provision suggests that it is an informal transaction on the part of the enforcement official, which cannot be considered permissible. The moment at which a proceeding in execution concludes must be unequivocally determined (also in relation to third parties, for ex., for the expunging of entries from the land register). Whereas in the proceeding held

before the District Court for Prague 5, by its 5 March 2004 ruling, No. Nc 733/2003-102, the court halted execution of the writ, in the proceeding held before the District Court for Prague 3, no such act was done. The Constitutional Court considers it appropriate for ordinary courts to conduct proceedings on the enforcement of decisions consistently, in accordance with § 268 para. 1, lit. g) of the Civil Procedure Code, and to dismiss proceedings even in the case that a collected claim ceases to exist in the course of the enforcement proceeding because it has been satisfied.

35. For the reasons given, the Constitutional Court Plenum decided, on the basis of § 70 para. 1 of the Act on the Constitutional Court, to annul § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., as subsequently amended, Art. II., point 1. of Regulation No. 233/2004 Coll., and Art. II., point 1. of Regulation No. 291/2006 Coll., as of the day this Judgment is published in the Collection of Laws.

Notice: Decisions of the Constitutional Court cannot be appealed.

Brno 1 March 2007

Dissenting Opinion
of Justice Vladimír Kůrka

This separate opinion is directed exclusively against the first statement of the judgment and is based above all upon the conviction that the majority opinion of the Constitutional Court Plenum grounded its reservation in § 5 para. 1, the second sentence, of Regulation. No. 330/2001 Coll., as subsequently amended (hereinafter „Regulation No. 330/2001 Coll.“), inappositely, as this provision is, from the perspective of the criticisms expressed in the Judgment, as well as the aim pursued therein, of no consequence. After all, it merely serves as the basis for the (general) determination of the commission of enforcement officials, whereas, in contrast thereto, in the decisive connections, it was § 11 para. 1 which was determinative; it was precisely the latter provision‘s purpose to react to the situation about which the Constitutional Court was concerned in both matters („if the obliged person voluntarily performs that which the power of distress imposes upon her . . .“) and only on the basis of that provision was it meant to be made clear that the cost burden on obliged persons, as far as concerns the enforcement official’s commission, lowers such that enforcement officials receive only 50 % of the amount they would be entitled to, if they had actually (by enforcement instruments) exacted the relevant performance. For that matter, in matter No. I. US 639/04, from which emerged the First Panel’s petition pursuant to § 64 para. 1 lit. c) of the Act on the Constitutional Court, the complainant sought precisely that the boon of the provisions of § 11 para. 1, lit. a) of Regulation No. 330/2001 Coll. not be denied her.

The plenary Judgment does not in any sense call into doubt this objective of the provisions of § 11 para. 1 of the Regulation; it is entirely within its rights, however, to criticize it that, by conjoining it with the obliged person‘s duty also „to pay the

costs of enforcement activities“ it is rendered effectively inapplicable, in consequence of which it comes into conflict with Art. 1 para. 1 of the Constitution, as „the creation of unfulfillable conditions for a reduced rate to apply is in conflict with the principle of the law-based state“.

It is therefore precisely the provisions of § 11 para. 1 of the Regulation (and not § 5 para. 1, the second sentence) whose intention is, on the one hand, to take into account the actual reduction of the enforcement officials‘ „efforts“ in procuring the performance of the obligation according to the power to act (which corresponds also to the reduction of his fee) and, on the other hand, to have „educational“ effects on the obliged person, due to the fact the he obtains a certain cost „discount“, if he performs „at the last possible moment“ without being obliged to do so by enforcement.

The provisions of § 5 para. 1, the second sentence, of the Regulation is directed at a dissimilar objective. It is an attempt to eliminate the problem connected with the first sentence of this provision, namely, to explicate the term, „exacted performance“ in situations when, after an enforcement proceeding has already commenced, the obliged person performed the obligation „voluntarily“. The need to supplement the original (single) sentence of § 5 para. 1 came about due to the fact that there was no unity in judicial practice on the issue of whether an „exacted performance“ can be understood exclusively as that which was effectuated within the framework of instruments of enforcement actually carried out (on the basis of the execution orders issued by the enforcement official) or, on the contrary, whether it also included performances provided by the obliged person, although outside of that framework, but under the pressure thereof and in an effort to avert it, when an enforcement official has at the same time already, on the basis of the charge to execute a specific writ, engaged in certain activity. Grounds, which could not be overlooked, existed for placing both on a par with each other, thus, even in the second instance of provided performance, for conceiving of it as „exacted“ (and as forming a part of the „base for the determination of the commission for levying in execution of the writ“ in the sense of § 5 para. 1, the first sentence, of the Regulation). Situations are known which are difficult to distinguish, namely, if the obliged person performs within the framework of the manner in which the execution is levied, or outside of that framework, or „voluntarily“ (cf., for ex. § 325a of the Civil Procedure Code, before the enforcement official resorts to a personal search).

In place of the until then ambiguous interpretation, the second sentence of § 5 para. 1 of the Regulation laid down (from the entry into effect of Regulation No. 233/2004 Coll.) a statutory fiction, which is to consider a performance as „exacted“; the amendment conveys a substantive meaning that could also have been accomplished by interpretation, but which judicial practice had not proved able (timely) to unify.

On a general level, it applies that a legal fiction is permissible, even in terms of the constitutional requirements, if it pursues a legitimate aim, and if it is appropriate, necessary, and proportionate.

It follows from the described difficulty in interpreting § 5 para. 1 in its original wording, and it can also further be substantiated, that the fictions expressed afterward in § 5 para. 1, the second sentence, moreover, as amended by Regulation No. 291/2006 Coll., are tolerable from those perspectives. The concept of an exacted performance, as amended in Regulation No. 233/2004 Coll., reflects first and foremost the circumstance of „non-voluntariness" of the obliged person's performance, if it occurred by the operation of the subjectively intermediated fact of execution (by delivery of the court's writ of execution); a performance „exacted" in the sense of Regulation No. 291/2006 Coll. then proceeds from the fact that at the moment the court issues its writ of execution and charges an enforcement official with executing it, certain „endeavor" or activity by the enforcement official is generally already tied up therewith (cf., for ex., § 35 para. 2, § 44 para. 1 of the Enforcement Code). The acceptability of these fictions is deepened by the observation that only the base of enforcement officials' commissions is determined through them, whereas the reduction thereof, in the case of satisfaction which the obliged person provides in the framework of the Enforcement Code (however, apart from the regime of compelled collection according to the issued enforcement orders), is reserved for the instrument to which the provisions of § 11 para. 1 of the Regulation is directed.

The elimination of the second sentence of § 5 para. 1 of the Regulation can only accomplish the result that the original interpretive problem, namely, what constitutes an „exacted performance", be reopened for judicial practice.

Even if objections can be raised against the specific form of the fiction under § 5 para. 1, the second sentence, of the Regulation (which can be imagined especially in relation to those already established by Regulation No. 291/2006 Coll.), one cannot even disregard the fact that „purposefulness", alternatively „appropriateness" or „correctness", are not, in and of themselves, applicable considerations of constitutionality, that is, of the constitutional review of legal norms.

A constitutional law element can hardly be found in the consideration that, „without the direct participation" of the enforcement official in the obliged person's performance of her obligation, the enforcement official would receive an unjustified preference as against those enforcement officials who „actually" levied execution (as in one case, the latter will be made up of a particular group of people, but in another case, they will be other people, and there is nothing suggesting that they would feel themselves discriminated against), and the prospective absence of any „educative" component in relation to the obliged person clearly does not rise to the level of constitutional law, if, as was already stated, an effective room is reserved for that interest in some other context (§ 11 para. 1 of the Regulation).

A genuine constitutional law argument on the protection of property in the sense of Art. 11 para. 1 of the Charter, bound up with the principle of the protection of the obliged person (not to cause him detriment to a greater extent than is indispensable, etc.), which was otherwise justifiably asserted in the Judgment, has, however, a limit, which cannot be overlooked and is constituted „by enforcement"; protection which is provided to the obliged person is logically

limited by the fact that it attaches to a person who did not voluntarily meet his obligation, so that it was necessary authoritatively to impose it upon him by the power of distress (typically through judicial decision), and which he, nevertheless, did not perform in favor of the entitled person, not even by a further deadline set on the basis of the right. If such a person takes upon himself the risk that execution will be levied against him, it is not unacceptably, even in constitutional law, to connect therewith also the adverse consequences of a further judicial (enforcement) proceeding, which consists in objectively anticipated detriment in terms of costs, including the costs of enforcement activities, as a part of the enforcement official's commission (§ 87 para. 1 of the Enforcement Code). Then it can only with difficulty be deduced that the protection of the obliged persons under Art. 11 para. 1 of the Charter could find expression even in the assessment of which performance, provided after the enforcement proceeding has already commenced, should come within the concept of an „exacted" performance and which should not.

Finally it is appropriate to remark that certain „flat rating" of the costs of a proceeding (whether it appears in the form of the State's cost, which the parties to a court proceeding help to defray by paying court fees, or the costs of representation, which the parties are obliged to pay) are, in relation to court proceedings, accepted by a general consensus, as such „flat rating" captures the objective inability – only for the determination of those costs, that is apart from the actual focal point of the relevant proceeding - satisfactorily (and „practically") to lay down the „actual" or „appropriate" costs, and those corresponding to the effort or expert requirements, whether of the State or the representatives of the parties. Therefore, in these contexts, the „value" of the dispute is traditionally measured by the subject, chiefly expressed monetarily, and not by an estimate of its „actual" expert or organizational demandingness (cf. § 6 of Act No. 549/1991 Coll., on Court Fees; § 7, § 8 of Regulation No. 177/1996 Coll., on the Remuneration of Attorneys and Substitute Attorneys for the Provision of Legal Services; § 3 of Regulation No. 484/2000 Coll., which Lays Down a Flat Rate Remuneration for an Attorney or Notary representing a Party in Decision-Making on the Reimbursement of Costs in a Civil Court Proceeding; § 4 of Regulation No. 196/2001 Coll., on the Remuneration and Substitution of Notaries and Inheritance Administrators; and others). Where a situation arises that is genuinely of the type of lower „demandingness", the mentioned enactments do not look for a „discount" in the reduction of objects, „bases", or „tariff values", etc. (cf. § 5 para. 1 of Regulation No. 330/2001 Coll.), rather in the regime which the provisions of § 11 para. 1 of the same enactment (see § 10 para. 3 of Act No. 549/1991 Coll. or § 13 to § 15 of Regulation No. 484/2000 Coll.) is – in the context – meant to serve.

Stated in summary, it leads to the conclusion that the Judgment's line of reasoning against the provisions of § 5 para. 1, the second sentence, of Regulation No. 330/2001 Coll., is effective neither on the plane of sub-constitutional law nor on the constitutional law plane, and that the ambition to derogate should not have been directed against this provision, rather against § 11 para. 1, to which a significant part of the Judgment's reasoning otherwise applies.

Brno, 1 March 2007