Pl. ÚS 106/20 of 9 February 2021
123/2021 Coll.

State of Emergency in the Time of the Coronavirus Pandemic (restriction of retail sales and services)

The Czech Republic
JUDGMENT
of the Constitutional Court
in the Name of the Republic

The plenum of the Constitutional Court, consisting of Chairman Pavel Rychetský and Justices Ludvík David, Jaroslav Fenyk, Josef Fiala, Jan Filip, Jaromír Jirsa, Tomáš Lichovník, Vladimír Sládeček, Pavel Šámal, Kateřina Šimáčková, Vojtěch Šimíček (judge rapporteur), Milada Tomková, David Uhlíř, and Jiří Zemánek, ruled on 9 February 2021, under file no. Pl. ÚS 106/20, on a petition from a group of senators, represented by Mgr. Eduard Belšán, attorney, with his registered address at Berounská 107, Lány, seeking the annulment of point I./1 of Government Resolution of 16 November 2020 no. 1192, on adoption of an emergency measure, promulgated as no. 465/2020 Coll., point II of Government Resolution of 20 November 2020 no. 1195, on extension of the state of emergency in connection with the epidemic of the SARS CoV-2 virus, promulgated as no. 471/2020 Coll., part of point 2 of Government Resolution of 20 November 2020 no. 1196, amending emergency measures, promulgated as no. 472/2020 Coll., point I./1 of Government Resolution of 20 November 2020 no. 1201, on adoption of an emergency measure, promulgated as no. 477/2020 Coll., point I./1 of Government Resolution of 22 January 2021 no. 57, on adoption of an emergency measure, promulgated as no. 23/2021 Coll., and point I./1 of Government Resolution of 28 January 2021 no. 78, on adoption of an emergency measure, promulgated as no. 31/2021 Coll., with the participation of the Government as a party to the proceeding, as follows:

I. The proceeding on the petition to annul point I./1 of Government Resolution of 16 November 2020 no. 1192, on adoption of an emergency measure, promulgated as no. 465/2020 Coll., point II of Government Resolution of 20 November 2020 no. 1195, on extending the state of emergency in connection with the epidemic of the SARS CoV-2 virus, promulgated as no. 471/2020 Coll., and part of point 2 of Government Resolution of 20 November 2020 no. 1196, amending emergency measures, promulgated as no. 472/2020 Coll., and point I./1 of Government Resolution of 20 November 2020 no. 1201, on adoption of an emergency measure, promulgated as no. 477/2020 Coll., and point I./1 of Government Resolution of 22 January 2021 no. 57, on adoption of an emergency measure, promulgated as no. 23/2021 Coll., is suspended.

II. The provisions of point I./1 of Government Resolution of 28 January 2021 no. 78, on adoption of an emergency measure, promulgated as no. 31/2021 Coll., is annulled as of the day this judgment is promulgated in the Collection of Laws.

Reasoning

I.
Subject Matter of the Proceeding

1. On 21 November 2020 the Constitutional Court received a petition from a group of 63 senators (the "Petitioner") seeking the annulment of point I./1 of Government Resolution of 16 November 2020 no. 1192, on adoption of an emergency measure, promulgated as no. 465/2020 Coll., ("Government Resolution no. 1192"), point II of Government Resolution of 20 November 2020 no. 1195, on extending the state of emergency in connection with the epidemic of the SARS CoV-2 virus, promulgated as no. 471/2020 Coll. ("Government Resolution no. 1195"), part of point 2 of Government Resolution of 20 November 2020 no. 1196, amending emergency measures, promulgated as no. 472/2020 Coll., ("Government Resolution no. 1196"), and point I./1 of Government Resolution of 20 November 2020 no. 1201, on adoption of an emergency measure, promulgated as no. 477/2020 Coll., ("Government Resolution no. 1201").

II.
The Contested Regulations and Subsequent Legislation

2. Government Resolution of 30 September 2020 no. 957, promulgated as no. 391/2020 Coll., ("Government Resolution no. 957") declared a state of emergency in the Czech Republic "for the period from 00:00 hours on 5 October 2020 for a period of 30 days". Government Resolution no. 1195 extended the state of emergency until 12 December 2020, and the contested point II set forth that "all measures adopted because of the state of emergency that are valid as of the day this resolution is adopted shall remain valid in the scope in which they were adopted". In Government Resolution no. 1192, the Government, under § 5 and 6 of Act no. 240/2000 Coll., on Emergency Management and amending certain Acts (the Emergency Act), as amended by later regulations, adopted an emergency measure "with effect as of 18 November 2020 from 00:00 hrs. until 20 November 2020 at 23:59 hrs.", by the contested part of which it prohibited "retail sales and sales and the provision of services in shops", with the exception of shops set forth in point I./1 let. a) to ae). In Government Resolution no. 1196 the Government, under § 5 and 6 of the Emergency Act, in the contested part of point 2, changed the effective period of Government Resolution no. 1192 so that its effective period "is extended until 22 November 2020 at 23:59 hrs.".

3. Further, in Government Resolution no. 1201, the Government, under § 5 and 6 of the Emergency Act, adopted an emergency measure "with effect from 23 November 2020 at 00:00 hrs. until 12 December 2020 at 23:59 hrs.", the contested part of which prohibited "retail sales and provision of services in shops" with the exception of shops set forth in point I./1 let. a) to af).

4. Government Resolution of 30 November 2020 no. 1262, promulgated as no. 498/2020 Coll., adopted an emergency measure "with effect from 3 December 2020 at 00:00 hrs. until 12 December 2020 at 23:59 hrs." that annulled Government Resolution no. 1201, and at the same time, no longer contained a prohibition regarding retail sales and the provision of services analogous to the one that had been set forth in point I./1 of Government Resolution no. 1201.

5. Government Resolution of 23 December 2020 no. 1376, on the adoption of an emergency measure, promulgated as no. 596/2020 Coll., (further "Government Resolution no. 1376"), "with effect as of 27 December 2020 at 00:00 hrs. until 10 January 2021 at 23:59 hrs.", prohibited "retail sales and the provision of services in shops", with the exception of shops set forth in point I./1 let. a) to af). Point I./1 of Government Resolution no. 1376 differs from the abovementioned wording of point I./1 of Government Resolution no. 1201 only in the following:
The exception set forth in let. b) is newly expanded to include "other needs for operating motor vehicles." The exception set forth in let. ad) no longer contains shops selling "Christmas trees, Christmas decorations, mistletoe, evergreen branches and related products."
The closing part – which follows the last exception contained in letter af) – newly contains text reading "with the provision that it is prohibited to sell or provide other goods and services in these shops or establishments; […] this prohibition also does not apply to establishments in which, retail sales and the sale and provision of services that are not prohibited do not represent the exclusive activity in the establishment, but that part of the establishment in which retail sales and the sale and provision of services that are not prohibited are conducted is separated from other parts of the establishment, to which customers are not given access."

6. Government Resolution of 7 January 2021 no. 12, amending emergency measures, promulgated as no. 9/2021 Coll., ("Government Resolution no. 12"), in point 2, changed "with effect as of 11 January 2021 at 00:00 hrs." the effective period of Government Resolution no. 1376 so that the effective period is extended until 22 January 2021 at 23:59 hrs.

7. Government Resolution of 18 January 2021 no. 53, on adoption of emergency measures, promulgated as no. 16/2021 Coll., ("Government Resolution no. 53") "with effect from 19 January 2021 at 00:00 hrs. until 22 January 2021 at 23:59 hrs." prohibited "retail sales and the provision of services in shops", with the exception of shops set forth in point I./1 let. a) to ai). Point I./1 of Government Resolution no. 53 differs from the wording of point I./1 of Government Resolution no. 1376 only in that the prohibition provided three new exceptions, which are as follows:
Exception provided in let. ag): "stationery shops";
Exception provided in let. ah): "shops selling children's clothing and children's footwear";
Exception provided in let. ai): "vehicles of taxi services or other individual contractual personal transportation services".

8. Point III of Government Resolution no. 53 repealed Government Resolution no. 1376.

9. Government Resolution of 22 January 2021 no. 57, on adoption of emergency measures, promulgated as no. 23/2021 Coll., ("Government Resolution no. 57") "with effect from 23 January 2021 at 00:00 hrs. until 14 February 2021 at 23:59 hrs." prohibited "retail sales and the provision of services in shops", with the exception of shops set forth in point I./1 let. a) to aj). Point I./1 of Government Resolution no. 57 differs from the wording of point I./1 of Government Resolution no. 53 only in that the prohibition provided a new exception, as follows:
Exception provided in let. aj): "establishments providing daycare for children up to three years of age".

10. Government Resolution of 28 January 2021 no. 78, on adoption of emergency measures, promulgated as no. 31/2021 Coll., ("Government Resolution no. 78") "with effect from 30 January 2021 at 00:00 hrs. until 14 February 2021 at 23:59 hrs." prohibited "retail sales and the provision

of services in shops", with the exception of shops set forth in point I./1 let. a) to aj). Point I./1 of Government Resolution no. 78 is identical with the wording of point I./1 f Government Resolution no. 57. Point III of Government Resolution no. 78 repealed Government Resolution no. 57.

11. The full text of the contested point I./1 of Government Resolution no. 78 is as follows:
"The Government, with effect from 30 January 2021 at 00:00 hrs. until 14 February 2021 at 23:59 hrs.
I. prohibits
1. retail sales and the sale and provision of services in shops, with the exception of these shops:
a) shops selling food,
b) shops selling fuel and other needs for operating motor vehicles,
c) shops selling fuel,
d) shops selling hygiene products, cosmetics, and other drugstore goods,
e) pharmacies, dispensaries and shops selling health care products,
f) shops selling small domestic animals,
g) shops selling feed and other needs for animals,
h) shops selling glasses, contact lenses, and related goods,
i) shops selling newspapers and magazines,
j) shops selling tobacco products,
k) laundries and dry cleaners,
l) Establishments providing maintenance and repairs of road vehicles,
m) Establishments providing towing and removal of defects in vehicles operated on surface thoroughfares,
n) shops selling replacement parts for means of transport and manufacturing technologies,
o) establishments enabling the pick up of goods and packages purchased remotely,
p) shops selling gardening needs including seeds and seedlings,
q) Sales offices selling transportation tickets,
r) flower shops,
s) establishments for contracting the construction of buildings and their removal, project work in construction, geological works, surveying, testing, measuring, and analysis in construction,
t) shops selling textiles and textile haberdashery,
u) establishments providing service for computers and telecommunications equipment, audio and video receivers, consumer electronics, appliances and other household products,
v) establishments providing real estate services and the activities of accounting consultants, accounting services, tax records services,
w) locksmiths and establishments providing service for other household products,
x) establishments providing repairs, maintenance and installation of household machines and appliances,
y) establishments providing funeral services, embalming and conservation, cremation of human remains or human remnants [post-burial human remains], including placing human remnants in urns,
z) carwashes,
aa) shops selling household products and hardware shops; household products are not considered to include furniture, carpets, and other floor coverings,
ab) establishments providing the collection and purchase of raw materials and composting plants,
ac) establishments performing stonework (e.g. the manufacture of monuments, gravestones, and their installation),

ad) establishments (including mobile ones) selling memorial goods, e.g. wreaths, flower arrangements for graves, memorial candles, etc.; these establishments are not subject to the prohibition on sales in mobile establishments set forth in point I/7,
ae) establishments providing dog and cat grooming and haircutting services,
af) shops selling weapons and ammunition,
ag) stationery shops,
ah) shops selling children's clothing and children's footwear,
ai) vehicles of taxi services or other individual contractual personal transport,
aj) establishments providing daycare for children up to three years of age,
with the provision that it is prohibited to sell or provide other goods and services in these shops or establishments; this prohibition does not apply to activities that are not trades under the Trades Licensing Act; this prohibition also does not apply to establishments in which retail sales and the sale and provision of services that are not prohibited do not represent the exclusive activity in the establishment, but that part of the establishment in which retail sales and the sale and provision of services that are not prohibited are conducted is separated from other parts of the establishment, to which customers are not given access".

III.
The Petitioner's Arguments

12. The Petitioner believes that the restriction of retail sales and services enacted by the contested legislation (the "prohibition") is discriminatory, disproportionate, and irrational, and violates the rights guaranteed in art. 3, 4, 11 and 26 of the Charter of Fundamental Rights and Freedoms (the "Charter"), art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), art. 1 of the Protocol to the Convention, and art. 26 of the International Covenant on Civil and Political Rights.

13. Specifically, the Petitioner also alleges unequal approaches to entrepreneurs based on the criterion of the type of goods sold in shops. According to the Petitioner, the Government did not explain in the contested resolutions or in connection with adopting them why it enacted a prohibition for some shops and why other shops have an exception from the prohibition. The Petitioner considers it incomprehensible why, for example, a hardware shop or flower shop has an exception to the prohibition, but other shops – for example shops selling footwear, winter clothing, washing machines, refrigerators or computers – do not. It is likewise incomprehensible to the Petitioner how the sale of weapons and ammunition or the services of cutting hair for cats and dogs is more essential compared to other categories and goods and services. Thus, according to the Petitioner, the prohibition, without any objective substantiation or rational reasons limits or makes impossible the conduct of business for some persons, while it is not made impossible for others.

14. The Petitioner also finds it discriminatory to maintain the operations of workplaces other than retail and services, when most cases of the spread of the disease occur at workplaces or at home, not in retail or services establishments. According to the petitioner, the Government did not in any way explain why, in light of that fact, it decided to close retail and services establishments instead of at least partially closing other kinds of workplaces. If the reason for applying the prohibition is to limit the spread of disease, the prohibition should have applied only to the highest risk areas of

business, and thus led to primarily the closure of large workplaces, and not the establishments of small business owners.

15. The Petitioner sees an unequal approach to business owners based on the different range of products sold because the basic principle of the prohibition is that it is aimed at business owners and their establishments based on the predominant type of goods sold, regardless of what kind of supplemental goods they sell. According to the petitioner, this approach impermissibly and illegally discriminates against smaller retailers with a narrower range of goods compared to large retail chains which, in an establishment that falls under an exception from the prohibition, also offer goods that small sellers are prevented from selling. Even after the prohibition ends, the market will continue to be distorted, in that privileged business owners with exceptions to the prohibition will take over the customers of business owners who go out of business, who were not given an exception, and who simply did not last out the prohibition due to their business situation.

16. According to the Petitioner, legal conditions for issuing the contested resolutions, or for imposing a prohibition, were not met at all, because under § 5 let. e) of the Emergency Act it is not permitted to restrict the right to conduct business activity that does not endanger or violate the implementation of emergency measures. The Petitioner claims that, even without the prohibition, the implementation of emergency measures would not be endangered, nor would their implementation be disrupted or prevented, nor does the Government claim any such thing, and it does not document how business activity subject to the prohibition, is supposed to endanger or disrupt some of the emergency measures adopted.

17. Finally, the Petitioner also alleges violation of the principle of legality due to the uncertainty of the prohibition, as entrepreneurs are exposed to distinct uncertainty as to whether they are subject to the prohibition or not. The Petitioner adds that the government gave an exception for household goods, but neither the government resolution nor other legal regulations define what is meant by an establishment selling household goods. Therefore, the prohibition cannot be considered precise, and its application is not predictable, as required by the case law of the European Court of Human Rights. The Petitioner believes that the procedure where the contested government resolutions were not published more than a few hours before they went into effect is disproportionate and impermissible, also in view of the impacts of the prohibition on its addressees, who objectively do not have an opportunity to become familiar with their individual obligations in order to be able to react to them in an appropriate time. In this context, the Petitioner also doubts whether the prohibition meets the condition of providing the necessary means of legal protection from arbitrary interference in property rights by the public authorities.

18. In conclusion the Petitioner states that it maintains its petition is reviewable even if the contested government resolutions cease to be valid. For one thing, the Petitioner states that, assuming the state of emergency continues and the emergency measure is valid – or another legal regulation announced within the state of emergency that contains at least partly identical subject matter regulation and to that extent has the same legal consequences – this petition is reviewable in accordance with the decision-making practice of the Constitutional Court and the constitutional order, and proceedings about it cannot be suspended before a decision is issued, at least as regards that part in which the analogous legal regulation is valid at the time the decision is issued. The Petitioner is also of the opinion that the Constitutional Court is required to issue a decision in the matter and not suspend the proceeding even if there is an end to the state of emergency and related

emergency measures proposed to be annulled in the proceeding. According to the Petitioner, even in that case, if the intervention is as intensive as in the presently adjudicated matter, it is necessary that the Court duly rule, despite the termination of validity of the contested government resolutions, because otherwise justice would be denied and protection of constitutionality would not be provided.

IV.
Course of the Proceeding before the Constitutional Court

19. The Constitutional Court sent the adjudicated proposal to the Government, as a party to the proceeding, and to the Public Defender of Rights, as a body that is entitled to join the proceeding as a secondary party.

20. The Public Defender of Rights informed the Constitutional Court that he would not join the proceeding.

21. In its statement of 22 December 2020, the Government proposed suspending the proceeding on the grounds that the contested provisions are no longer in effect and were replaced by other measures. Insofar as the Petitioner, in its submission, seeks to have the Constitutional Court rule on the contested provisions on the merits even after they have ceased to be valid, the government points to Constitutional Court resolution of 8 December 2020 file no. Pl. ÚS 102/20 (Constitutional Court decisions are available at https://nalus.usoud.cz), in which the Constitutional Court states that such a step would be inconsistent with the essence of abstract review of norms.

22. The Government also presented reasons due to which it finds the contested legislation to be constitutional. In its statement it states that it is aware that the adopted emergency measures significantly interfered in the fundamental rights and freedoms of individuals, but the Government believes that in this case that was outweighed by the public interest in the protection of lives and health, i.e., the adopted measures were proportionate to the aim of preventing possible extensive health consequences among the population. It is not appropriate to evaluate emergency measures concerning retail shops and services, issued by the government during the state of emergency, always for a narrowly defined period of time, by applying a strict proportionality test. In the case of government emergency measures, when evaluating the step of necessity as a rule it would never be possible to reach a clear conclusion, or only after a long interval of time, at a point when the international expert community agrees on a universal, necessary and suitable solution. During a state of emergency the government must have a sufficient degree of discretion, both concerning the choice of individual measures and concerning their scope, in order to be able to respond flexibly to the dynamic development of the spread of the virus, the behavior of the population, new information about the virus, and a number of other circumstances that affect coping with the pandemic. During states of emergency it is not possible to wait for a point when there is a full analysis of all steps under consideration and precise and thoroughly substantiated evaluation of the effects of individual steps on the health and lives of persons, on freedom of movement, on economic effects, etc.; otherwise no emergency measures could be issued in a timely manner. In its submission, the Petitioner is de facto asking the Constitutional Court to annul the government's decisions concerning specialized, strategic, and security issues, and replace them with its own thoughts on the need for specific anti-epidemic measures.

23. Therefore, the contested government resolutions can be reviewed only through the lens of the rationality test, specifically in its deferential form, aimed at determining whether a given restriction of a fundamental right has a legitimate aim and whether the means applied can be considered reasonable, not necessarily the most suitable or essential for achieving this aim. In this case the legitimate aim is preventing or at least mitigating the spread of the highly contagious respiratory disease COVID-19, preventing the collapse of the health care system and extensive damage to the health of the population. In this case the means selected to achieve this aim is a prohibition of retail sales and the provision and sale of services that, based on a consensus reached by the government and its consulting bodies, are not considered essential for the daily living needs of the population in a state of emergency. The Government adds that there is no uniform universal list that would, for example, define across Europe what is a daily living need of the population; thus, defining the shops and services that are essential for everyday life during a pandemic is a decision by the political representation. Although the Petitioner claims that there is minimal risk of infection in retail shops and services, the increased mobility of persons and visits to establishments in which personal meetings take place represent a significant factor in the spread of disease. Likewise, an international comparison shows that, although closing the operation of retail shops and services is not the most effective solution, together with other restrictions on meetings and movement, it is part of a set of measures for slowing the spread of the epidemic. Moreover, this prohibition was limited by a relatively short time period, and in order to mitigate the effects of this significant interference in the right to conduct business, caused by the absolutely exceptional current situation, a number of supporting programs were adopted, the aim of which is to provide at least basic income to the affected business owners while the state of emergency and the emergency measures continue, and further compensation is still under discussion as well. The Government also states that while the contested measures were in effect, there was an exception to the prohibition on retail sales that permitted the continuing operation of establishments that provided the possibility to pick up goods and packages purchased remotely. The affected business owners would undoubtedly face a considerable drop in revenue even without the explicit prohibitions, because the pandemic massively affected all business sectors regardless of state intervention, and also affected the consumer behavior of the population.

24. According to the Government, one can conclude that achieving the selected legitimate aim, i.e. the public interest in protecting the health of the population, could be reasonably pursued through the enacted restrictive measures – the closure of retail shops and services. These specific restrictive measures played an irreplaceable role in the set of all measures adopted at the time, when the Czech Republic was struggling with the uncontrollable spread of the COVID-19 infection. Although from a later evaluation they may appear (as the Petitioner attempts to argue) as not necessarily the best, most suitable, and most necessary, in the Government's opinion at the time they met the criteria of rationality and contributed to achieving the aim pursued, as during the period in question the curve of infected and hospitalized persons began to decline (with a time delay, of course).

25. Regarding the claim that the prohibition is uncertain the Government states that the precision of legislation need not be absolute. The provisions of legislation may require interpretation, and private subjects may also be forced to obtain legal advice regarding how they are to conduct themselves on the basis of these norms, which applies all the more so to business owners (Lekič v. Slovenia, no. 36480/07, judgment of the Grand Chamber of the European Court of Human Rights of 11 December 2018, § 97). It is difficult to evaluate this aspect before it becomes apparent what

kind of decision making practice develops on the basis of the relevant provisions. According to the Government, it does not detract from the principle of legality under article 1 of the Protocol to the Convention if business owners interpret the contested prohibition more broadly. Likewise, accessibility and foreseeability must be evaluated in light of the methods of publication used for the contested regulations and the ability of business owners to react to the changes to legislation (Špaček, s. r. o., v. the Czech Republic, no. 26449/95, judgment of the European Court of Human Rights of 9 November 1999, § 57–60).

26. In its reply of 11 January 2021 the Petitioner largely develops its original arguments. In response to the part of the Government's statement, where the Government describes the emergency measures as an effective means of preventing infection, and thus protecting lives and health, the Petitioner responds that the Government does not at all consider that the real destruction of retail and establishments providing services will worsen the financial situation of a substantial part of the population of the Czech Republic and its public budget, with effects on the health care systems, which also has negative effects on people's lives and health. In this regard the Government also does not take into account the threat of increasing numbers of suicides, heart attacks, etc. Regarding the next part of the Government's arguments, the Petitioner objects that the prohibition is also directed at shops that serve only single-digit numbers of customers daily, and pose no danger of gatherings of persons in numbers of 10 and more. Moreover, according to the table submitted by the Government, it is evident that closing schools would be many more percent effective than closing shops and establishments providing services, and yet schools were opened earlier than retail shops and services, and in this sense the Government's arguments are also illogical. The Petitioner also disagrees with the Government's assertion that it cannot wait for relevant data when issuing measures, because in the Petitioner's opinion this is a situation where citizens' rights are restricted without the standard legislative process and with extreme effects on the entire society.

27. Further to the Government's pointing to analogous regulation abroad, the Petitioner states in its response that in countries where retail sales and services establishments were not closed in a manner similar to the contested provisions the numbers of infected persons per capita were lower than in the Czech Republic, and therefore this restriction for preventing the spread of the epidemic cannot be considered essential. Finally, as regards the Government's assertion that the precision of the regulation does not have to be absolute, the Petitioner states that in this case, where, in view of the state of emergency and the manner of issuing the legal norms in question, Parliament is practically circumvented, rights and obligations must be set forth in an unambiguous manner that rules out arbitrariness. In this regard the Petitioner again points to the extreme uncertainty in the interpretation of the term "household goods."

28. The Petitioner also states that the contested emergency measures also lead to discrimination among consumers, as there are groups of persons who are not able to order goods in e-shops, and thus lost access to certain kinds of goods, compared to other consumers. In the conclusion of its response, the Petitioner states that after it submitted its original petition, the Government made the situation even worse, because it restricted the sale of, for example, clothing for newborns in any establishments whatsoever, regardless of the focus of the shop in question, and thus this kind of goods can be purchased only in an e-shop, which does not solve the sudden need of such goods after the birth of a child.

29. In response to the fact that the contested government resolutions were no longer in effect, the Petitioner submitted a request to allow an amendment to the petition, in which it also proposes annulment of point I./1 of Government Resolution no. 1376, because it sets forth legal regulation that is materially analogous to the legal regulation already contested in the original petition, and considers it inconsistent with the constitutional order for the same reasons. The Petitioner also asks to expand its filing by a petition to annul point 2 with introduction and postscript of Government Resolution no. 12, because the Government thereby extended the effective period of Government Resolution no. 1376 until 22 January 2021. In this regard the Petitioner cites Constitutional Court judgments of 20 November 2002 file no. Pl. ÚS 8/02 (N 142/28 SbNU 237; 528/2002 Coll.) and of 8 March 2006 file no. Pl. ÚS 50/04 (N 50/40 SbNU 443; 154/2006 Coll.). The Petitioner also notes that it is not true that all of the originally contested government resolutions ceased to be valid, because Government Resolution no. 1192, no. 1195 and no. 1196 were never derogated and are still valid, even if not in effect.

30. In response to the Petitioner's response and request to amend the petition, on 25 January 2021 the Government submitted another statement, in which it does not contest the Petitioner's request to expand its petition, but continues to point out that the contested Government Resolution no. 1376 was already annulled and replaced by Government Resolution no. 53. Therefore, the Government proposes that the Constitutional Court suspend the proceeding. In subsequent parts of its statement the Government repeats some of its previous arguments and also points to the fact that recent expert research confirms that reducing mobility and the meetings of people in shops is of fundamental importance for stopping the spread of disease. In this regard the Government also emphasizes that the overall current situation definitely does not allow the contested measures to be dramatically relaxed, as the petitioner requests, because the burden on health care facilities is extremely high. Regarding the objection that the prohibition is uncertain in connect with the term "household goods" the Government states that the situation is sufficiently addressed by information provided to business owners by the Ministry of Industry and Trade, through a chart published on the Ministry's webpage, which contains explanations of certain terms, including the term "household goods". The Government devotes the remaining part of its statement to an overview of the ongoing compensation programs which, in its opinion, mitigate the burden that the prohibition of retail and services represents for business owners, and help to bridge the emergency period and to prevent existential problems for business owners affected by the Government's emergency measures and the pandemic situation.

31. On 21 January 2021, 25 January 2021 and 4 February 2021 the Petitioner filed with the Constitutional Court new supplements to its petition, including a request to permit an amendment to its petition, in which it also proposes annulment of point I./1 of Government Resolution no. 53, point I./1 of Government Resolution no. 57, and finally point I./1 of Government Resolution no. 78, because these are legal regulations analogous to the legal regulation already contested by the petition, and the Petitioner considers it unconstitutional for the same reasons that it set forth in its previous submissions. In these submissions the Petitioner also develops its previous objections concerning the senselessness of the prohibition, which, in its opinion, is not supported by objective necessity, but only by unorganized and random requests from various persons. The Petitioner presents assertions that it is not defensible for the exceptions not to include hairdressing, massage, and similar services, as well as establishments providing pre-school care for children over 3 years of age. Analogously, it makes no sense for the exceptions to include only children's clothing and footwear, and not clothing and footwear for adults. The Petitioner criticizes the term "children's

clothing and footwear" for being uncertain. In the remaining parts of these submissions the Petitioner sets forth an additional assortment of goods (electronics, books, sporting goods) that, in its opinion, should be included in the exceptions to the prohibition.

V.
Change of Judge Rapporteur

32. Based on the docket the petition was assigned to Justice Jaroslav Fenyk as judge rapporteur. However, when reviewing the matter on 9 February 2021 the plenum did not accept his proposed judgment. Therefore, the Chairman of the Court, under § 55 of Act no. 182/1993 Coll., on the Constitutional Court, assigned Justice Vojtěch Šimíček as the new judge rapporteur.

VI.
Procedural Prerequisites for a Proceeding before the Constitutional Court

33. The Constitutional Court has already repeatedly considered the question of whether a government resolution adopting emergency measures is an act that can be subject to a proceeding to annul a statute or other legislation under § 64 et seq. of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Constitutional Court Act"). In resolution file no. Pl. ÚS 20/20 of 16 June 2020 it stated that government resolutions on emergency measures that directly interfere in fundamental rights and freedoms or that create a legal basis for such interference through an individual administrative act can have various forms and content, wherefore they cannot be collectively classified under a single category of legal acts. In terms of proceedings before the Constitutional Court, depending on their content, they may be reviewable either as legislation, or as a decision or other intervention by a public authority. The Constitutional Court must review the nature of the emergency measure in each individual case, based on its content.

34. The contested parts of the contested Government Resolutions no. 1192 and no. 1201 are a general regulation governing its subject matter and subjects by defining traits, applicable to the entire territory of the Czech Republic and an unlimited number of persons. Thus, this is legislation that can be contested in a proceeding on abstract review of norms.

35. This petition was filed by a group of 63 senators. In accordance with § 64 par. 5 of the Constitutional Court Act, as amended by Act no. 320/2002 Coll., it added a signature page on which each of the senators individual confirmed that he or she was joining the petition. Thus, the group of senators meets the condition of active standing.

36. The Constitutional Court also had to consider the fact that the contested resolutions no. 1192 and no. 1201 are no longer in effect. Under § 67 par. 1 of the Constitutional Court Act proceedings to annul statutes and other legislation shall be suspended if the statute, other legislation, or individual provisions thereof proposed to be annulled cease to be valid before the proceeding before the Constitutional Court is finished. Aware of this, the Petitioner asked the Constitutional Court during the proceeding to permit an amendment to its petition so that it sequentially also proposed annulment of point I./1 of Government Resolution no. 1376, point 2 of Government Resolution no.

12, point I./1 of Government Resolution no. 53, point I./1 of Government Resolution no. 57, and finally point I./1 of Government Resolution no. 78.

37. In cases in the past when, during a proceeding, a new regulation with identical content was issued in place of a regulation that was no longer valid, the Constitutional Court permitted an amendment to a petition, and, in accordance with it, continued the proceeding with the new regulation (judgment of 20 November 2002 file no. Pl. ÚS 8/02). The Constitutional Court reached a conclusion to proceed accordingly with the presently adopted emergency measures, which typically have a relatively short "lifespan". In its resolution of 8 December 2020 file no. Pl. ÚS 102/20 the Constitutional Court stated that if a contested emergency measure is annulled during the course of a proceeding before the Constitutional Court, the procedural steps taken by the Constitutional Court also depend on the petitioner's actions, in the sense that, if a norm with identical or analogous content is incorporated in the new emergency measure, basically nothing prevents the petitioner from supplementing its petition accordingly.

38. In the present case, point I./1 of Government Resolution no. 57 adopted a new legal regulation which is – with certain exceptions – analogous to the previous regulation. Nonetheless, as a result of the short "lifespan" of emergency measures, as of today Government Resolution no. 57, is also no longer in effect, having been replaced by Government Resolution no. 78, but the contested point I./1 is identical in both resolutions.

39. In view of the foregoing, the Constitutional Court did not independently call on the Government for a statement regarding this last amendment to the petition. If it were to do so, this would lead to an absurd situation where the matter could not be decided because of repeatedly giving an opportunity to the Petitioner, and possibly also to the Government, to respond to emergency measures that were changing regularly at short intervals. Therefore, the Constitutional Court permitted the subject amendment to the petition directed against Government Resolution no. 78, and subjected the contested part to constitutional review.

40. As regards the contested parts of Government Resolution no. 1192 and no. 1201, review of the petition is prevented by the fact that these resolutions have already ceased to be valid under § 67 par. 1 of the Constitutional Court Act, and therefore this part of the proceeding was suspended. We must reach the same decision to suspend the proceedings as regards the part of the petition directed against point II of Government Resolution no. 1195 and part of point 2 of Government Resolution no. 1196, regarding which the Petitioner applies arguments that are basically directed only against the contested parts of the no longer valid Government Resolution no. 1192 and no. 1201, prohibiting retail sales and the provision of services in shops. Specifically, the Petitioner seeks the annulment of part of point 2 of Government Resolution no. 1196 on the grounds that it led to the extension of the effective period of Government Resolution no. 1192, or that the last-named resolution was amended to that effect by Government Resolution no. 1196. Also taking into account the fact that an amendment to legislation does not have independent normative existence but becomes part of the amended norm [cf. e.g., judgment file no. Pl. ÚS 5/96 (N 98/6 SbNU 203; 286/1996 Coll.), resolution file no. Pl. ÚS 25/2000 (U 27/19 SbNU 271), judgments file no. Pl. ÚS 21/01 (N 14/25 SbNU 97; 95/2002 Coll.), file no. Pl. ÚS 33/01 (N 28/25 SbNU 215; 145/2002 Coll.)], we must apply to the amending Government Resolution no. 1196 the decision to suspend proceedings, which was already stated above regarding the amended Government Resolution no. 1192. Finally, as regards point II of Government Resolution no. 1195, the proceeding must be

suspended for the reason that this is a regulation concerning the extension of a state of emergency – declared by Government Resolution no. 957, which was thus extended until 12 December 2020 – and therefore it is a time-limited legal norm, which is also subject to the obstacle to review under § 67 par. 1 of the Constitutional Court Act, just as in the case of government resolutions that ceased to be valid due being repealed by the Government. Although the state of emergency declared by Government Resolution no. 957 was extended subsequently, most recently by Government Resolution of 22 January 2021 no. 55, promulgated as no. 21/2021 Coll., until 14 February 2021, the possible expansion of the petition to also include annulment of the later, presently still effective extension of the state of emergency does not come into consideration, in view of the abovementioned nature of the objections that the Petitioner raises against the extension of the state of emergency. In any case, the Petitioner itself did not make any such request of the Constitutional Court.

41. The Constitutional Court did not expect further clarification of the matter from a hearing, and therefore waived it under § 44 first sentence of the Constitutional Court Act.

VII.
Review of the Constitutionality of the Adoption and Issuing of the Emergency Measures

42. In a proceeding on the review of norms the Constitutional Court, under § 68 par. 2 of the Constitutional Court Act, as amended by Act no. 48/2002 Coll., first evaluates whether the contested legislation was adopted and issued within the bounds of constitutionally provided jurisdiction and in the prescribed manner.

43. The Petitioner objects that the condition in § 5 let. e) of the Emergency Act was not met at all for the issuance of Government Resolution no. 78, or for imposing the prohibition contained in it; per that condition, the right to conduct business activity can be restricted only if that activity threatens implemented emergency measures or disrupts or prevents the implementation of emergency measures. Under § 6 par. 1 let. b) of the Emergency Act the Government is authorized to use emergency measures to, among other things, prohibit entry to defined places. That authorization can also include prohibiting entry to establishments with retail sales and the provision of services. Such a prohibition undoubtedly also means or requires the restriction of the right to conduct business activity. In other words, without such a restriction of the right to conduct business activity the prohibition in question – incorporated in the emergency measure – would be impossible. This meets the condition for restricting the right to conduct business activity contained in § 5 let. e) of the Emergency Act. Nothing about this conclusion can be changed by the manner in which the prohibition in the emergency measure in the present case is formulated, i.e. that entry into shops is ruled out not by being directly prohibited, but by a prohibition on conducting the relevant business activity. Therefore, regarding this objection by the Petitioner the Constitutional Court concludes that setting the prohibition contained in point I./1 of Government Resolution no. 78 is within the Government's jurisdiction to issue emergency measures.

44. Also directed against the process of issuing Government Resolution no. 78 is the Petitioner's objection that it is impermissible for an emergency measure, in view of the effects of the prohibition it contains, to be published only a few hours before it takes effect, whereby its addressees are deprived of the opportunity to prepare and react to it.

45. A decision on emergency measures under § 6 par. 1 of the Emergency Act, under § 8 of the Act, is published in mass media and promulgated in the same manner as a statute, i.e. by promulgation in the Collection of Laws. Therefore, an emergency measure becomes valid on the day it is promulgated in the Collection of Laws, and the day of promulgation is the day the relevant part of the Collection of Laws is distributed, set forth in its heading [§ 1 and 3 of Act no. 309/1999 Coll., on the Collection of Laws and the Collection of International Treaties, as amended by later regulations, (the "Act on the Collection of Laws")]. Under § 8 of the Emergency Act, emergency measures go into effect at the time specified in the decision.

46. Thus, as regards the question of the manner and time of announcing an emergency measure, the Emergency Act refers to the legal framework established for promulgating statutes, contained in the Act on the Collection of Laws. In contrast, as regards the question of the entry into effect of an emergency measure, the Emergency Act contains its own legal framework, under which decisions on emergency measures go into effect at the moment specified in them. Compared to the legal framework for statutes to take effect, the Emergency Act does not set forth conditions under which an emergency measure can take effect as soon as the day after it is promulgated, or even at the moment it is promulgated. Thus, the Emergency Act does not in any way expressly limit in what cases an emergency measure may take effect immediately. Nonetheless, in view of the fact that the Government is authorized to issue emergency measures when a state of emergency exists, and in response to the crisis situation that caused the state of emergency, as a rule, with such measures the circumstance will exist which, with statutes, fulfils the condition for them to go into effect at the moment they are promulgated – i.e., if a regulation is issued in connection with a declared state of emergency (§ 3 par. 4 of the Act on the Collection of Laws and the Collection of International Treaties, as amended by Act no. 277/2019 Coll.).

47. In the present case, Government Resolution no. 78 was promulgated on 28 January 2021 and went into effect on the second day after promulgation, i.e. 30 January 2021. Nonetheless, it is appropriate to emphasize that the effective period of Government Resolution no. 78 followed on to the effective period of Government Resolution no. 57, containing the identical regulation. Thus, in the case of Government Resolution no. 78 one cannot say that it was impossible for its addressees to prepare for the regulation, in the sense in which the Petitioner makes this objection (the Petitioner originally directed this objection against Government Resolution no. 1201). Therefore, the legislative gap of the emergency measure cannot be considered unconstitutional in terms of its length.

VIII.
Substantive Review of the Petition

48. The Constitutional Court considered the Petitioner's objects that point I./1 of Government Resolution no. 78 disproportionately and irrationally interferes in the right to conduct business [commercial and economic activity] under art. 26 of the Charter, because the regulation in question is neither effective nor necessary and its negatives outweigh its positives, and the situation could be resolved by a milder intervention or restrictions in a different area. The Petitioner sets the violation of this fundamental right into the context of violation of the right to equal treatment (the prohibition of discrimination); thus, it asserts that the violation of the right to conduct business lies

not only in the nature and intensity of the interference, but also in the fact that the rights of various groups of business owners are interfered with in different degrees, without the existence of a rational and proportional reason for such differentiation.

49. First of all the Constitutional Court had to evaluate whether the Government even could interfere in the right to conduct business through the contested measure. Regarding that, the Constitutional Court states that under art. 6 of Constitutional Act no. 110/1998 Coll., on the Security of the Czech Republic, (the "Constitutional Act on Security"), when it declares a state of emergency the Government must simultaneously define which rights set forth in the special statute and in what scope are being restricted, in accordance with the Charter of Fundamental Rights and Freedoms, and which obligations, and in what scope, are being imposed. Also, § 5 of the Emergency Act permits the Government to restrict the right to conduct business only "to the extent necessary".

50. In resolution file no. Pl. ÚS 8/20 of 22 April 2020 the Constitutional Court stated (point 26) that "declaration of a state of emergency by the government is […] primarily an act of application of constitutional law; it represents 'an act of governing' that has a normative effect, is fundamentally not subject to review by the Constitutional Court, and is 'reviewable' primarily by a democratically elected political ('nonjudicial') body, which is the Chamber of Deputies. If the legislature did not set a suitable standard for judicial review in the form of special procedural rules, the traditional constitutional review of proportionality cannot be applied to a political decision on a state of emergency. The Government bears political responsibility for the declaration of a state of emergency, because it is answerable to the Chamber of Deputies (art. 68 par. 1 of the Constitution), which can then fulfil the review role under art. 5 par. 4 of the Constitutional Act on the Security of the Republic." In the same resolution the Constitutional Court stated (points 29 and 30) that "the steps taken by the Government, which first issued a separate decision to declare a state of emergency and subsequently set specific emergency measures that implicitly restricted fundamental rights (and their scope) and which simultaneously imposed obligations (and their scope) is not unconstitutional. […] Thus, we can conclude that if the decision on a state of emergency, under art. 6 par. 1 of the Constitutional Act on the Security of the Republic, does not itself directly contain emergency measures, direct and 'isolated' review of it by the Constitutional Court is fundamentally ruled out, because in that case there is primarily a governing act of a political nature. In contrast – if specific emergency measures were set forth directly in the decision about a state of emergency, review by the Constitutional Court could not be ruled out absolutely as regards the part of the decision that contained specific emergency measures containing generally binding normative rules of conduct, which, however, is not the case of the present matter."

51. Likewise, in the present matter, Government Resolution of 30 September 2020 no. 957 (no. 391/2020 Coll.) indicates that the Government first issued a separate decision declaring a state of emergency, and only subsequently established specific emergency measures that restricted fundamental rights. Nonetheless, the Constitutional Court, maintains the abovementioned legal opinion that such steps are not unconstitutional.

52. The next step of review on the merits of the contested legislation is review of whether the interference in the asserted fundamental rights is consistent with their constitutional guarantees. In its previous case law the Constitutional Court emphasized that the right to conduct business is included in Chapter Four of the Charter, among the economic, social, and cultural rights, and it is

also one of the economic, social and cultural rights listed in art. 41 par. 1 of the Charter. Therefore, it is not directly applicable in the same scope as fundamental human rights or political rights. The regulation of these rights is primarily in the hands of the legislature, and the constitutional guarantee of economic, social, and cultural rights can only secondarily be considered a judicial issue. However, even in the case of fundamental rights under art. 26 par. 1 of the Charter the requirement arising from art. 4 par. 4 applies, that in setting limits on these rights their essence and significance must be preserved [judgments of 12 December 2017 file no. Pl. ÚS 26/16 (N 227/87 SbNU 597; 8/2018 Coll.); file no. Pl. ÚS 7/17 of 27. 3. 2018 (N 55/88 SbNU 727; 81/2018 Coll.)].

53. In the cited judgment file no. Pl. ÚS 26/16 the Constitutional Court, continuing on from older case law, set out that the essence and significance of the right to conduct business comprise both the purely individual level (the individual's opportunity for self-realization) and the material law level, because this individual freedom is also a substantive requisite of a democratic law- based state, and the economic level (in simplified terms, the earning of profit, which is partly taxed so that the state acquires the funds for fulfilling its functions). In other words, with the right to conduct business and other economic activity, there would be a limitation affecting its essence and significance if, as a result, a particular activity ceased to be capable of securing means of support for those who conduct it [judgments of 8 December 2015 file no. Pl. ÚS 5/15 (N 204/79 SbNU 313; 15/2016 Coll.), point 48, or of 23 May 2017 file no. Pl. ÚS 10/12 (N 82/85 SbNU 393, 207/2017 Coll.), point 66].

54. In addition the Constitutional Court states that the prohibition contained in point I./1 of Government Resolution no. 78, under which the particular kind of business activity cannot be conducted in a shop, in a number of cases means that it de facto makes it impossible to conduct the gainful activity as such, or at least very considerably reduces the opportunity to secure resources for the needs of these retail sales operators and services providers: for example, some products either cannot be sold remotely at all, or only with considerable difficulties; also (as the Petitioner stated in its response of 11 January 2021), among consumers there are people who are not able to order the goods they need electronically, and they are thus at a considerable disadvantage compared to other consumers. Thus, there is no doubt – nor does the Government deny it – that the contested provision interferes in the right to conduct business. Moreover, one can state that after the implementation of the present prohibition a relevant part of retail operators and services providers were not able to secure means to support themselves through their business activity [cf. judgment of 8 August 2017 file no. Pl. ÚS 9/15 (N 138/86 SbNU 333, 338/2017 Coll.)]. Thus, the contested prohibition affects the very essence and significance of the right to conduct business.

55. At the same time, however, it must be added that no fundamental right exists in isolation, and therefore the Constitutional Court performs a balancing of individual conflicting fundamental rights. In the present matter, the Government argues that the conflict rights include primarily protection of health (art. 31 of the Charter) and even the right to life (art. 6 par. 1 of the Charter). Therefore, the Constitutional Court had to make this comparison of conflicting fundamental rights.

56. However, as the Constitutional Court already indicated above, a conclusion on the constitutionality of the contested legal regulation cannot be reached only by evaluating the justification and intensity of interference in the rights of individual groups of business owners as such. The second substantive level of the entire matter is the question of whether the differentiation

between individual groups of business owners was constitutional (i.e. the prohibition of discrimination).

57. The Constitutional Court points out that in judgment file no. Pl. ÚS 18/15 of 28 June 2016 (N 121/81 SbNU 889; 271/2016 Coll.; points 99–102) it considered in detail the description of how alleged interference in the right to equal treatment needs to be reviewed. It stated that the constitutional right to equal treatment is guaranteed both in art. 1 of the Charter as an independent fundamental right, which can be claimed directly without anything further (non-accessory equality), and as a conditional fundamental right, which can be claimed under art. 3 par. 1 of the Charter only in connection with alleged interference in another fundamental right or freedom protected by the Charter (accessory equality). In view of the fact that in its case law the Constitutional Court, in addition to constitutional protection of equality in the fundamental rights under art. 3 par. 1 of the Charter, also recognized constitutional protection of equality in all rights, or the general prohibition of arbitrariness under art. 1 of the Charter, merely distinguishing accessory or non-accessory equality in a proceeding on review of legislation before the Constitutional Court is not decisive, because all possible objections based on art. 3 par. 1 of the Charter are always normatively "covered" by art. 1 of the Charter, whose scope is wider by its nature. Therefore, the intensity of constitutional review does not primarily depend on the fact whether the unequal treatment occurs in relation to another constitutionally guaranteed right (accessorily) or not (non-accessorily). The key thing is the reason for the different treatment, that is, the specified distinguishing element, and also the specific right or value in relation to which the different treatment occurs. This then has to correspond to the requirements placed by the Constitutional Court on documenting the legitimacy (justification) of different treatment [judgment file no. Pl. ÚS 18/15, points 100–101; analogously judgment file no. Pl. ÚS 5/19 of 1 October 2019 (303/2019 Coll.), point 51].

58. When reviewing whether the right to equal treatment was violated because of the distinguishing criteria used in legislation, we must assess whether 1. the individuals or groups are comparable; 2. they have been treated differently, and on what grounds; 3. whether the different treatment is to the detriment of certain individuals or groups (by imposing a burden or denying a benefit); 4. whether this different treatment is justifiable, that is, a) it pursues a legitimate aim, and b) it is proportionate [cf. analogously judgment file no. Pl. ÚS 49/10 of 28 January 2014 (N 10/72 SbNU 111; 44/2014 Coll.), point 34; judgment file no. Pl. ÚS 4/17 of 11 February 2020 (148/2020 Coll.), point 173; judgment file no. Pl. ÚS 30/16 of 7 April 2020 (254/2020 Coll.), point 136]. How intensive the review of the proportionality of different treatment will be will depend primarily on the reason applied for the different treatment, and also on which specific right or value the different treatment affects. A requirement for a rational relationship between the legislation and the aim pursued, that is, whether it can contribute to achieving it in some way, will mean a lower degree of intensity [cf. analogously judgment file no. Pl. ÚS 15/15 of 30 January 2018 (N 12/88 SbNU 171; 62/2018 Coll.), point 38; judgment file no. Pl. ÚS 7/03 of 18 August 2004 (N 113/34 SbNU 165; 512/2004 Coll.)], thus, it need not necessarily be the best, most suitable, most effective, or wisest solution. The requirement of proportionality in relation to the aim pursued will then mean a higher degree of intensity.

59. In the present matter, the essence of the emergency measure (or its contested parts) consists of a complete prohibition of retail sales and the sale and provision of services in shops, with 36 exceptions to the prohibition.

60. In view of the abovementioned discrimination test, the Constitutional Court considers it undisputed that the contested regulation affects comparable individuals and groups, i.e. the providers of the services in question. Likewise, the second step has been met, i.e. they are treated differently, because some of them are forbidden to conduct their business activity and some, on the contrary, are permitted. The Constitutional Court has already addressed the question of different treatment being to the detriment of these subjects (point 54), finding that the contested prohibition affects the essence and significance of the right to conduct business.

61. The Constitutional Court therefore turned to evaluating the justifiability of the different treatment, i.e. whether it pursues a legitimate aim and is proportionate, that is, whether it is a solution that can actually contribute to the aim in the abovementioned sense.

62. First of all the Constitutional Court emphasizes that it does not question the existence of a legitimate (i.e. constitutionally approved) aim, which the contested measure pursues at a general level. That aim (here, for brevity we refer to both of the Government statements reproduced above) is preventing or at least mitigating the spread of the highly contagious respiratory disease COVID-19, preventing the related collapse of the health care system and extensive damage to the health and lives of the population. Regarding this, the Government stated that the increased mobility of persons and visits to shops in which personal meetings occur represent a significant factor in the spread of disease, and the closing of retail and service operations plays an irreplaceable role in the complex of all the emergency measures taken to slow the spread of the epidemic. The contested provisions of point I./1 of Government Resolution no. 78 pursued the protection of health (guaranteed on the part of the state by art. 31 of the Charter), as well as life (art. 6 par. 1 of the Charter). The Government defined these aims in its statement of 22 December 2020 by saying that the concern is to minimize the negative effects of dangers related to the incidence of the coronavirus, and the main aims are 1. to prevent exceeding the capacity of hospitals, 2. to prevent explosive spread of the COVID 19 virus, and 3. To reduce the mortality and frequency of severe infections. The Constitutional Court considers these aims legitimate, in view of their constitutional guarantees in the Charter.

63. It is a different question, however, whether the different treatment of individual groups of business owners that the contested measure implements is sufficiently justifiable and proportionate. Specifically, it remains a question whether there are sufficiently strong reasons for this different treatment, including whether it was not possible to achieve the pursued aim by using less invasive means interfering in the fundamental rights of the affected subjects.

64. Regarding this, the Government's statement of 25 January 2021 says that "the Government does not claim, in its previous statement or now, that closing retail shops and services is a measure that will by itself lead to slowing the spread of infection, but that it is inseparably tied to other restrictive measures. The aim of all the emergency measures, as a group, is to interrupt the spread of infection among individuals and in the entire population, as the Government already set forth in its statement of 22 December 2020 (to limit gathering, reduce the number of meetings, limit the movement of persons, limited provision of selected services, use of protective and disinfecting aids). Scientific research from the recent period confirm that reducing mobility and meetings of people in shops is of fundamental importance for stopping the spread of disease. Moreover, open

shops and services increase not only increase the mobility of persons, but also increase the load on mass transit. The riskiness of longer trips in public mass transit has been documented."

65. Thus, the Government does not in any way address this essential question of weighing the implemented complete prohibition on retail sales and provision of services while setting exceptions to the prohibition, nor is it evident whether it even considered the use of less invasive restrictive means. Such weighing cannot consist of the brief statement contained in the Government's statement of 22 December 2020, which only generally states that "given a serious infection that is transmitted by contaminated droplets and aerosol it is necessary to prevent the concentration of people, especially in an enclosed space, and potentially set further conditions for their remaining in such a place. Therefore, it is necessary to use instruments for regulating operations in such places." Such a terse statement obviously cannot become persuasive even by reference to the presentation by professor R. Chlíbek at the Ministry of Health press conference of 17 September 2020, which the Government cites in a footnote.

66. The Constitutional Court states that the cited art. 6 of the Constitutional Act on Security represents an authorization given to the Government for defining rights that are being restricted. A statute connected to this constitutional statute is the Emergency Act, which specified in § 5 and 6 which rights can be limited during a state of emergency for an absolutely necessary time and in an absolutely necessary scope. In this regard the contested Government Resolution cites § 5 let. a) to e) and § 6 of the Emergency Act, which, of course, in practice means that the Government thus – at least declaratively – used all the possibilities that the law allows [with one exception: the right to strike under § 5 let. f) of the Emergency Act]. However, in terms of deciding on the present matter, it is significant that § 5 let. b) and e) of the cited statute expressly allow the possibility of restricting ownership and use rights and the right to conduct business.

67. At the same time, however, the safeguards arising from the Charter must be respected, even in an extraordinary situation when a state of emergency is declared. Under art. 2 par. 3 of the Charter, everyone can do what is not prohibited by law, and no one can be compelled to do what the law does not impose. This paragraph – together with paragraph 2 ("State authority can be asserted only in cases and within the bounds provided by law and only in the manner prescribed by law.") – enshrines one of the key principles of a law-based state: while the exercise of state power is bound by laws, i.e. the state may not do anything that the law does not allow it to do, in the case of an individual it is the opposite – an individual may do anything that is not prohibited by law, and may not be compelled to do what the law does not impose. The ideological starting point of that rule is the primacy of the individual before the state. Thus, in contrast to the exercise of state power, an individual has far wider space for his activities, and the state may limit him only by law, and, moreover, not arbitrarily, but only in certain cases. In other words, the cited article of the Charter gives rise to the prohibition of arbitrariness. The prohibition of arbitrariness also arises from the principle of a material law-based state, guaranteed by art. 1 par. 1 of the Constitution of the Czech Republic (the "Constitution"). Similarly, under art. 4 par. 4 of the Charter, "in employing the provisions concerning limitations upon the fundamental rights and freedoms their essence and significance must be preserved. Such limitations are not to be misused for purposes other than those for which they were established."

68. The Constitutional Court states that it is fully aware that with the pandemic crisis the Government faced problems that are exceptionally difficult to address through legal regulation, for

many reasons. First of all, public authorities – and this is far from applying only to the Czech Republic – lack experience with handling a crisis of similar scope; moreover, the epidemic situation is very dynamic, and even experts do not completely agree how to evaluate it, and consequently, how to most effectively regulate it. At the same time, however, it must be emphasized that in a modern constitutional state, regulation of the rights and obligations of individuals, and consequently deciding which group of people will have its rights preserved and which, in contrast, will bear the burdens of having them restricted, may not simply be an expression of political will. The fact that a public authority has the power to regulate rights and obligations and at the same time finds the majority needed to exercise this power, is not in and of itself sufficient to issue a constitutional legal act. Such legal regulation – which applies especially in cases of restricting fundamental rights – must also reflect the requirement of rationality, i.e. it must be based on reasonably, generally acceptable reasons, and these reasons must also be outwardly recognizable . Incidentally, this requirement is one of the fundamental building blocks of a law-based state, as the Constitutional Court formulated in its previous case law in relation to the abovementioned prohibition of arbitrariness.

69. In addition, under art. 6 par. 1 of the Constitutional Act on Security, definition of the restricted fundamental rights, the scope of the restrictions, and the obligations imposed must be recognizable from the Government's emergency measures issued in a state of emergency, and these measures must be consistent with the Charter and with the Emergency Act.

70. The foregoing leads to several key starting points for the presently adjudicated matter. First of all, the Government selected a solution that consisted of a general prohibition of all retail sales and provision of services in shops, and simultaneously set a great number of exceptions, reminiscent of a "phone book" (36 in total). However, a fundamental flaw in this procedure is the fact that it is not evident from any relevant source on what basis the Government chose this solution. The Government also did not take the opportunity to identify these sources at least in its statement concerning the present petition, although the Constitutional Court repeatedly called on it to do so.

71. The Constitutional Court cannot consider such specific sources to be the Government's claims (citing foreign sources) that reducing the mobility and meetings of people in shops is fundamentally important for stopping the spread of disease. Although the Constitutional Court does not intend to debate this claim in any way, it is not clear from it, without anything further, whether the chosen measure is really essential in the given situation and whether it was not possible to achieve a comparable aim by using less restrictive measures. For example, it is evident from the nature of the matter that the essence of retail sales lies precisely in the fact that people make use of shops near their residence (or employment), and therefore do not have to travel far and use public transportation. Similarly, the Government's references to results of research from the USA (statement of 22 December 2020, pp. 7-8) merely document that the riskiest places for transmission are restaurants, fitness centers, and cafes, which of course is obviously different from the essence of the present emergency measure. The reference made here to the importance of limiting the association and gathering of persons is also logical, but again, we cannot derive from it an explanation of why the Government chose this form of the prohibition of sales and the provision of services.

72. Another essential dimension of the present matter – which of course is closely related to the aforementioned starting points – is the manner in which the Government, in the contested measure,

prohibited, or prohibited and permitted the sale of goods and provision of services. Although, as the Constitutional Court already laid out above, in a state of emergency, in accordance with art. 6 of the Constitutional Act on Security, the Government is authorized to restrict certain fundamental rights, the cited art. 2 par. 3 of the Charter does not enshrine "merely" a reservation for statutes, not is it a mere legislative-technical provision, but it reflects a fundamental and inviolable value starting point of a material law-based stated established on respect for fundamental rights and freedoms. While the public power can be applied only in cases foreseen by the law, the fundamental state of an individual is a state of freedom. The state (public) power is legitimized and constitutionally authorized to interfere in this fundamental individual state, that is, to regulate the rights and obligations of individuals, but the nature of such interference must respect the text and meaning of art. 2 par. 3 of the Charter. Thus, the state may address a certain order or prohibition to the individual in a constitutionally foreseen manner, but it must not reverse the basic logic of the relationship between the public power and the individual. Thus, a legal regulation cannot generally and in a completely unjustified manner prohibit "everything" and then use exceptions to "retroactively permit" certain areas affected by the prohibition (again without any sort of justification). On the contrary, the regulation of people's rights and obligations, especially regulation restricting fundamental rights and freedoms, must be performed through relatively certain orders or prohibitions, that will be justified in an appropriate manner, even in a state of emergency.

73. The requirement of a rational and outwardly recognizable justification for a measure interfering in fundamental rights in a manner that has different effects among comparable subjects is an immanent part of the discrimination test, i.e. evaluation of whether the different treatment is sufficiently justified and proportionate. Only in that case can the different treatment be considered justifiable. In the context of a law-based state it is unthinkable for any act by a public authority that interferes in fundamental rights not to be rationally and convincingly justified, or for that justification not to at least be recognizable in a subsequent judicial review.

74. Justification is required all the more for a regulation that leads to unequal interference in the right to conduct business in the context of various types of business in the area of retail and services. If there is an arbitrary and unjustified decision about which types of retail sales and services will be permitted and which will be forbidden, without it being possible to determine in each case solid arguments for their necessity or, on the contrary, lack of it, and epidemiological danger or acceptability, this also interferes in the right to equal access to the right to conduct business, which is guaranteed in the conjunction of art. 26 par. 1 of the Charter and art. 1 of the Charter, guaranteeing that people have equal rights.

75. Of course, the specific demands for the rationality of a solution or requirements for the completeness and reliability justifying the adoption of a particular legal regulation may – in fact, must – be based on a specific factual situation, and thus reflect reality. Thus, when reviewing a legal regulation that regulates the rights and obligations of persons, the Constitutional Court must also reflect what information the relevant public authority could and should have had at its disposal and in what factual situation it was when formulating the particular contested measure. Thus, it is evident that the Constitutional Court may impose different (higher) demands on the rationality and justification of a statute that was adopted in "peaceful times" after extensive parliamentary debates, was accompanied by a background report, and when it was being adopted the legislature was not under time pressure caused by objective external circumstances. In contrast, when reviewing a legal

regulation that, for objective reasons, had to be adopted "from one day to the next" and which responds to a complicated factual situation, whose development is difficult to predict, a certain degree of restraint in subsequent judicial review is appropriate. As the Constitutional Court of the Republic of Austria stated in its decision file no. V 436/2020 of 10 December 2020, in the process of issuing a directive it must be "documented on what information basis the directive rests and that the relevant interests were weighed. The requirements for this may not be excessive, of course."

76. Thus, on the one hand, it is not the task of the Constitutional Court, as part of constitutional law review, to require the Government to find and perfectly justify a (likely hypothetical) "optimal solution" and optimal distribution of the burdens connected with restricting the fundamental rights of certain groups of people, if even among experts there is no practical agreement on evaluating the current situation and prognoses of its possible developments (the requirement for justification may not be "exaggerated"). From a constitutional viewpoint, however, it is also not possible to allow the other extreme. Briefly, even practical uncertainty and a lack of perfect information does not mean that the Government can do "anything," and rely only on instinct or political compromise. A Government decision must be based on expert recommendations, based on the maximum degree of available information about the disease in question and its spread.

77. It is fully up to the Government, from what sources and in what manner it will draw this information, and in that regard the Constitutional Court must exercise a lot of restraint. However, in view of its obligation to protect fundamental rights, it must insist that these reasons, documenting the need for (precisely this intensive) interference in fundamental rights through a Government decision (an emergency measure) be recognizable, which specifically means that they should be publicly available. It is necessary to keep in mind that every emergency measure is a political decision, which, of course, must be based on expert grounds; nevertheless, it is the Government that bears responsibility for them, not its expert advisors. At the same time, the Government must not only weigh specific expert grounds that it has at its disposal, but must take into account the full context and the effects of its measures in other areas of social life, in the short and long term. Precisely for that reason it is essential that it be able to rationally justify every such decision, and that the reasons for these measures be externally recognizable. If not, they lose the appropriate legitimacy.

78. In this regard the Constitutional Court rejects the potential objection that it is not possible to strictly require that every legal regulation be justified, because it is not possible in practice, for example, to require justification of a statutory amendment adopted on the basis of an unjustified amending proposal from some deputy in the second reading. The presently adjudicated matter concerns an emergency measure by the Government, that is, a collective body, for which it can be expected and required that it is based on sufficient expert documentation and is rationally justified.

79. Moreover, when evaluating the intensity of interference in the fundamental right to conduct business and the different treatment applied to individual subjects by the contested emergency measures, it is also necessary to begin with the fact that at the present time the Government has now had enough time to think through and justify the adopted measures much better than was the case when the restrictive measures were imposed in March 2020. It also applies to this area of the exercise of public power that after the passage of time greater requirements must be placed on the justification of interference in fundamental rights than on the immediate response at the beginning of the pandemic, and with a certain degree of hyperbole we can even speak of a certain

proportionate relationship between the intensity and justification of prohibitions and the passage of time. The reasons for this increasing requirement thus include the fact that the Government had much more information, practical experience, and time to think through and systematically justify the contested regulation, but also the fact that long-term and repeated interference in a fundamental right (in this case the right to conduct business) is much more invasive an "painful" than a short-term and temporary restriction.

80. The judicial branch, which has the constitutional obligation to protect fundamental rights (art. 4 of the Constitution), and is therefore obligated to review the legal acts of the public authorities from that point of view, cannot effectively do so in a situation where it is not recognizable from the acts themselves or from the available documentation why and in what extent they were issued.

81. As set out above, the Constitutional Court is well aware that when a state of emergency has been declared, it is not possible to consistently insist on all the formal attributes of norm creation, as in normal conditions. At the same time, however, it must be seen that the subject emergency measures issued by the Government (i.e. an executive body) really do create very robust interference into the fundamental rights of a great number of individuals and legal entities, and therefore these measures must be reviewable not only from a procedural viewpoint but also a material one. Therefore, effective review by the Constitutional Court is not possible without the Government properly explaining the need to issue the contested measure (including supplying documentation , on which it relied) and justifying the necessary scope of restriction of fundamental rights and definition of the obligations imposed. Moreover, as the foregoing indicates, the contested measure was issued after several months of experience with the growth of the pandemic in the Czech Republic and elsewhere in the world, so the degree of practical uncertainty was no longer as high as in the first months of the pandemic, and one can therefore expect that the Government could have had and did have a range of relevant documentation for rational and justified decision making.

82. Of course, it is not only the existence of the Government's constitutional obligation to base its selected normative solution on rational and recognizable grounds that is important for the Constitutional Court's decision in this matter, but also answering the question in what form, when and to whom these grounds and documentation must be available in order for the emergency measure not to be seen as justifying different treatment of the entrepreneurial subjects concerned.

83. The Constitutional Court believes that it is not necessary for the norm-creator's reasons, which may subsequently be relevant for review of the constitutionality of legislation, to always be unconditionally explicitly captured in a formal document that would be the justification (background report) for the legislation. Although, based on the government's legislative rules, there is an obligation to present a background report together with the drafts of legislation, this is not an obligation that arises directly from the constitutional order. On the other hand, however, every public body that regulates the rights and obligations of persons through legislation must have the appropriate grounds and documentation available, and at least in the case of review of constitutionality of such legislation must be prepared to present them to the Constitutional Court. If it does not do so, we cannot but conclude that the reviewed legislation is an expression of arbitrariness. Simply put: insofar as the Constitutional Court consistently postulates a rational legislature (or more generally, norm-creator), it also assumes that every decision by a public authority that interferes in fundamental rights is based on sufficient documentation, that opposing

arguments are very carefully weighed during the approval of the decision, and the possibility to review it exists, precisely through this documentation being available, at least subsequently. Otherwise, the decision is not rational, but completely random.

84. German constitutional law doctrine and case law have analogous starting points. Whereas the obligation of a statutory or sub-statutory norm creator to always capture the grounds for legislation in advance and in a formalized form may be considered not completely clear (although some doctrine draws that from the Grundgesetz [Basic Law], cf. Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke, GG, 14. Aufl. 2018, Art. 76 par. 22, or Mann, in: Sachs, GG, 8. Aufl. 2018, Art. 80 par. 31), the obligation to have such grounds available and to be prepared to submit them to the Constitutional Court in the event of constitutional review is generally recognized. So, for example, in the past the German Federal Constitutional Court found an obligation on the legislature (which, of course, can also be extended to other norm creators) to "comprehensibly justify" legislation [nachvollziehbar zu begründen; BVerfGE 125, 175 (238)].

85. Specifically as regards legislation issued to regulate the epidemic situation with the COVID epidemic, the Constitutional Court can cite (in addition to the decisions of the same court cited above), e.g. the decision of the Constitutional Court of the Republic of Austria file no. V 411/2020 of 14 July 2020, in which the court emphasized that "in the process of adopting directives on restrictions, prohibitions, or exceptions to them, the legislature must duly capture information about the circumstances that it regulates, in order to permit subsequent review of the lawfulness or constitutionality of the directive. The legislature is required to document its steps when adopting directives, including in a time of emergency."

86. Therefore, in the present matter it was up to the Government itself to present sufficient and rational grounds on which it adopted the contested measure in the form it did. Only based on these can the Constitutional Court properly fulfill its function and review the consistency of the contested legislation with the law, or with the constitutional order. In the present matter the Petitioner points to the absence of justification both as regards the prohibition itself, and as regards the specified exceptions, and it identifies certain specific examples that it considers to be illogical. The Constitutional Court finds this objection justified as well. In this situation, with the absence of any justification whatsoever, it is also not possible to weigh the conflicting fundamental rights (the right to conduct business and the right to property versus the right to protection of health or the right to life).

87. The Constitutional Court does not question that the purpose for which exceptions to the prohibition are established, so that essential goods will be sold and essential services will be provided (goods and services of basic daily needs – essential goods and services), can be described as rational because this involves, or is supposed to involve, a range of goods whose unavailability in shops would be most problematic, even fata. for society and its functioning. In any case, other countries that adopted similar measures also do this, which the Government documents in its statements. However, the Constitutional Court is required to review whether the inclusion of goods – which the Petitioner points to in its objections – in these exceptions is rational in terms of the stated aim. The Constitutional Court repeatedly states that it cannot enter the field of political decision making by requiring an optimal, most suitable, or best solution, which, in any case, cannot always be specified precisely at the constitutional level; it is sufficient if there is a solution that is reasonable in relation to the aim that is to be achieved. Here one must accept a wide degree of

discretion for the Government, because a requirement that the "essential" nature goods and services be quite precisely justifiable would be impossible [cf. judgment of 28 June 2016 file no. Pl. ÚS 18/15 (N 121/81 SbNU 889, 271/2016 Coll.)]. In any case it is also clear from foreign legislation indicate that different states do not have the same approach to what basic goods and services fall within exceptions to a prohibition.

88. However, what is important is that the Government be able to properly and convincingly justify 1. for what reasons it was necessary to adopt a complete prohibition of retail sales and the sale and provision of services in shops (i.e., in particular, why a comparable result could not be achieved through less invasive means, e.g. by limiting the number of customers present and other measures) and 2. where the rationality of the exceptions lies.

89. The Government itself acknowledges, in its statement of 22 December 2020, that the definition of non-essential shops and services during the pandemic differs from country to country, when it states that "there is no single universal list that would define for all of Europe what is a basic daily need for the population. Thus, defining goods and services that are essential for daily life during the pandemic depends on a decision by political representatives." The Constitutional Court fully respects this fact, but precisely for that reason it is essential that the Government (as a political representative) properly explain the exceptions. Both possible selected methods, i.e. a general prohibition on sales with specified exceptions, or, in contrast, an exhaustive determination of the prohibited sales segment, lead to the same aim: among a number of business entities the Government decides which ones can continue to conduct their activity and which ones cannot.

90. The Constitutional Court does not question the Government's right to make this political decision, which must be the result of careful weighing of various aspects (health care, social, economic, etc.) and for which it also bears full responsibility; nonetheless, for reasons of protecting the fundamental rights of the affected subjects it must insist that the Government duly and specifically explain the decision, for only thus will it be ensured that the decision is not completely arbitrary. In addition, the affected operators of retail sales and services, in particular, have the right to learn the grounds for different treatment of them.

91. Therefore, the Constitutional Court concludes that in a situation when the Government uses the possibility of restricting a fundamental right or freedom by an emergency measure and of imposing obligations on the measure's addressees, it must also be able to properly justify its measure, so that it is evident that its decision making was not arbitrary or random. That means, specifically, that (at a minimum) the information on the basis of which the Government makes decisions in these cases should be available, and this information must be subsequently reviewable in a proceeding before the Constitutional Court. Citing negative developments in the epidemic situation, on which the Government's responses to the Petitioner's petition are based, is "merely" specification of the legitimate aim pursued by the contested regulation, but it says nothing about a rational relationship between that aim and the selected measure, or even about the necessity of that measure. Although the Constitutional Court, when evaluating the suitability and necessity of the reviewed measure, is prepared to give the Government considerable discretion for formulating the legal framework (precisely in view of the difficult, dynamic, and unclear situation), even this restrained approach cannot justify the actions of the Government, which was not able to support its measure with rational arguments.

92. Finally, if the Government, in both cited statements, argues on the basis of foreign legal frameworks, often also consisting of a prohibition on sales with certain exceptions, in that regard the Constitutional Court states that in a number of lands (Austria, Poland, Bavaria) emergency measures by the Government and ministries are supplied with justification (for a sample list containing specific citations see, e.g. the text of J. Wintr, Neodůvodněná krizová opatření vlády odporují principům demokratického právního státu [The Government's Unjustified Emergency Measures Violate the Principles of a Democratic Law-Based State, in Právo a krize [Law and Emergency], 30 January 2021, https://pravoakrize.net/neoduvodnena-krizova-opatreni-vlady-odporuji-principum-demokratickeho-pravniho-statu/). Therefore, the Government's comparative argument is double-edged: it can be used to explain not only a similar procedure by executive bodies in other European lands during the pandemic in terms of setting prohibitions and exceptions to them, but also the requirement for appropriate justification of these measures. Succinctly, it is obvious from these examples that even in such a hectic and tense situation it is not possible to abandon adequate justification of restrictive measures.

93. We can thus summarize that the Constitutional Court is well aware that legislation issued during a state of emergency cannot be subjected to the same demands as those issued during "calm weather," i.e. it is not necessary, for example, to always insist that the background report must be formalized. At the same time, however, neither can the opposite extreme be allowed: a situation where the Government, even in a proceeding on abstract review of norms before the Constitutional Court, when a specific emergency measure is reviewed, is not able or willing to provide any relevant and specific reasons why the particular prohibition is necessary, why it is not sufficient to have less robust interference in fundamental rights, and where the rationality of the specified exceptions lies. Although it is obvious from the nature of the matter that some of these exceptions are really necessary (e.g. the sale of food, medicines, or fuel), a number of other exceptions requires a convincing explanation from which it would be evident that the Government is not acting with impermissible arbitrariness (e.g., as cited by the Petitioner, flower shops or shops selling weapons and ammunition).

94. This justification is not only essential documentation for the review performed by the Constitutional Court, but also for social acceptance, and thus the legitimacy of emergency measures. As stated above, the constitutional system of the Czech Republic is based on the primacy of the individual before the state, and thus consistently connects to the theory of the social contract. However, it is essentially foreign to this concept to have a procedure where an executive body issues a measure that very fundamentally interferes in the fundamental rights of these individuals without these measures being properly and rationally justified. In that case their legitimacy and willingness to be accepted by the citizens understandably declines.

95. Therefore the Constitutional Court annulled the contested point I./1 of Government Resolution no. 31/2021 Coll. on grounds of violation of art. 1 par. 1 of the Constitution and art. 2 par. 3, art. 4 par. 4 in conjunction with art. 26 par. 1 of the Charter.

IX.
Closing

96. In closing the Constitutional Court summarizes that during the proceeding on the petition the following ceased to be valid: point I./1 of Government Resolution of 16 November 2020 no. 1192, on adoption of emergency measures, promulgated as no. 465/2020 Coll., point I./1 of Government Resolution of 20 November 2020 no. 1201, on adoption of emergency measures, promulgated as no. 477/2020 Coll., point II of Government Resolution of 20 November 2020 no. 1195, on extending the state of emergency in connection with the epidemic of the SARS CoV-2 virus, promulgated as no. 471/2020 Coll., point 2 of Government Resolution of 20 November 2020 no. 1196, amending emergency measures, promulgated as no. 472/2020 Coll., and point I./1 of Government Resolution of 22 January 2021 no. 57, on adoption of emergency measures, promulgated as no. 23/2021 Coll. Therefore the Constitutional Court suspended the proceeding on the part of the petition directed against the cited measures under § 67 par. 1 of the Constitutional Court Act (verdict I).

97. the Constitutional Court annulled the contested point I./1 of Government Resolution no. 31/2021 Coll. on grounds of violation of art. 1 par. 1 of the Constitution and art. 2 par. 3, art. 4 par. 4 in conjunction with art. 26 par. 1 of the Charter and violation of art. 26 par. 1 in conjunction with art. 1 of the Charter as of the day this judgment is promulgated in the Collection of Laws under § 70 par. 1 of the Constitutional Court Act, as amended by Act no. 48/2002 Coll., (verdict II).

98. The Constitutional Court is aware that publication of this judgment, and thus also its executability by promulgation in the Collection of Laws will occur after the end of the validity of the contested emergency measure (14 February 2021). Although it is therefore obvious that this judgment will not directly lead "to opening retail sales," nevertheless the Constitutional Court considers the conclusions contained in the reasoning of this judgment to be very fundamental, as they represent a kind of "memento" for potential further restrictive measures by the Government.

Instruction: Decisions of the Constitutional Court cannot be appealed (§ 54 par. 2 of the Act on the Constitutional Court).

Brno, 9 February 2021

Pavel Rychetský
Chairman of the Constitutional Court:

Dissenting opinions under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, were filed to the decision of the plenum by Justices Jaroslav Fenyk, Josef Fiala and Vladimír Sládeček.

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1. Dissenting opinion of Justice Jaroslav Fenyk to verdict no. II and to the justification of the judgment (under § 14 of Act no. 182/1993 Coll., on the Constitutional Court)

I. The Constitutional Court's deviation from the principle of self-restraint

I do not agree with the derogatory verdict (II.) of the judgment or with its reasoning because the judgment thereby, or as a consequence thereof, replaces the Government's thoughts concerning expert, strategic, and security questions, with the thoughts of the Constitutional Court (the majority of the plenum) on the necessity or lack thereof of specific anti-epidemic measures. The Constitutional Court thereby in an activist manner steps onto the field of political decision making, which does not belong to it under the Constitution of the Czech Republic. The Constitutional Court cannot simultaneously be a court and a legislature (footnote 1). Questions that can be answered only by using political criteria must be decided by the political representation represented by bodies of the legislative or executive branch, not by an activist approach by the Constitutional Court (footnote 2).

The judgment in its final form de facto means the Constitutional Court's (increasing) deviation from the principle of judicial self-restraint, which the Constitutional Court has long accepted in its decision making practice and which emanates from respect to the separation of powers in the state (footnote 3).

The Constitutional Court annulled part of an emergency measure (the prohibition of retail sales and services in shops) basically on the grounds that this emergency measure was not sufficiently justified either through the Government's statement submitted in the proceeding before the Constitutional Court, or in relation to the public.

On one hand, in the reasoning of the judgment the Constitutional Court declares a restrained approach in the question of demands for such justification, and on the other hand it breaks through this restraint – specifically it requires (point 90) that it be evident from the justification that the Government's decisions were not arbitrary or random, and states that in evaluating the suitability and necessity of an emergency measure the Constitutional Court is prepared to give the Government considerable discretion for formulating the legal framework, precisely in view of the difficult, dynamic, and unclear situation concerning the state of emergency.

The Constitutional Court's somewhat schizophrenic approach to requirements for the justification of the Government measures also cannot escape notice. In the Czech Republic legal regulations do not include justifications. The Constitution does not prescribe an obligation to provide justification as an obligatory component of legal regulations, and a proper justification is not by itself a referential criterion for the consistency of a legal regulation with the constitutional order that the Constitutional Court would use in its practice. In this regard the Constitutional Court could not

criticize the Government for anything. Thus, the Constitutional Court first focused on justification of the measure in the Government's statement as a party to the proceedings in response to a call from the Constitutional Court. Aware, of course, of the argumentative sterility of such evaluation, it decided to also subject to constitutional review the abstract measure of the Government in relation to the wider public (point 77 of the judgment), from which it derived, in my opinion, a constitutionally elusive conclusion.

Given that justification of a legal regulation is not an obligatory component as such, all the less could insufficient justification of the contested measures for the wider public be seen as a constitutional flaw. The manner in which the Government communicates to the public, to what extent it presents the public with complete and convincing information, falls quite essentially in the sphere of public discussion and political answerability, for which the Government is held to account in elections. Thus, the majority of the plenum here impermissibly stepped into the political arena and restricted it.

In any case, it must be pointed out that in judgment file no. Pl. ÚS 4/17 (148/2020 Coll.) the Constitutional Court spoke very restrictively about the possibility of public officials conducting their own media activity, and de facto made it impossible to operate media with the participation of members of the Government. In connection with the requirement for sufficient public justification of the contested measures, that now means that the majority of the plenum is imposing another requirement on the constitutionality of legislation, which is that it must be published in necessary cooperation with the media, which moves even further from the mandatory requirements for legislation arising from the constitutional order and the practice of the Constitutional Court.

II. Evaluation of the effectiveness of the Government measure by the Constitutional Court – statement from the Government as a party to the proceeding before the Constitutional Court

On the one hand the Constitutional Court cites the aforementioned restraint in the judgment, but at the same time it rejects as insufficient the grounds that the Government presented in its statements.

The Government's grounds, which it presented to the Constitutional Court in its statement, can be summarized to the effect that the achievement of the pursued legitimate aim – preventing or at least reducing the spread of the highly contagious respiratory disease COVID-19, preventing a related collapse of the health care system and extensive damage to the health and lives of the population – is to occur (among other things) through the prohibition of retail sales and services because this leads to reducing mobility and meetings of people, which represents a significant factor in the spread of disease. The Government emphasizes in its statement that the closure of retail sales and services plays an irreplaceable role in the set of all emergency measures adopted to slow the spread of the epidemic. In this regard the Government also points to the percentage rating of the effectiveness of individual measures in a scientific study entitled "Inferring the effectiveness of government interventions against COVID-19" (BRAUNER, J. M. and coll. Science, 15 December 2020), which, according to the Government, demonstrates the importance of the anti-epidemic measure of general closure of shops and services with exceptions for the sale of basic needs. In this context the Government's statement also points to other scientific results – "Mobility network models of COVID-19 explain inequities and inform reopening" (CHANG, S. and coll. Nature, 10 November 2020), that show that increased mobility together with visits of face-to-face businesses are a significant factor in the spread of disease.

Although the Constitutional Court indicates in the reasoning of the judgment that it does not intend to argue with the Government's claim that reducing the mobility and meetings of people in shops is fundamentally important for stopping the spread of the disease, in fact it partly does so by presenting (point 71) its own substantive (expert) thoughts, according to which:

1) "For example, it is evident from the nature of the matter that the essence of retail sales lies precisely in the fact that people make use of shops near their residence (or employment), and therefore do not have to travel far and use public transportation."

Regarding the scientific research which the Government uses to explain its actions, the Constitutional Court states that:

2) "Similarly, the Government's references to results of research from the USA (statement of 22 December 2020, pp. 7-8) merely document that the riskiest places for transmission are restaurants, fitness centers, and cafes, which of course is obviously different from the essence of the present emergency measure."

The reasoning of the judgment does not contain any further specific arguments regarding the insufficiency of the Government's statement (merely more generally formulated requirements that are placed on such justification by the constitutional order).

Re 1) With the first cited sentence, the judgment basically denies that closing retail shops would have a fundamental influence on the spread of the epidemic, and the judgment justifies this expert (epidemiological) consideration by saying that it is "evident from the nature of the matter" (sic!). Not only does the Constitutional Court thereby impermissibly step into an expert substantive debate with the Government, but it does so very unconvincingly. No such thing is evident "from the nature of the matter," if only because retail sales include not only sales in, e.g. over-the counter and self-service shops, but also supermarkets, hypermarkets, department stores, outlets, etc. where it is not true that people do not travel a greater distance from their homes or employment to reach them. In any case, retail sale also includes highly specialized shops where it cannot be ruled out (on the contrary it can be assumed), that customers will travel greater distances for purposes of shopping, because they simply do not have such a specialized shop near their residence.

Here the Constitutional Court is entering an expert epidemiological debate about whether even mobility over shorter distances to shops where customers meet is or is not relevantly significant for the spread of the epidemic (according to the Government's statement that is the case). Yet, precisely in this expert debate the Constitutional Court should be very restrained. It was not, however, although it appears that it was well aware of its position (point 77, first sentence). In any case, in the situation of a turbulent crisis, in which new information appears faster than it is possible to respond to it by introducing new measures, the Constitutional Court must be especially restrained, because even a measure that turns out to be ineffective in retrospect need not have appeared so ex ante in expert opinions on the effectiveness of the measure. The Government cannot be required to have an authoritative solution for expert disputes, and if there is competition between qualified expert opinions about the suitability of effectiveness of a particular measure, inclination to one of them is purely a question of political answerability.

Re 2) In the second cited sentence the judgment again evaluates from a substantive viewpoint expert documentation, which the Government relied on when deciding on the prohibition, when it considers the cited scientific studies to be irrelevant to the present emergency measure. And again, the judgment also does so very unconvincingly, because it is not true that they "merely document that the riskiest places for transmission are restaurants, fitness centers, and cafes," because in the study "Inferring the effectiveness of government interventions against COVID-19" an anti-epidemic measure concerning general closure of shops and services was presented as significant ("Most nonessential businesses closed").

Despite the abovementioned content of the Government's statement, the Constitutional Court concludes in the judgment that the Government's statement says nothing about a rational relationship between the aim and the selected measure, or, the judgment reaches the conclusion in this regard that the Government was not able to support its measure with rational arguments (point 90).

This conclusion by the majority of the plenum of the Constitutional Court – that there are insufficient rational arguments for such steps – is also not convincing in view of the fact that in other countries it is also not unusual, for purposes of limiting the spread of the epidemic, that the majority of shops are closed, with exceptions for an essential range of goods (Germany, Austria, France, and other countries), which, after all, the Government extensively pointed out – in support of the justification of the prohibition – in its statements before the Constitutional Court.

However, the judgment describes the Government's statement as merely citing negative development in the epidemic situation, which is merely specification of the legitimate aim pursued by the contested regulation (point 91).

If the Constitutional Court thus considers the abovementioned grounds, which the Government presented in support of the measure in question, to be insufficient, it thereby de facto replaces the Government's thoughts concerning expert, strategic, and security questions (moreover, in substantive terms also very unconvincingly, as set forth above), and the Court thereby steps onto the field of political decision making.

Although one can agree that from a constitutional viewpoint it is not permissible for the Government to be able to do "anything," relying only on instinct or political compromise (point 76), the Government's statement concerning the prohibition, or the justification presented by the Government (as briefly presented above) does not indicate any such thing.

III. Evaluation of the effectiveness of the Government's measure by the Constitutional Court – justification of the Government measure in relation to the public

Insofar as the majority of the plenum of the Constitutional Court substantively evaluated the abovementioned grounds – contained in the Government's statements – and concluded that they are insufficient, then it is surprising that with these conclusions the judgment completely overlooks other documentation that is publicly available, as, after all, the judgment requires in point 77 (specifically, on the official information portal of the Ministry of Health, "koronavirus.mzcr.cz" or

on the webpage "vláda.cz"), and which the Government took as its starting point when issuing the prohibition, or which also create grounds for the emergency measure.

As an example, we can cite the overview of data reports, documentation materials and analyses for evaluating the COVID-19 epidemic in the Czech Republic, and also the CR Anti-epidemic System [Protiepidemický systém ("PES")]. The Government expressly justified implementing the prohibition of retail sales and services in shops precisely on the grounds of entering the highest level of that system (press conference after the Government's extraordinary session on 23 December 2020). This emergency level is based on the growth of daily values of the risk index and other indicators of the COVID-19 epidemic, and so these data are a further explanation of why the Government considered it necessary to introduce the prohibition of operating retail sales and services, and why it was insufficient to have a milder measure in the form of limiting the number of persons in a shop, which corresponds to a lower emergency level, or to lower values of the risk index and other indicators of the COVID-19 epidemic (see the published table of measures).

However, the Constitutional Court does not reflect any of the foregoing in the judgment, and with its conclusions about the justifications for the emergency measure in the end it de facto limited itself to a critique of the contested measures and the Government's statements before the Constitutional Court, despite the fact that it itself emphasizes in the judgment that for communicating the grounds for the emergency measure it is not necessary to insist that they be formalized (point 93). Therefore, insofar as the Constitutional Court did not in any way take into account these other published relevant documentation materials, then all the more so it should not have re-evaluated the Government's considerations about the necessity of the prohibition in as narrow and unconvincing manner as it did in the judgment.

Insofar as the judgment (points 89 and 92) points to the absence of a convincing explanation for certain exceptions, causing unjustified unequal treatment in the context of individual types of business in the retail and services area (e.g., exceptions for flower shops or shops selling weapons and ammunition), this is not and cannot be grounds for annulling the entire prohibition, but only those exceptions to it that cause such unequal treatment.

In other words, insofar as the Constitutional Court concluded that in the case of certain exceptions – in terms of the nature of the range of goods and the purpose of the exceptions (the essential nature of certain goods and services) –objective and reasonable grounds do not exist that would explain the inclusion of that type of goods and services in the relevant exceptions, and insofar as the Government itself did not present any such grounds (at the latest in its statements before the Constitutional Court) and did not comment further on them outwardly, there should have been derogation "only" of such unexplained exceptions due to inconsistency with the right to equal treatment under art. 1 first sentence of the Charter, as I proposed as the original judge rapporteur in my report, which was rejected by the plenum of the Constitutional Court and replaced by a judgment derogating the entire prohibition.

IV. Conclusion

I am thus convinced that the Government presented to the Constitutional court adequate grounds for the prohibition of the sale of goods and provision of services in shops, and justified them, including in relation to the public, and when the Constitutional Court annuls the entire prohibition

on the grounds of the insufficiency of that justification, it thereby steps onto the field of political decision making, which, however, as I stated above, does not belong to it.

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1) Montesquieu, Ch. L., On the Spirit of Laws: A. Čeněk, 2003 p. 47, also Šimíček, V. In: Bahýľová, L. and coll. Ústava České republiky: komentář. [The Constitution of the Czech Republic: Commentary.] Prague: Linde, 2010, p. 50, point 9.

2) Tomoszek, M. Aplikace doktríny politických otázek Ústavním soudem ČR. [Application of the Ddoctrine of political questions by the Constitutional Court of the Czech Republic] In: Hamuĺák, O. (ed.). Fenomén judikatury v právu. Sborník z konference Olomoucké debaty mladých právníků 2009. [The Phenomenon of case law in the law. Documents from the conference of the Olomouc debate of young lawyers, 2009.] Prague: 2010.

3) The German Federal Constitutional Court, whose case law the Czech Constitutional Court inclined to for decades, in 1973 (BVerfGE 36, 1, 14 f.) defined this principle as follows: "The principle of self-restraint does not mean shrinking or weakening the jurisdiction of the Constitutional Court, but a refusal for it to 'conduct politics,' i.e., interfere in the constitutionally created and limited field of free political formation.["] Therefore, it intends to leave the space for free political creation, which the Constitution guaranteed for other constitutional bodies, open. The Czech Constitutional Court has followed this principle in many decisions (e.g., Pl. ÚS 54/05, Pl. ÚS 24/09), among other authors, e.g., Holländer, P. Kolaps "soudcovského státu": běží odpočítávání? [The Collapse of the "judicial state": is the countdown running?] In: Šimíček, V. and coll. Dělba soudní moci v ČR. [Separation of the Judicial Branch in the Czech Republic.] Brno: Masarykova univerzita, 2004, p. 6, and many others.

In Brno, 9 February 2021

prof. JUDr. Jaroslav Fenyk, Ph.D., DSc.

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2. Dissenting Opinion of Justice Josef Fiala

In the matter file no. Pl. ÚS 106/20, in accordance with to § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, I am filing a dissenting opinion, against verdict II. of the judgment and its reasoning (points 48 et seq.).

1. I am convinced that the Constitutional Court should have denied the petition seeking the annulment of point I. 1. of Government Resolution of 28 January 2021 no. 78, on adoption of an emergency measure, promulgated as no. 31/2021 Coll.. The extraordinary situation caused by the spread of the contagious respiratory disease COVID-19 requires the Constitutional Court to thoroughly respect the principle of judicial self-restraint and from that perspective strictly weigh the effects of its decision. I consider the annulment of the contested provision, which leads to loosening restrictions, to be irresponsible. In my opinion the emphasis on protection of the right to conduct business (e.g., point 53 of the reasoning, without taking into account one of the fundamental elements of entrepreneurial activity, i.e. conducting it on one's own responsibility),

when weighed with the right to protection of health, is not constitutional. With the right to protection of health (art. 31 first sentence of the Charter of Fundamental Rights and Freedoms) the commissive, positive obligation of the state clearly dominates (cf. art. 1 of Constitutional Act no. 110/1998 Coll., on the Security of the Czech Republic), and in this case the Government fulfils it by issuing individual emergency measures. Substantive review of them – in the spirit of the principle of self-restraint – does not belong to the Constitutional Court (the reasoning of the judgment even refers to a certain degree of restraint at the beginning of point 77, but does not subsequently observe it).

2. I point out that verdict II. of the judgment approved by the majority of the plenum on 9 February 2021 does not take into account the state of the legal regulation as of that day (cf. Government Resolution of 8 February 2021 no. 119, on amendment of an emergency measure, promulgated as no. 48/2021 Coll.)

3. I state that the resulting text of the judgment (the reasoning) was not reviewed at any session of the plenum of the Constitutional Court. The text of the reasoning in part VIII "Substantive evaluation of the petition" differs rather considerably from the text presented at the session held on 9 February 2021. I consider this process of forming a decision to be inappropriate and undignified for the Constitutional Court, and maintain that it is one of the consequences of the lack of rules of procedure [note the criticism that the Constitutional Court received in the media that this was arbitrariness on its part (compared to the procedure when announcing the judgment in the matter file no. Pl. ÚS 44/17 (49/2021 Coll.), i.e. the matter of the Act on Elections) thus appears to be completely misplaced, as the reason for the delay is pragmatic – creation of the definitive version of the judgment].

Brno, 19 February 2021

Josef Fiala

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3. Dissenting Opinion of Justice Vladimír Sládeček

In accordance with § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") I submit a dissenting opinion to the verdict and justification of the judgment of 9 February 2021 file no. Pl. ÚS 106/20:

1. My fundamental reservations are primarily directed against the procedures followed in adopting this judgment.

2. I admit that I considered supporting the derogatory verdict of the decisions (the entire point I./1 of the emergency measure), on the assumption that it would be adequately (relevantly) justified. However, discussion and approval of the draft (the judge rapporteur's report) took place in a somewhat non-standard manner. The first version of the draft was sent to the other justices on Thursday, 4 February, at 15:56 hrs., the second, edited (supplemented) version on Monday, 8 February, at 11:46 hrs. On Tuesday, 9 February, after about a two-hour discussion, the draft was approved by the majority of the plenum.

3. I see a problem primarily in the fact, as I already once – in the beginnings of my term on the Constitutional Court – lamented in a separate vote, that there is little time for an adequate review of the draft, including (with more complicated or more serious matters) a possible study of related case law and expert literature, possibly consultation with assistants or other judges. The issue is for the other justices to have at least a fragment of the time that the judge rapporteur had when preparing the draft. Not until a few months ago were we able to approve a rule in the plenum that before discussion in the plenum the draft must be available (distributed) at least one week before. Even this minimalist requirement was again not met (cf. point 2).

4. Another, equally serious problem lies in the procedures when discussing or approving the draft. As is customary, like the other justices, I spoke regarding the draft and presented quite serious comments on the reasoning and certain relevant recommendations for edits. It makes no sense to repeat them; anyway they are recorded in the minutes of the session. The usual next step is that, before voting, the edits that will be made on the basis of comments from the justices in the reasoning, possibly in the verdict, are summarized. However, this is only if it involves minor substantive edits, not substantial shifts. Otherwise, the judge rapporteur is called on to edit the draft, so that voting can take place at the plenum's next session. In this case, without the comments from the other justices being settled in this manner, voting took place. More precisely – per the minutes of the session – the presiding justice said that he would "leave room for Vojtěch Šimíček to amend the reasoning, and puts his proposal to a vote."

5. I voted against because – euphemistically put – the reasoning presented at the plenum was not convincing, and in some parts was even contradictory. And, of course, I was surprised that the judge rapporteur was given a "blank check" to change the reasoning, perhaps according to the comments raised.

6. Someone may object that only the verdict of the judgment (resolution) is relevant in decision making. However, that is not the case, because the reasoning is an integral part of the decision, and not only with decisions of the Constitutional Court. A general court of a higher level will not annul or amend a decision by a lower level court because of the verdict, but as a rule due to flaws in the reasoning. More precisely, the higher level court reviews the verdict in the light of the reasoning. As regards the Constitutional Court, it is largely recognized that, in accordance with art. 89 par. 2 of the Constitution, it is not only the verdict of a decision that is binding, but also the ratio decidendi, that is, the main reasons contained in the reasoning, whether legally or by their persuasive strength. For more detail, cf. in particular. FILIP, J. Čl. 89. [Art. 89] In: BAHÝĽOVÁ, L., FILIP, J., MOLEK, P., PODHRÁZSKÝ, M., SUCHÁNEK, R., ŠIMÍČEK, V., VYHNÁNEK, L. Ústava České republiky. Komentář. [The Constitution of the Czech Republic. Commentary.] Prague: Linde, 2010, p. 1216 et seq., LANGÁŠEK, T. Čl. 89. [Art. 89] In: RYCHETSKÝ, P., LANGÁŠEK, T., HERC, T., MLSNA, P. and coll. Ústava České republiky. Ústavní zákon o bezpečnosti ČR. Komentář. [The Constitution of the Czech Republic. The Constitutional Act on the Security of the Czech Republic.] Prague: Wolters Kluwer, 2015, p. 929 et seq., SLÁDEČEK, V. Čl. 89. In: SLÁDEČEK, V., MIKULE, V., SUCHÁNEK, R., SYLLOVÁ, J. Ústava České republiky. Komentář. [The Constitution of the Czech Republic. Commentary.] Prague: C. H. Beck, 2016, p. 1018 et seq. (in all cases, cf. also the literature cited therein). Nothing about this can be changed by the opportunity to submit a dissenting opinion only to the reasoning; moreover, in this

case a judge does not even know to which version of the reasoning he is to submit his separate vote. This is a somewhat "chameleon-like" reasoning, changing in time …

7. On Thursday, 11 February, at 16:24 hrs. the judge rapporteur sent the justices an "edited" version of the reasoning. I could accept smaller edits in the text of the reasoning, in view of the comments made. However, compared to the "approved" reasoning, the new version had considerable, fundamental changes. Surprisingly, this is not supposed to be a final version, but an "open" one, because the judge called on his colleagues to send comments by Monday, 15 February (!!!).

8. The relevant changes consist primarily in the fact that the judge rapporteur completely retreated from the originally applied test of rationality, subsequently "flipped" into the test of proportionality, which, however was represented by the ratio decidendi in his previous version of the reasoning of the judgment. In accordance with the comments from some of the judges (including me), presented at the plenum session held of 9 February, he based the reasoning primarily on evaluation of accessory equality, or the prohibition of discrimination.

9. I consider the process of discussing and approving the judgment, as described above, to be absolutely unacceptable, in my opinion even inconsistent with the Act on the Constitutional Court. So there has appeared again not the need, but the necessity of adopting rules of procedure for the Constitutional Court, as is the case, after all, with supreme courts (cf. also the Organizational and Procedural Rules of the Constitutional [Court] of the CSFR, approved under § 15 of Act no. 491/1991 Coll., on Organization of the Constitutional Court of the Czech and Slovak Federative Republic and on Proceedings before It). If the Constitutional Court wishes to be worthy of the designation of an independent guard of constitutionality, it should act with deliberation, and make decisions after appropriate discussion, the result of which is reflected in the judgment (resolution) and its reasoning. It should not adopt rushed decisions, moreover with a non-consensually adopted reasoning. More precisely: not adopt a decision without a known reasoning.

10. In any case, the question arises whether the hurry was not only in order to annul the Government's emergency measure before it ceased to be valid. Of course, one can point out that it was obvious that the Government would issue a new, practically identical emergency measure, so it was possible – as in the present matter – to proceed analogously under points 37 to 39 of the judgment.

11. Strictly speaking, this dissenting opinion should concern the form of the reasoning approved on 9 February2021 (minor, technical edits are possible after a decision is adopted), which, however, does not make sense, because it will not even be available, or will not be published. As regards the current version of the reasoning (in this situation I do not intend to send comments to the judge rapporteur again), we can welcome a new essence in the reasoning on the basis of evaluating equality. Nonetheless, it could have been separated more clearly, it gets somewhat lost in other, sometimes substantial, sometimes irrelevant parts. For example, it is not clear to me what the purpose is of the extensive quotation in point 50, because the declaration of a state of emergency was not the subject of review at all. If the desire was to say (point 51) that we accept that the Government separately declares a state of emergency and individual emergency measures, it would have been sufficient to simply cite judgment file no. Pl. ÚS 8/20 (N 142/28 SbNU 237; 528/2002 Coll.). Is it really necessary to quote widely from the Government's statement (point 64)? It might be enough to give a concise explanation in our own words.

12. I consider somewhat unclear the conclusion of point 54, that the contested prohibition affects the very essence and significance of the right to conduct business. What does that mean within the context of the review? It is more a fragment of the arguments from the original version of the reasoning applied in the shift from the test of rationality to the test of proportionality.

13. The categoric conclusion that the Constitutional Court had to conduct a comparison of conflicting fundamental rights, which evidently means the conflict between the right to conduct business and the right to protection of health and the right to life (point 55), raises an expectation of appropriate arguments. However, we find nothing like that in the reasoning; not until point 86 is it explained that, as the Government did not present sufficient and rational grounds "[only] based on these can the Constitutional Court properly fulfil its function and review the consistency of the contested legislation with the law (!), or with the constitutional order (…) it is also not possible to weight the conflicting fundamental rights (the right to conduct business and the right to property versus the right to protection of health or the right to life)".

14. Points 67 and 69 argue on the basis of provisions of the Charter of Fundamental Rights and Freedoms (the "Charter") that set forth limitations of the state power, or application of the public power by statute. Can we conclude from this that a government emergency measure has the legal force of a statute? The Constitutional Court visibly avoids an express conclusion about what legal force an emergency measure has as a legal regulation sui generis, although point 86 (cf. the previous paragraph) would tend to indicate that it is a sub-statutory legal regulation. Regarding this, cf. also, e.g., my dissenting opinion to resolution file no. Pl. ÚS 10/20 (available at https://nalus.usoud.cz).

15. The relationship between the Charter and the Constitutional Act on the Security of the Czech Republic can be considered an interesting question. However, it appears that one can conclude from the reasoning, because it operates with art. 4 (point 69), that the Charter has higher legal force than the Constitutional Act on the Security of the Czech Republic, which is of course not true. I incline to believe that the Constitutional Act on the Security of the Czech Republic (in view of its subject matter) has the relationship of a special law to the Charter (lex specialis derogat legi generali). In any case, I believe that the framework in the Constitutional Act on the Security of the Czech Republic would need amending (cf. SLÁDEČEK, V. Vláda a nouzový stav. [The Government and the State of Emergency.] Správní právo [Administrative Law], 2020, no. 5–6, p. 278 et seq.).

16. The judgment addresses the question of justification of the emergency measure in a somewhat scattered manner and not fully consistently (points 70–83, 92–93). So, e.g., the Constitutional Court first criticizes that the Government, even in its response to the petition, did not identify any relevant sources "on the basis of which the Government decided on this solution" (point 70), then it states that it is unthinkable for "any act by a public authority that interferes in fundamental rights to not be rationally and convincingly justified" (point 73). The Constitutional Court then acknowledges that it is not its role to require perfect justification from the Government, and further repeats that the Government's decisions must "be based on expert recommendations, based on the maximum degree of available information" (point 76). Then the Constitutional Court rejects the objection that it cannot "strictly require that every legal regulation be justified" (point 78). Further the Constitutional Court states that "effective review by the Constitutional Court (…) is not possible without the Government properly explaining the need to issue the contested measure" (point 81, does this perhaps mean that the review was only sort of "by halves"?), and closes by saying that "it

is not necessary for the norm creator's reasons (…) to always be unconditionally explicitly captured in a formal document that would be the justification (background report) for the legislation" (point 83). I consider such extensive, partly repeated points to be counterproductive. I believe the starting point must be that the Constitutional Court in its previous case law described an emergency measure as a legal regulation sui generis. The Constitutional Court should draw from that conclusion that it is precisely that special nature of the regulation (issued, moreover, in an extraordinary situation) that requires an emergency measure to be accompanied by an obligatory justification, apparently even if published only on the government's webpage.

17. I have considerable doubts about the conclusion that the state "may address a certain order or prohibition to an individual (…), but may not reverse the basic logic of the relationship between the public power and the individual. Thus, a legal regulation cannot (…) prohibit everything' and use the form of exceptions to 'retroactively permit' certain areas affected by the prohibition" (point 72). I do not know on what basis the Constitutional Court then reached such a categoric conclusion, when we can find statutes in the legal order that use precisely such a legislative technique, without raising any doubts whatsoever about their constitutionality. Cf. e.g., § 30 par. 7 of Act no. 254/2001 Coll., on Waters and amending certain Acts (the Waters Act), as amended by later regulations, § 22 par. 3 and § 29c par. 1 and 2 of Act no. 114/1995 Coll., on Domestic Water Traffic, as amended by later regulations, § 20 par. 1 to 3 and § 32 par. 8 of Act no. 289/1995 Coll., on Forests and amending and supplementing certain Acts (the Forests Act), as amended by later regulations. After all, the Act on the Constitutional Court, as amended by Act no. 173/2018 Coll., in § 4 par. 2 "prohibits" a judge from holding another paid office or performing other income-earning activity, of course with exceptions subsequently set forth.

18. And finally – the closing point, point 95 drily states that art. 1 par. 1 of the Constitution was violated, without any kind of justification at all.

19. On Tuesday, 16 February, at 9:10 hrs., the judge rapporteur distributed the final version of the "plenary judgment," stating that there was sufficient space for any dissents, because the judgment would be announced on 22 February at 9:00 hrs. As any changes to the original version were not technically marked, there was no option but to compare both versions of the reasoning. Minor (insignificant) corrections were registered in points 54, 60, 72, 73 and 87. More serious edits can be found in points 67, 69 and 89, and a new point 90 was added. Point 67 was expanded by the arguments concerning art. 1 par. 1 of the Constitution ("the prohibition or arbitrariness also comes from the principle of the material law of the state, guaranteed in art. 1 par. 1 of the Constitution") and quotation of art. 4 par. 4 of the Charter; analysis of art. 4 of the Charter contained in point 69 was deleted. Part of the text from point 89 was moved to the new point 90, and the text was expanded slightly. I have basically nothing to change in the comments already processed, perhaps only that the comment in my point 14, or 15, applies only to point 67 of the judgment.

20. To conclude: I fear that I would also have a certain problem with supporting the decision with reasoning; luckily I no longer have to, and even should not, address it. Although I understand that the judge rapporteur had little time for the substantially revised reasoning of the judgment (of course, he set the deadline himself), that does not excuse some flaws.

Brno, 16 February 2021

Vladimír Sládeček