Pl.ÚS 7/17 dated 27 March 2018
81/2018 Sb.

Anti-smoking Act or the Complete Smoking Prohibition in Restaurants

Czech Republic
JUDGMENT
Of the Constitutional Court
In the Name of the Republic

Under the file reference Pl. ÚS 7/17 dated 27 March 2018, the Constitutional Court, in the Plenum consisting of the Chairman Pavel Rychetský (Judge Rapporteur), and Judges Ludvík David, Jaroslav Fenyk, Josef Fiala, Jan Filip, Jaromír Jirsa, Tomáš Lichovník, Jan Musil, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Vojtěch Šimíček, Milada Tomková, David Uhlíř, and Jiří Zemánek, held on the petition of a group of Senators of the Parliament of the Czech Republic, on behalf of whom acts Senator Ivo Valenta, represented by doc. JUDr. Zdeněk Koudelka, Ph.D., attorney, with the registered office at Optátova 874/46, Brno, seeking the annulment of Section 3 (2) (d), Section 6 (5) (d), Section 8 (1) (k), Section 11 (2) (d), Section 11 (4) and (6), Section 19 in the wording "themselves or", Section 24 (2) in the semi-colon and the wording "if the minor person under investigation does not enjoy full legal capacity, these costs are to be borne by their legal representative", Section 24 (3), the first sentence in the semi-colon and in the wording "if the minor person under investigation does not enjoy full legal capacity, these costs are to be borne by their legal representative", Section 24 (4), sentence two, Section 24 (5), sentence two, in the semi-colon and the wording "if the minor person under investigation does not enjoy full legal capacity, these costs are to be borne by their legal representative", Section 35 (1) (a) in the wording "or 4" Section 35 (1) (k), Section 35 (2) (b) in the wording "k) or", Section 35 (4) (a) in the wording "k) or", Section 36 (1) (b), Section 36 (1) (j) in the wording "or 4", Section 36 (1) (k) and (m), and Section 36 (10) (b) in labelling the letters "b)", "k)" and "m)" of Act No. 65/2017 Coll., on Health Protection from the Harmful Effects of Addictive Substances, under the participation of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Czech Republic, as the parties to the proceedings, and the Government of the Czech Republic, as the secondary party to the proceedings, as follows:

I. In Section 3 (2) (d), Section 11 (2) (d), and Section 36 (1) (b) and (k) of Act No. 65/2017 Coll., on Health Protection, the word "primarily" shall be annulled on the date of publishing this Judgment in the Collection of Laws.

II. In Section 19 of Act No. 65/2017 Coll., on Health Protection, the words "themselves or" shall be annulled on the date of publishing this Judgment in the Collection of Laws.

III. The remainder of the petition has been dismissed.

Reasoning

I.

Subject Matter of the Proceedings

1. On 13 March 2017, the Constitutional Court was served a petition of a group of 20 senators of the Senate of the Parliament of the Czech Republic (hereinafter only as the "Petitioner"), represented by Senator Ivo Valenta and seeking the annulment of Section 3 (2) (d), Section 6 (5) (d), Section 8 (1) (k), Section 11 (2) (d), Section 11 (4) and (6), Section 19 in the wording "themselves or", Section 24 (2) in the semi-colon and the wording "if the minor person under investigation does not enjoy full legal capacity, these costs are to be borne by their legal representative", Section 24 (3), the first sentence in the semi-colon and in the wording "if the minor person under investigation does not enjoy full legal capacity, these costs are to be borne by their legal representative", Section 24 (4), sentence two, Section 24 (5), sentence two, in the semi-colon and the wording "if the minor person under investigation does not enjoy full legal capacity, these costs are to be borne by their legal representative", Section 35 (1) (a) in the wording "or 4" Section 35 (1) (k), Section 35 (2) (b) in the wording "k) or", Section 35 (4) (a) in the wording "k) or", Section 36 (1) (b), Section 36 (1) (j) in the wording "or 4", Section 36 (1) (k) and (m), and

Section 36 (10) (b) in labelling the letters "b)", "k)" and "m)" of Act No. 65/2017 Coll., on Health Protection from the Harmful Effects of Addictive Substances.

2. The petition was filed in accordance with Section 64 (1) (b) of Act No. 182/1993 Coll., on the Constitutional Court, mainly owing to the inconsistency with Art. 1 (1) and Art. 2 (3) of the Constitution of the Czech Republic (hereinafter only as the "Constitution") and Art. 1, Art. 2 (2), Art. 11 (1) and (4), and Art. 26 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter only as the "Charter").

II.

Argumentation of the Petitioner

3. In the introduction of the petition, the Petitioner pointed out that unconstitutionality may also consist in less obvious reasons than the apparent inconsistency with the constitutional norm, and considers that this is the case of the contested provisions. While their adoption was motivated by understandable arguments, they are, in effect, contrary to Art. 1 (1) of the Constitution, defining the Czech Republic as a State governed by the rule of law. It does not, in particular, stand the test from the perspective of the reasonableness of the legal regulation, proportionality, suitability, and necessity. The Petitioner emphasised that public power in a liberal rule of law state is not tasked with educating people and imposing on them the lifestyle that the current power-holder considers right. If suicide does not constitute a criminal offence in the Czech Republic, the Petitioner believes that it is impossible to perceive as criminal acts assessed as not beneficial for the health of the person engaged in such conduct. In this context, the Petitioner referred to the Judgment of the Constitutional Court dated 2 January 2017, file reference I. ÚS 2078/16, in which the Constitutional Court stated that it was not legitimate for the State to allow interference with the integrity of a person in order to protect the person herself. According to the Petitioner, the Constitutional Court has repeatedly acknowledged that the Czech Republic is a liberal State. In the liberal rule of law State, public authorities are then required not to interfere with the private lives of citizens and their freedom protected by Art. 1 of the Charter. The Petitioner grouped the contested provisions of the Act on the Protection of Health from the Harmful Effects of Addictive Substances into seven sections, considering the legal regulation contained in the Act on the Protection of Health from the Harmful Effects of Addictive Substances as unconstitutional in the seven corresponding areas for the reasons specified below.

4. The first group of the objections raised by the Petitioner was directed against Section 3 (2) (d), Section 11 (2) d), Section 36 (1) (b) and (k), and Section 36 (10) (b) in labelling the letters "(b)" and "(k)" of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. These provisions govern the prohibition on the sale of tobacco products, smoking aids, herbal products intended for smoking and electronic cigarettes (hereinafter only as "tobacco and similar products") "at an event intended primarily for persons under 18 years of age", the prohibition on selling or serving alcoholic beverages "at an event intended primarily for persons under 18 years of age", and related infractions. The Petitioner believed that these restrictions were not rational in nature and corresponded to a highly paternalist State. Acceptable child and youth protection is already included in a ban on the sale of those products to persons under the age of 18. There is no reason to restrict the children's parents who accompany their children to the events intended for them. On the contrary, the Petitioner considered as traditional that parents would have a beer or wine, for instance, on Children's Day, while their children play. Since "events intended primarily for persons under 18 years of age" is an indefinite legal concept, according to the Petitioner, for instance, the operators of refreshment stalls in sports or tourist sites will be subject to substantial legal uncertainty, and hence also to the arbitrariness of the inspection authorities, provided that, in addition to normal operation, these sites will also be used to organise events for children. Therefore, the above-listed provisions were considered inconsistent with Art. 1 (1) and Art. 2 (3) of the Constitution and Art. 1, Art. 2 (2) and Art. 26 (1) of the Charter.

5. Within the second group of objections, the Petitioner opposed Section 6 (5) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. According to this provision, a notification to the Ministry of Health, which must be sent by a vendor of tobacco and similar products being sold via the means of distance communication, shall also include a "list of Member States of the European Union and the Contracting States of the Agreement on the European Economic Area, where potential consumers are located in the event cross-border sale under Section 7". The obligation to include this information in the notification was also assessed by the Petitioner as a manifestation of arbitrariness contradictory to the operation of distance sale, particularly over the Internet. The vendor may only estimate this information, which reduces its informative value. Even the fact that in the statement of reasons, the Government refers to Art. 18 (1) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and

sale of tobacco products and related products and repealing Directive 2001/37/EC (hereinafter only as "Directive 2014/40/EU") does not exclude the possible unconstitutionality of the contested provision. If the State allowed sales on the Internet, it is pointless to lay down obligations which seem unreasonable in relation to it. The reasonableness of the legal regulation is an essential requirement of a democratic rule of law State. The Petitioner therefore considered the contested provision to be inconsistent with Art. 1 (1) and Art. 2 (3) of the Constitution and Art. 2 (2) and Art. 26 (1) of the Charter.

6. In the third group of the objections, the Petitioner disputed the constitutionality of Section 8 (1) (k) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, which prohibits smoking inside the premises of the catering services, except for the use of water pipes. The Petitioner believed that this was a special provision for Section 8 (1) (a) of the same act prohibiting smoking in publicly available indoor spaces, with the exception of a structurally separated smoking area. The special prohibition imposed on catering services facilities was assessed as unjustified and paternalistic, making it impossible to establish smoking facilities. Under Section 10 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, they would have to be specially ventilated areas where the employee, while performing their work, would not be allowed to enter at the time when people smoke there. By means of a special prohibition, restaurants at airports cannot be equipped with smoking facilities, even if it is possible to establish smoking facilities in the area of an international airport. In the Petitioner's view, the ban is unreasonable and unjustified and does not correspond to the Government's declared purpose of protecting non-smokers' health, thus being unconstitutional. In fact, it is impossible to accept the intervention of public authority motivated by health protection of smokers, rather than non-smokers. The Petitioner referred to the Judgment of the German Federal Constitutional Court dated 30 July 2008, file ref. 1 BvR 3262/07, BVerfGE 121, 317, and the Decision of the Constitutional Court of the Free State of Saxony dated 20 November 2008, file ref. Vf. 63-IV-08 (HS). The Petitioner stated that there were multiple possible solutions to the health protection of non-smokers, but the absolute prohibition and rejection of amendments to the Act was unconstitutional. The contested provision was therefore considered to be inconsistent with Art. 1 (1) and Art. 2 (3) of the Constitution and Art. 1, Art. 2 (2) and Art. 26 (1) of the Charter.

7. The fourth group of the Petitioner's objections was directed against Section 11 (4), Section 35 (1) (a) in the wording "or 4", and Section 36 (1) (j) in the wording "or 4" of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. The contested Section 11 (4) of the Act prohibits the sale of alcoholic beverages through a vending machine, while the remaining provisions regulate the related infractions. The Petitioner questioned the reasonableness of this ban and assessed the fact that it also applies to wine tasting vending machines in special wine shops as completely arbitrary. They contain bottles with a protective nitrogen atmosphere and can thus be opened for a longer time without undesirable oxidation, allowing for better-quality tasting of a larger number of wine samples. Therefore, the enumerated provisions were considered to be inconsistent with Art. 1 (1) and Art. 2 (3) of the Constitution and Art. 2 (2) and Art. 26 (1) of the Charter.

8. By its fifth group of the objections, the Petitioner challenged Section 11 (6), Section 35 (1) (k), Section 35 (2) (b) in the wording "k) or", Section 35 (4) (a) in the wording "k) or", Section 36 (1) (m), and Section 36 (10) (b) in labelling the letter "m" of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. The contested Section 11 (6) of the Act prohibits the sale or service of an alcoholic beverage to a person who can reasonably be expected to immediately consume the alcoholic beverage and subsequently to perform an activity in which, due to previous ingestion of the alcoholic beverage, they could jeopardise human health or damage property. The remaining listed provisions regulate the related infractions. The Petitioner emphasised that this obligation was burdensome for everyone, not only entrepreneurs. It creates a substantial degree of legal uncertainty with the possibility of arbitrariness of the State, since it is problematic to identify a person to whom the serving of alcoholic beverages is forbidden under Section 11 (6) of the Act. According to the Petitioner, it is everyone's duty to decide whether to drink alcoholic beverages or not, and the weight of this decision cannot be transferred onto other private individuals. Therefore, the enumerated provisions were considered to be inconsistent with Art. 1 (1) and Art.2 (3) of the Constitution and Art. 1 and Art. 2 (2) of the Charter.

9. The sixth group of the Petitioner's objections was directed against Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances in the wording "themselves or". The aforementioned Section 19 of the Act prohibits a person who carries out an activity in which, among other things, they may endanger their health, from consuming alcoholic beverages or other addictive substances in the course of any such activity or prior to performing it. The Petitioner opposed the fact that this provision affects the threat to oneself, even though human life and health are not State property. According to the Petitioner, it also introduces the punishability of a failed suicide, as a fine of up to CZK 50,000 can be imposed for violating Section 19 of the

Act. The provision was also deemed superfluous, as the initial prohibitions, such as consuming alcohol when driving a motor vehicle, are already subject to special legal regulations, which then have application priority.

Although the contested regulation was already part of the Czech legal order (in Section 16 (1) of Act No. 379/2005 Coll., on Measures Aimed at Protection against Harm Caused by Tobacco Products, Alcohol and other Addictive Substances and Amendments to Related Acts, as amended by Act No. 274/2008 Coll.), it has not yet been subjected to a constitutional review. The Petitioner compared the contested provision with the penalty imposed on cyclists who only injured themselves. This was considered a tragic example of the Government's attempt at an all-encompassing violation of privacy, thus being contrary to Art. 1 (1) and Art. 2 (3) of the Constitution and Art. 1 and Art. 2 (2) of the Charter.

10. By means of the seventh group of the objections, the Petitioner did not agree with the reimbursement of the costs of the compulsory medical examination for the presence of alcohol or other addictive substances in the case of minors by their legal representatives contained in Section 24 (2), (3), (4) and (5) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. The Petitioner believed that this provision established the objective responsibility of the legal representatives, even if the minor was placed in a young offender's facility and the parent did not have any influence over their potential intoxication. Transferring the responsibility onto parents without the possibility to take into account individual circumstances or their cause is, according to the Petitioner, unfair, unconstitutional and contrary, in particular, to the principle of the rule of law State under Art. 1 (1) of the Constitution and the protection of property under Art. 11 (1) of the Charter. According to the Petitioner, in the case of annulment, in addition to the adoption of a new regulation, it is possible to proceed according to general civil law regulations, according to which a minor who has not acquired full legal capacity is competent to perform legal acts reasonably appropriate in their the nature to the intellectual and volitional maturity of minors of their age. Since the whole Act on the Protection of Health from the Harmful Effects of Addictive Substances is rather a public law regulation, it is not appropriate, by means of its partial regulation, to interfere with its general regulation of responsible relationships between parents and children and third parties, which is otherwise contained in the Civil Code.

11. For the reasons described above, the Petitioner has sought the annulment of all the above provisions of the Act on the Protection of Health from the Harmful Effects of Addictive Substances.

III.

Proceedings before the Constitutional Court

12. Pursuant to Section 69 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, the Constitutional Court sent the petition to the Chambers of the Parliament as the parties to the proceedings and to the Government and the Public Defender of Rights, entitled to intervene in the proceedings as the secondary parties.

13. In its statement, the Chamber of Deputies summarised the course of the legislative process, in which the Act on the Protection of Health from the Harmful Effects of Addictive Substances was discussed and adopted. It stated that the legislature had acted in the belief that the adopted statute was consistent with the Constitution and the Czech legal order.

14. In its statement, the Senate also summarised the course of the legislative process, recalling the statements of some Senators presented in the course of discussing the Bill on the Protection of Health from the Harmful Effects of Addictive Substances. According to the Senate, it is up to the Constitutional Court to assess the petition seeking the annulment of the individual provisions of this Act and decide on the case.

15. The Government announced that it would participate in the proceedings, and instructed the Minister for Human Rights, Equal Opportunities and Legislation to draw up and send, in cooperation with the Minister of Health, a statement on the petition to the Constitutional Court. In the statement, the Government expressed its position on the individual points of the petition.

16. As for the first group of the Petitioner's objections concerning the restrictions on events intended predominantly for persons under the age of 18 years, it stated that it did not perceive in the contested legal regulation any inconsistency with the constitutional order. The regulation protects persons under the age of 18 years from the negative impact of addictive substances. It disagreed with the statement that the regulation could lead to the uncertainty of refreshment stall operators. In fact, nothing prevents them from restricting the sale of

forbidden goods if an event for a legally protected group is held on the site at a specific moment. It is also foreseen that such event will not take place spontaneously, but will be agreed or announced in advance. The Act may lay down conditions and restrictions for the exercise of certain professions or activities; the contested legal regulation thus implements Art. 26 (2) of the Charter, being in compliance with the constitutional order.

17. The Government did not express its statement on the second group of the Petitioner's objections directed against the content of the notification to the Ministry of Health.

18. With regard to the third group of the objections concerning the exclusion of smoking facilities in restaurants in restaurants, the Government advised that it did not consider the regulation to be inconsistent with the constitutional order. In the Government's view, this regulation merely defines the scope of state power implementation in accordance with Art. 2 (3) of the Constitution, being a manifestation of the State's interest in the application of Art. 31 of the Charter, according to which everyone has the right to the protection of their health. It pursues the human goal of improving the health of the population and protecting against exposure to tobacco smoke. It is a legal and political approach seeking health benefits for citizens, unconditioned by exceptions that would essentially negate this effort.

19. As for the fourth group of the Petitioner's objections against the prohibition on the sale of alcoholic beverages by means of vending machines, the Government noted that the aim of the regulation includes, inter alia, the protection of persons below the age of 18 years against the harmful effects of alcohol. Based on previous experience, sales through a vending machine preclude shop operators from effectively enforcing lawful prohibitions on the sale of these goods to protected persons. This is a legal application of Art 2 (3) of the Constitution and Art. 2 (2) of the Charter, as well as the legal determination of the conditions and limitations under Art. 26 (2) of the Charter.

20. As for the fifth group of the objections concerning the prohibition to sell and serve alcohol to certain persons, the Government did not agree that the contested provisions would result in legal uncertainty. On the contrary, the Government believes that it consists in introducing a legal framework for the protection of life and health by means of a lawful ban on an activity which could jeopardise these values. This is thus the legal implementation of Art. 31 of the Charter, the right to health protection, being consistent with Art. 2 (3) of the Constitution and Art. 2 (2) of the Charter.

21. As for the sixth group of the objections concerning punishability of threatening oneself, the Government did not perceive as appropriate the arguments of hypothetical examples of sanctioning suicides. The purpose of the statute is to protect against the harmful effects of addictive substances, i.e. the protection of every addressee of this legal regulation. Any statutory duty without sanction is very difficult to enforce. The protection of human life and health plays a leading role in interpreting the contested legislation; it is thus necessary to prohibit certain activities by means of law that may jeopardise these values. Since it is the implementation of Art. 31 of the Charter, the right to health protection, the Government did not perceive any violation of the constitutional order.

22. As for the seventh group of the objections directed against the reimbursement of the cost of forced examination of minors, the Government stated it did not perceive any inconsistence of the regulation with the constitutional order. The contested provision is a manifestation or consequence of the responsibility of the legal representative of a minor child not enjoying full legal capacity. It concerns the establishment of a legal obligation in accordance with Art. 2 (3) of the Constitution and Art. 2 (2) of the Charter.

23. Overall, the Government did not consider the Petitioner's application to be justified and sought its dismissal. However, should the Constitutional Court proceed to the derogation from the contested legal regulation, it perceived that it would be necessary to postpone the enforceability of the judgment in order to prepare and discuss a bill containing another constitutionally consistent manner of protection against the harmful effects of addictive substances.

24. The Public Defender of Rights stated that it would not participate in the proceedings.

25. The Petitioner filed a reply to the individual statements. It did not raise any objections to the statements of the Chamber of Deputies and the Senate. In the Petitioner's view, the Government's statement affirmed the approach that the Government had decided to change the life of citizens through force, treating them as puppets. As for the issue of the restrictions at events intended primarily for persons under the age of 18 years, it perceived the Government's statement as superficial, as it did not answer, for instance, whether the event focusing on parents with children was still an event intended primarily for children or not. As an example, it mentioned tilts

held at castles or other performances which are also watched by adults, not only as children's accompaniment. For such events, it is not clear whether it is an event intended primarily for persons under the age of 18 years. In addition, the refreshment stall keeper does not have to be informed by the castle's owner that such an event is taking place. As for prohibiting smoking facilities in restaurants, the Government has not explained at all, in the Petitioner's view, why smoking facilities can be provided at airports but not in restaurants, and why a smoker at the airport has more rights than a smoker in a restaurant. Above all, however, the Petitioner considered the Government's attitude as contradictory to the liberal foundations of the State. According to the Petitioner, the Government's arguments of health protection under Art. 31 of the Charter show that the Government failed to understand the Charter as an instrument for protecting the rights and freedoms of citizens but as an instrument of State power against citizens. If a citizen can refuse hospital treatment, even if it can result in their death, all the more can they go to smoke in the smoking room with other smokers. If the Government fails to respect this, it reaches the position of a totalitarian government wishing to create a new person according to their own ideas. As for wine tasting machines, the Petitioner pointed out that the Government officials did not know the circumstances in Moravia, and the Government failed to explain at all why they wished to ban the possibility of tasting expensive wines through machines. The Petitioner disagreed with the possible postponement of the derogating effects of the Constitutional Court's decision.

26. Pursuant to Section 44 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, the Constitutional Court held on the matter dispensing with an oral hearing, as it could not be expected to provide any further clarification on the case.

IV.

The wording and the context of the contested provisions

27. The Petitioner seeks the annulment of a number of provisions of the Act on the Protection of Health from the Harmful Effects of Addictive Substances or their parts, whose valid and effective wording will be provided below by the Constitutional Court for the sake of clarity (note: the contested provisions are in bold).

28. The contested Section 3 (2) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances and its context read as follows:

§ 3

Prohibition of the sale of tobacco products, smoking aids, herbal products intended for smoking, and electronic cigarettes

(1) It is forbidden to sell tobacco products, smoking aids, herbal products intended for smoking, and electronic cigarettes outside a store specialising in the sale of such goods, a store which is a food establishment, a store with the predominant assortment of daily and other periodical press, a catering services establishment, an accommodation facility, a refreshment stand which has a firm structure and complies with the terms for running a food business for the purpose of operating catering services under the Public Health Protection Act (hereinafter only as "refreshment stand"), a stand with a fixed structure with a predominant assortment of daily and other periodical press, a stand specialising in the sale of these goods located inside a building intended for trade, and transport means of air transport.

(2) Notwithstanding the provisions of paragraph 1, it is forbidden to sell tobacco products, smoking aids, herbal products intended for smoking, and electronic cigarettes

(…)

d) At an event intended primarily for persons under 18 years of age;

(…)

29. The contested Section 6 (5) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances and its context read as follows:

§ 6

(1) Tobacco products, smoking aids, herbal products intended for smoking, and electronic cigarettes may be sold by means of distance communication provided that the sale to persons under the age of 18 years is excluded; for this purpose, the vendor of these products by means of distance communication shall be equipped with a computer system which electronically uniquely verifies the consumer's age (hereinafter only as the "age verification system"). At the time of the sale, the vendor shall verify that the consumer making the purchase is not under 18 years of age.

(…)

(4) The vendor of tobacco products, smoking aids, herbal products intended for smoking, and electronic cigarettes by means of distance communication shall be obliged to notify in writing the data on the age verification system and its functioning to the Ministry of Health, in the case of:

a) The cross-border sale of tobacco products and electronic cigarettes which may be used to inhale nicotine-containing vapours within 5 days upon the date of receipt of the registration certificate under the Food and Tobacco Products Act;

b) The sale of tobacco products and electronic cigarettes on the territory of the Czech Republic, within 15 days prior to the commencement date of such sale;

c) The sale of smoking aids and herbal products intended for smoking, within 15 days prior to the commencement date of such sale; or

d) Any change in this information within 30 days upon the day when the change occurred.

(5) The notification referred to in paragraph 4 shall contain, in addition to the items specified in the Administrative Procedure Code, the following information:

a) The identification number of the vendor;

b) The address of the website used for sale by means of distance communication;

c) A description of the age verification system and its functioning;

d) The list of the Member States of the European Union and the Contracting States of the Agreement on the European Economic Area, where potential consumers are located, in the case of cross-border sales pursuant to Section 7.

(…)

30. The contested Section 8 (1) (k) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, its context, and the related Section 9 of the same Act read as follows:

§ 8

(1) It is forbidden to smoke

a) In a publicly accessible indoor space, with the exception of a structurally separate smoking area;

b) In the transit area of an international airport, with the exception of a structurally separate smoking area;

(…)

e) In a healthcare facility and in the premises associated with its operation, with the exception of a structurally separate smoking area in a closed psychiatric ward or any other addiction treatment facility,

(…)

k) In the indoor space of catering services establishments, with the exception of the use of water pipes,

(…)

§ 9

(1) In the event that the owner of the space referred to in Section 8 (1) (a), (c) and (h), the operator of an international airport, the public transport operator, the health service provider, the school or the school facility, the founder or provider of the services in the facility, establishment or area referred to in Article 8 (1) g), a sports ground operator, an entertainment venue operator, an event organiser, a catering services operator, or a zoological garden operator where smoking and using electronic cigarettes is prohibited under Section 8 or Section 17 (1), establishes a violation of this prohibition they shall invite the person who fails to observe a smoking ban or a ban on using electronic cigarettes not to continue with that conduct or leave the premises. This person is obliged to obey the instruction.

(2) The entrance to the premises, with the exception of the premises referred to in Section 8 (1) (c) or a means of transport where smoking is prohibited shall be marked by the person referred to in Paragraph 1 with a clearly visible graphic symbol "Smoking Prohibited". The graphic design of the mark is set out in the Annex to this Act.

(3) The entrance to the premises, with the exception of the premises referred to in Section 8 (1) (c) or a means of transport where using electronic cigarettes is prohibited shall be marked by the person referred to in Paragraph 1 with a clearly visible text indicating that the use of electronic cigarettes is prohibited in that area. This text shall be provided in the Czech language in black capital letters on a white background and a font size of at least 1 cm.

31. The contested Section 11 (2) (d) and (4) and (6) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances and their context read as follows:

§ 11

Prohibition and restrictions on selling and serving alcoholic beverage

(1) It is forbidden to sell alcoholic beverages outside a store which is a food enterprise, a catering services facility, a wine producer's establishment, accommodation facilities, a refreshment stall, a stall specialising in the sale of such goods located inside a building intended for trade and a public means of long-distance rail, air, water, and bus transport.

(2) Notwithstanding the provisions of Paragraph 1, it is prohibited to sell or serve alcoholic beverages

(…)

d) At an event intended primarily for persons under 18 years of age;

(…)

(4) It is forbidden to sell alcoholic beverages through a vending machine.

(5) It is forbidden to sell or to serve an alcoholic beverage to a person under the age of 18 years.

(6) It is forbidden to sell or serve an alcoholic beverage to a person who can reasonably be expected to consume the alcoholic beverage immediately afterwards and subsequently to perform an activity in which, due to the previous ingestion of the alcoholic beverage, they could jeopardise human health or damage property.

(…)

32. The contested Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances reads as follows (Section 19 is contested in the wording "themselves or"):

§ 19

The prohibition on consuming alcoholic beverages or using other addictive substances

A person who conducts an activity in which they may jeopardise the life or health of themselves or another person or damage property or in respect of whom any other legal regulation provides for a prohibition of consuming alcohol or using other addictive substances shall not consume alcohol or use other addictive substances when conducting any such activity or prior to conducting it in order to ensure that any such activity is not conducted under the influence of alcohol or any other addictive substance.

33. The contested Section 24 (2), (3), (4) and (5) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances reads as follows (the individual paragraphs of Section 24 are always contested only in the parts concerning the reimbursement of costs for minors):

§ 24

Reimbursement of the costs of professional medical examination and transportation to the health facility

(…)

(2) If the presence of alcohol or any other addictive substance is established, the examined person shall pay to the person who has paid the health service provider for a medical examination pursuant to Paragraph 1 the costs incurred by the payment of the medical examination; if the examined person is a minor who does not enjoy full legal capacity, these costs shall be borne by their legal representative.

(3) The costs of transporting the examined person to a health facility for the purpose of performing a medical examination shall be paid by the examined person if the presence of alcohol or any other addictive substance is established; if the examined person is a minor who does not enjoy full legal capacity, these costs shall be borne by their legal representative. If the presence of alcohol or other addictive substance is not established, the costs shall be borne by the Police of the Czech Republic, the Military Police, the Municipal Police, the Prison Service, the employer, the inspection body or the health services provider, within the scope of which a request for examination pursuant to Section 21 (1) or a request for examination pursuant to Section 21 (2) has been made, unless it is a case of differential diagnosis covered by public health insurance.

(4) If the medical examination was conducted due to a refusal of an approximate examination by the examined person, the examined person shall be obliged to pay to the provider of the medical services for the medical examination pursuant to Paragraph 1 the costs incurred to the provider as a result of any such payment, irrespective of the result of the examination; this person shall also pay the transportation cost to the medical facility for the purpose of performing a medical examination. If the examined person is a minor who does not enjoy full legal capacity, the costs shall be borne by their legal representative.

(5) The toxicological examination shall be paid to the health services provider by the person who requested this examination. Unless the amount paid is part of the costs of proceedings under another legal regulation and if the presence of alcohol or any other addictive substance is established, the examined person shall compensate the person who has paid for the toxicological examination to the health service provider for the costs incurred by the toxicological examination; if the examined person under investigation is a minor who does not enjoy full legal capacity, these costs shall be borne by their representative.

34. The contested parts of Section 35 of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll., and their context read as follows [Section 35 is contested only in Paragraph 1 (a) in the wording “or 4”, in Paragraph 1 (k), in Paragraph 2 (b) in the wording “k) or”, and in Paragraph 4 (a) in the wording “k) or”]:

§ 35

Infractions of natural persons

(1) A natural person commits an infraction when:

a) Contrary to Section 3 (1), (2) or (3) or Section 11 (1), (2), (3) or (4), they sell a tobacco product, a smoking aid, a herbal product intended for smoking, an electronic cigarette or an alcoholic beverage;

(…)

k) Contrary to Section 11 (6), they sell or serve an alcoholic beverage to a person who can reasonably be expected to consume the alcoholic beverage immediately afterwards and subsequently to perform an activity in which, due to the previous ingestion of the alcoholic beverage, they could jeopardise human health or damage property;

(…)

o) Contrary to Section 19

1. They consume an alcoholic beverage or use any other addictive substance even though they are aware that they will perform an activity in the course of which they could jeopardise the life or health of themselves or another person or damage property;

2. After consuming an alcoholic beverage or using any other addictive substance, they conduct an activity in the course of which they could jeopardise the life or health of themselves or another person or damage property; or

(…)

(2) For an infraction, it is possible to impose a fine of up to

a) 5,000 CZK in the event of an infraction under Paragraph 1 (d) to (h) or (m);

b) 10,000 CZK in the event of an infraction under Paragraph 1 (k) or (l);

(…)

(4) For an infraction, it is possible to impose prohibition of the activity for up to

a) 1 year in the event of an infraction under Paragraph 1 (k) or (l);

(…)

35. The contested parts of Section 36 Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll., and their context read as follows [Section 36 is contested only in Paragraph 1 (b), in Paragraph 1 (j) in the wording "or 4", in Paragraph 1(k) and (m), and in Paragraph 10 (b) in the labelling of letters "b)", "k)" and "m)"]:

§ 36

Infractions of legal entities and natural persons conducting business

(1) A vendor commits an infraction when:

(…)

b) Contrary to Section 3 (2) (d), they sell a tobacco product, a smoking aid, a herbal product intended for smoking, or an electronic cigarette at an event intended primarily for persons under the age of 18 years;

(…)

j) Contrary to Section 11 (1), Section 11 (2) (a), (b), (c), (e), (f) or (g) or Section 11 (3) or (4), they sell or serve an alcoholic beverage;

k) Contrary to Section 11 (2) (d), they sell or serve an alcoholic beverage at an event intended primarily for persons under the age of 18 years;

l) Contrary to Section 11 (5), they sell or serve an alcoholic beverage to a person under the age of 18 years;

m) Contrary to Section 11 (6), they sell or serve an alcoholic beverage to a person who can reasonably be expected to consume an alcoholic beverage immediately afterwards and subsequently to perform an activity in

which, due to previous ingestion of the alcoholic beverage, they could jeopardise human health or damage property;
(…)

(8) An operator of a catering services facility commits an infraction when:

a) Contrary to Section 9 (1), they fail to invite the person who does not abide by the prohibition of smoking on the premises where smoking is prohibited to discontinue any such conduct or leave the premises; or

b) They fail to comply with the labelling duty under Section 9 (2).

(…)

(10) For an infraction, it is possible to impose a fine of up to

(…)

b) 50,000 CZK in the event of an infraction under Paragraph 1 (b), (d), (e), (h), (k), (m), (n), and (o), Paragraph 2 (a) and (c) to (e), Paragraph 3 (a) and (c), Paragraph 4 (a), (c), (d), (e), and (f), Paragraph 5 (a) and (c), Paragraph 6 (a) and (c), Paragraph 7 (a) and (c), Paragraph 8 (a), or Paragraph 9 (a);

(…)

V.

Terms of the assessment of the petition's merits

36. The Constitutional Court states that it has jurisdiction to hear the petition seeking the annulment of the contested statutory provisions, the petition complies with all statutory formalities and the Petitioner had the standing to file it [Section 64 (1) (b) of Act No. 182/1993 Coll., on the Constitutional Court]. At the same time, it has not found any grounds for the inadmissibility of the petition or for discontinuing the proceedings. The terms for the assessment of its merits have thus been complied with.

VI.

Assessment of the competence and constitutional conformity of the procedure for adopting the contested legal provisions

37. Pursuant to Section 68 (2) of Act 182/1993 Coll., on the Constitutional Court, as amended by Act No. 48/2002 Coll., the assessment of the constitutionality of the statute with the constitutional order consists of answering three questions: whether the statute was adopted and issued within the limits of the competence determined by the Constitution, in a constitutionally prescribed manner and whether its content complies with the constitutional laws.

38. The contested provisions or their parts were adopted as part of the new Act on the Protection of Health from Harmful Effects of Addictive Substances, which came into effect on 31 May 2017. This Act has already been amended by Act No. 183/2017 Coll., which amends certain acts in relation to adopting the Act on Liability for Infractions and the Related Proceedings Act and the Act on Certain Infractions. However, the contested provisions or their parts have not been subject to any amendments. In general, the terminology has been amended so that the violation of the Act committed by natural persons and legal entities is labelled as the "infraction" in Sections 35 and 36 of Act No. 65/2017 Coll., on the Protection of Health from Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll. In terms of the context of the contested provisions, the wording "alongside the fine" was deleted from the introductory part of Section 35 (4) of the Act; the prohibition of activity under this provision may thus be imposed separately. In the introductory part of Section 36 (10) of the Act, the wording "a fine shall be imposed" was replaced with the wording "a fine may be imposed".

39. Pursuant to Art. 15 (1) of the Constitution, the Parliament had the competence to adopt the Act on the Protection of Health from the Harmful Effects of Addictive Substances. Using the statements of its Chambers and the publicly available documents relating to the legislative process, the Constitutional Court found that the

bill (Chamber Document No. 828, 7th term, 2013 – 2017), which also included the contested provisions or their parts, was submitted by the Government to the Chamber of Deputies on 2 June 2016. The Chamber of Deputies adopted it in its third reading on 9 December 2016 in its 53rd session (Resolution No. 1480). Out of 163 Deputies present, 118 voted in favour of the bill, while 23 Deputies voted against, and 22 abstained.

40. After submitting the bill to the Senate, its Committee on Agenda and Procedure instructed, inter alia, the Committee on Legal and Constitutional Affairs to discuss the bill. However, the Committee on Legal and Constitutional Affairs did not adopt any resolution concerning the discussed bill. The Senate discussed and adopted the bill (Senate Document No. 28, 11th term, 2016–2018) on 19 January 2017 in its 4th session (Resolution No. 80). Out of 68 Senators present, 45 voted in favour of the bill, 12 against and 11 abstained. The adopted Act was served onto the President of the Republic on 31 January 2017 and signed by him on 14 February 2017. It was promulgated in the Collection of Laws on 3 March 2017 in volume 21 under No. 65/2017 Coll.; it took effect on 31 March 2017.

41. These findings are sufficient to conclude that the Act was adopted in a constitutionally prescribed manner. In addition, the Petitioner did not raise any objections to the adoption procedure of the statute. The fact that the Chamber of Deputies did not adopt certain amendments in the prescribed procedure cannot establish the unconstitutionality of the Act.

In fact, the Constitutional Court proceeds to derogation from the legal regulation owing to procedural errors of the norm-adopting procedure in the event that within the legislative process, there was a direct violation of the Constitution or any other part of the constitutional order or the violation of any of the provisions of sub-constitutional law (for instance, Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies, as amended), yet only in the case that the violation amounts to a constitutional law dimension, especially due to the protection of free competition of political parties and the protection of minorities [for instance, cf. the Judgment dated 1 March 2011, file ref. Pl. ÚS 55/10 (N 27/60 SbNU 279; 80/2011 Coll.) or Judgment dated 27 November 2012, file ref. Pl. ÚS 1/12 (N 195/67 SbNU 333; 437/2012 Coll.)]. No such error was objected by the Petitioner or established by the Constitutional Court.

VII.

General background to the assessment of the merits

42. Due to the fact that the Constitutional Court did not hold on the lack of jurisdiction or the deficiencies in the procedure in adopting the contested provisions, it proceeded to the assessment of the material compliance of these provisions with the constitutional order.

VII.1

Nature of the rights allegedly violated in the Petitioner's view and the review of the interference with these rights by the Constitutional Court

43. The Petitioner alleged the inconsistency of the various parts of the Act with Art. 1 (1) of the Constitution, according to which the Czech Republic is a democratic state governed by the rule of law, with the limitation of state power and the prohibition of arbitrariness by the state power contained in Art. 2 (3) of the Constitution and Art. 2 (2) of the Charter, with human freedom as a value declared in Art. 1 of the Charter, with the protection of property in accordance with Art. 11 (1) of the Charter and with the right to engage in enterprise in accordance with Art. 26 (1) of the Charter. The Constitutional Court has repeatedly expressed its views on the content of these provisions and the manner in which they are manifested in the procedure seeking the annulment of laws and other legal regulations. At this point, it will briefly recall its existing approach, as it implies an assessment of the contested provisions.

44. By reference to the introductory provisions of the Constitution and the Charter, the Petitioner emphasises the fundamental principles and values which the Czech Republic has acknowledged, yet which do not imply any specific public subjective rights. In particular, in the context of the following provisions of these regulations, they acquire importance on an interpretative basis or as an argumentation tool in the Constitutional Court's considerations.

45. For instance, the Constitutional Court thus concluded that Art. 1 (1) of the Constitution implied the respect for fundamental rights and freedoms of an individual [for instance, the above quoted Judgment file ref. Pl. ÚS

55/10 or Judgment dated 22 March 2011, file ref. Pl. ÚS 24/10 (N 52/60 SbNU 625; 94/2011 Coll.)], the prohibition of retroactivity or the principle of legal certainty [Judgment dated 24 May 1994, file reference Pl. ÚS 16/93 (N 25/1 SbNU 189; 131/1994 Coll.)]. At the same time, Art. 1 of the Constitution is closely linked to the prohibition of arbitrariness by the state authority contained in Art. 2 (3) of the Constitution and Art. 2 (2) of the Charter [cf. Judgment dated 23 May 2000, file reference Pl. ÚS 24/99 (N 73/18 SbNU 135; 167/2000 Coll.), and the above-quoted Judgment file reference Pl. ÚS 24/10].

46. Above all, the Constitutional Court has consistently held that Art. 1 of the Charter, the violation of which is expressly alleged, cannot be interpreted separately from the other general Articles 2 to 4 of the Charter, but on the contrary, they must be perceived as a whole. The regulation of these general provisions unambiguously implies that the fundamental protected values listed in Art. 1 of the Charter were not conceived as absolute by the constitutional legislator. This is also reflected in Art. 4 of the Charter, which directly assumes the existence of the obligations and limitations provided for by law, as well as in Art. 2 (3) of the Charter, anticipating the possibility to impose certain obligations or restrictions [cf. Judgment of the Constitutional Court of the Czech and Slovak Federative Republic dated 8 October 1992, file reference Pl. ÚS 22/92; i.e. Judgment No. 11 of the Collection of Resolutions and Judgements of the Constitutional Court of the CSFR, Prague: Linde, 2011, p. 41, and Judgments dated 12 March 2008, file reference Pl. ÚS 83/06 (N 55/48 SbNU 629; 116/2008 Coll.), dated 26 May 2009, file reference Pl. ÚS 40/08 (N 120/53 SbNU 501; 241/2009 Coll.), and dated 15 May 2012, file reference Pl. ÚS 17/11 (N 102/65 SbNU 367; 220/2012 Coll.)].

47. On the contrary, the property right protected by Art. 11 (1) of the Charter belongs among the fundamental human rights and freedoms of an individual by its nature. However, similarly to other fundamental rights, it may also be subject to restrictions, especially in the event of a collision with another fundamental right or in the case of a necessary enforcement of a constitutionally approved public interest. In order to determine whether the property right was restricted in accordance with Art. 11 (1) of the Charter, the Constitutional Court first assesses whether it has occurred on the basis of a statute and within its limits [cf. Judgment dated 11 October 1995, file reference Pl. ÚS 3/95 (N 59/4 SbNU 91; 265/1995 Coll.) or Judgment dated 22 March 2005, file reference Pl. ÚS 63/04 (N 61/36 SbNU 663; 210/2005 Coll.)]. If these conditions have been satisfied, it proceeds to the proportionality test and examines whether the measure in question follows a legitimate (constitutionally approved) objective and, if so, whether it is appropriate to achieve this objective (suitability requirement), whether this objective may not be achieved in any other manner which would take greater consideration of the fundamental right in question (necessity requirement) and, finally, whether the interest in achieving that objective in a particular legal relationship will prevail over the fundamental right in question (proportionality in the narrower sense).

48. Most recently, the Constitutional Court has expressed its detailed view on the right to engage in enterprise and the related case law in the judgment concerning electronic sales records [Judgment dated 12 December 2017, file reference Pl. ÚS 26/16 (8/2018 Coll.)]. It recalled that, in accordance with Article 26 of the Charter, access to the right to engage in enterprise, as the freedom to conduct business guaranteed in paragraph 1 of this provision, must be distinguished from the pursuit of a profession or any other economic activity, including the conditions attached to it, which may be set by law (Art. 26 (2) of the Charter). It further stressed that the right to engage in enterprise is included in Chapter Four among economic, social and cultural rights and, at the same time, it is the economic, social and cultural right listed in Art. 41 (1) of the Charter. Therefore, it is not directly applicable to the same extent as fundamental human rights or political rights. The regulation of these rights is primarily in the hands of the legislature, while the constitutional guarantees of economic, social and cultural rights may be regarded as a judicial matter only secondarily and to a limited extent. However, even in the case of fundamental rights under Art. 26 (1) of the Charter, the requirement under its Art. 4 (4) is to be applied to consider the substance and meaning of the rights when determining their limits.

49. These conclusions are also consistent with the methodology for reviewing the interference with the right to engage in enterprise. The constitutionality test will also be complied with in the event of a legal regulation which pursues a legitimate aim and does so in a manner which can be imagined as a reasonable means to attain it, yet not necessarily the best, the most appropriate, the most effective or the wisest means [cf. also Judgment dated 5 October 2006, file reference Pl. ÚS 61/04 (N 181/43 SbNU 57; 16/2007 Coll.)]. The methodological tool of the Constitutional Court to review the legislature's intervention in the right to engage in enterprise therefore consists in the reasonableness test (distinct from the proportionality test), which reflects both the need to respect the legislature's rather extensive discretion and the need to eliminate any possible excesses.

50. The reasonableness test consists of the following four steps:

I. Defining the meaning and substance of the fundamental right, i.e. its essential content.

II. Assessing whether the law itself does not affect the very existence of the fundamental right or the actual exercise of its essential content.

III. Assessing whether the legal regulation pursues a legitimate aim; whether it is not an arbitrary substantial reduction of the overall standard of fundamental rights.

IV. Considering the question whether the legal means used to achieve it is rational, albeit not necessarily the best, the most appropriate, the most effective or the wisest.

51. Following the previous case law, in the above-quoted Judgment file reference Pl. ÚS 26/16, the Constitutional Court held that that the meaning and essence of the right to engage in enterprise comprises the purely individual aspect (the possibility of self-realisation of an individual), as well as the substantive law aspect, when the individual's freedom also represents a substantial requirement of the democratic rule-of-law state, and the economic aspect (this simply means obtaining a profit which is partially taxed so that the State can obtain the means to fulfil its functions). In other words, in the case of the right to engage in enterprise and conduct any other economic activity, the restriction affecting its essence and meaning would mean that as its consequence, a certain activity would no longer be capable of providing the means to respond to the needs of those engaged in that activity [Judgment dated 8 December 2015, file reference Pl. ÚS 5/15 (N 204/79 SbNU 313; 15/2016 Coll.), paragraph 48, or Judgment dated 23 May 2017, file reference Pl. ÚS 10/12 (207/2017 Coll.), paragraph 66].

52. In the judgment concerning electronic sales records, the Constitutional Court had to deal with a statutory term which may be considered as conditional on the actual access to enterprise, since it was not possible to commence conducting business in the specific sectors unless it had been complied with (condition sine qua non). On the contrary, the contested restrictions on the sale of addictive substances or smoking, with the exception of notifications sent to the Ministry of Health pursuant to Section 6 (4) and (5) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, represent the conditions restricting entrepreneurs only when conducting their own business, rather than representing the conditions of access to it, which the Constitutional Court assesses more strictly.

VII.2

The objective of the Act on the Protection of Health from the Harmful Effects of Addictive Substances

53. The afore-mentioned rights and freedoms, the breach of which the Petitioner alleges, come into conflict with the fundamental rights the protection or enforcement of which has been pursued by the adoption of the contested legislation. In fact, the very title of the Act on the Protection of Health from the Harmful Effects of Addictive Substances and almost all of its substantive provisions imply that its adoption and fulfilment pursued health protection (guaranteed by the State through Art. 31 of the Charter), or life itself (Art. 6 (1) of the Charter), the specific protection of children and youths, and the protection of pregnant women (Art. 32 and 6 (1) of the Charter). In a broader context, the sense of the Act may also be seen in the improvement of the environment (Art. 35 (1) of the Charter) and the reduction of State expenditure on health and safety. This conclusion may also be implied by the statement of reasons to the Government bill, according to which the primary general objective of the Act is to "strengthen the protection against damage caused by addictive substances. In this regard, the priority includes increasing public health protection, especially in the case of children and youths, while also focusing on reducing damage caused by addictive substances on the social, safety and economic levels" (Digital Repository of the Chamber of Deputies of the Parliament of the Czech Republic, document No. 828/0, 7th term, available at www.psp.cz).

54. The statement of reasons points to a study according to which, in 2007, the social costs of using addictive substances (including, for instance, the costs of providing health services, social services, and costs of drug-related crime) amounted to a total of 56.2 billion CZK; out of which the social costs of using tobacco amounted to 33.1 billion CZK, alcohol to 16.4 billion CZK, and for illegal addictive substances to 6.7 billion CZK. Other studies or expert estimates suggest that the social costs associated with damage caused by using addictive substances may actually be significantly higher, especially in the case of alcohol and tobacco (cf. page 169 of the statement of reasons). Furthermore, page 174 refers to studies in which 18,000 people die annually in the Czech Republic due to illnesses associated with the use of tobacco products, while smoking causes 9 out of 10 cases of lung cancer, up to 6 times more head / neck cancer, up to 4 times more pancreatic cancer, up to 14 times more chronic obstructive pulmonary disease, or up to 10 times more cardiovascular disease (e.g. myocardial infarction

or stroke). Other research, described for instance on pages 174 to 177 of the statement of reasons, shows inadequate protection of children from exposure to tobacco smoke, alcohol and illegal drugs, the link between alcohol consumption, tobacco use and illegal drugs, and a number of other sociological findings.

55. The Constitutional Court is to address the objectives of individual contested provisions or parts of the Act below within their own review.

56. As for the protection of health and life, the Constitutional Court has previously emphasised that it is one of the fundamental values [cf. Judgment dated 27 September 2006, file reference Pl. ÚS 51/06 (N 171/42 SbNU 471; 483/2006 Coll.), paragraph 37, Judgment dated 23 September 2008, file reference Pl. ÚS 11/08 (N 155/50 SbNU 365), paragraph 26, or Judgment dated 14 October 2008, file reference Pl. ÚS 40/06 (N 171/51 SbNU 93; 6/2009 Coll.), paragraph 54]. The State serves as the entity liable for securing and fulfilling the right to health protection, and for this reason, it is also tasked to adopt adequate measures for this purpose, among other things through improving all aspects of external life conditions (the above-quoted Judgment file reference Pl. ÚS 11/08). The constitutional order provides the legislature with a relatively wide margin of appreciation on how to secure health protection in particular (the above-quoted Judgment file reference Pl. ÚS 40/06).

57. The right to health protection implies a positive obligation on the part of the State to act (among other things, it is a fundamental duty of the State under Art. 1 of the Constitutional Act No. 110/1998 Coll., on the Security of the Czech Republic) and protect health by various necessary measures. The Charter itself expressly admits the protection of health as an exemption from the prohibition of forced labour (Art. 9 (2) of the Charter), as a possible reason to restrict the exercise of ownership (Art. 11 (3) of the Charter), an exemption for an encroachment upon the inviolability of a dwelling (Art. 12 (3) of the Charter), a possible reason to restrict the freedom of movement and residence (Art. 14 (3) of the Charter), the free manifestation of religion or faith (Art. 16 (4) of the Charter, the freedom of expression and the right to information (Art. 17 (4) of the Charter, and the right of peaceful assembly (Art. 19 (2) of the Charter).

58. The Constitutional Court has also already concluded that Art. 31 of the Charter implies the duty of the State to protect public health, and thus in cases exceeding the individual's legal sphere, the duty to protect health even against the will of the persons concerned (the above-quoted Judgment file reference Pl. ÚS 11/08). Therefore, it is necessary to distinguish situations in which the individual's health is protected in a particular case, while also respecting their dignity and freedom of decision-making [e.g. the cases of disagreement with the provision of health care, cf. the Judgment file reference I. ÚS 2078/16, referred to by the Petitioner; or an exceptionally accepted disagreement with mandatory vaccination, e.g. Judgment dated 3 February 2011, file reference III. ÚS 449/06 (N 10/60 SbNU 97), or Judgment dated 22 December 2015, file reference I. ÚS 1253/14 (N 220/79 SbNU 527)], from situations when the State protects the population as a whole regardless of the individuals' will [even if application exemptions had been subsequently inferred, cf. the blanket vaccination duty approved again, for instance, by Judgment dated 27 January 2015, file reference Pl. ÚS 19/14 (N 16/76 SbNU 231; 97/2015 Coll.), as well as, for instance, blanket restrictions in handling narcotic and psychotropic addictive substances, measures to protect against epidemics and serious contagious diseases, or occupational health protection even against the individual's will; see the above-quoted Judgment file reference Pl. ÚS 11/08].

59. It may not be disregarded that the objectives pursued by the Act on the Protection of Health from the Harmful Effects of Addictive Substances in general also serve to fulfil the international obligations of the Czech Republic as a State which claims to comply with these obligations (Art. 1 (2) of the Constitution). For example, it is possible to mention Art. 12 of the International Covenant on Economic, Social and Cultural Rights, promulgated under No. 120/1976 Coll., under which States Parties recognise the right of everyone to achieve the highest attainable level of physical and mental health and take measures to achieve the full exercise of this right including, inter alia, measures to reduce the number of abortions and infant mortality and measures for healthy development of the child, improvement of all aspects of living conditions and industrial hygiene, and the prevention, treatment and control of epidemic, local diseases, occupational diseases, and other diseases.

60. Similarly, under Art. 24 of the Convention on the Rights of the Child, promulgated under No. 104/1991 Coll., State Parties recognise the child's right to achieve the highest attainable level of health and take the necessary measures to reduce infant and child mortality and all effective and necessary measures to eliminate all traditional practices damaging children's health.

61. In accordance with Art. 11 of the European Social Charter, promulgated under No. 14/2000 Coll., the State Parties undertake to adopt measures aimed, in particular, at eliminating the causes of diseases as much as

possible, providing counselling and education services to promote health and increase the responsibility of the individual in health matters and to prevent as much as possible epidemic, endemic and other diseases.

62. The Czech Republic is also a party to the World Health Organization Framework Convention on Tobacco Control, promulgated under No. 71/2012 Coll. of the Int. Treaties (hereinafter only as the "Framework Convention"). Among the main principles of this Convention, the provisions of Art. 4 include the need to take measures to protect all persons from exposure to tobacco smoke and the need to take measures to prevent the initiation, to promote and support cessation, and to decrease the consumption of tobacco products in any form. Furthermore, as a guiding principle, it states that comprehensive multisectoral measures and responses to reduce consumption of all tobacco products at the national, regional and international levels are essential so as to prevent, in accordance with public health principles, the incidence of diseases, premature disability and mortality due to tobacco consumption and exposure to tobacco smoke. Art. 5 (3) of the Framework Convention obliges States Parties to proceed in setting and implementing their public health policies to protect these policies from commercial and other vested interests of the tobacco industry.

63. Under Art. 8 of the Framework Convention, the Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places. Each Party shall therefore adopt and implement, in areas falling under national law, within its national jurisdiction and other areas of its competence, actively promoting the adoption and implementation of effective legislative, implementing, administrative or other measures providing protection against exposure to tobacco smoke within the workplace, public transport, indoor public spaces and, where appropriate, other public places.

64. In view of the statements contained in Article 8 of the Framework Convention, the Constitutional Court accepts the link between smoking cessation and exposure to tobacco smoke and health protection. Therefore, it will not discuss individual scientific studies on its own in order to verify or point out this interdependence. Nor does the Petitioner contest the negative effects of smoking and tobacco smoke.

65. It is also impossible to disregard the EU level of regulation, in particular Directive 2014/40/EU, which affects mainly the labelling and sale of tobacco and similar products. It is also possible to refer to the Council Recommendation of 30 November 2009 on smoke-free environments No 2009/C 296/02 and the subsequent reports of the European Commission on the protection against passive smoking.

66. Accordingly, the Constitutional Court is to proceed from these general considerations when assessing the individual contested provisions or parts of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. The Petitioner's arguments rest upon human freedom as the fundamental value of a democratic rule of law state. The Constitutional Court, on the basis of the above, must also take into account that the protection of human freedom without the protection of human life, health and the environment enabling life and its freedom would be pointless. The legal regulation of the scope and limits of fundamental rights depends on the possibilities of society and the state of social and scientific knowledge. The extent and limits of fundamental rights are therefore not invariable and unrestrictable. One may again refer to the judgments in which the Constitutional Court recalled that the fundamental protected values contained in the introductory provisions of the Charter were not conceived by the legislature as absolute or unlimited and their possible limitations are foreseen by the Charter itself, both in Art. 4 and in Article 2 (3) (see paragraph 46).

VIII.

The assessment of individual contested provisions or parts of the Act

67. The Constitutional Court conducted the assessment of the substantive compliance of the contested provisions of the Act on the Protection of Health from the Harmful Effects of Addictive Substances with the constitutional order following the substantive context in seven areas corresponding to the seven groups of the objections raised by the Petitioner.

68. Since any obligation may be imposed only on the basis of the statute and within its limits and at the same time the limits of fundamental rights and freedoms may be regulated only by law (see Art. 4 (1) and (2) of the Charter), and restrictions on property rights are admissible only on the basis of the statute (Art. 11 (4) of the

Charter), the Constitutional Court may at this point summarise that all the contested provisions are directly legal provisions. The Constitutional Court has already addressed the manner in which they were adopted (see Part VI of this Judgment) and has not found any procedural or competence shortcomings. For this reason, the condition that any rights may only be limited on the basis of the statute and within its limits has been complied with for all parts of the Act considered below.

VIII.1

Provisions related to "events intended primarily for persons under 18 years of age"

69. The first group of the Petitioner's objections challenged the prohibitions contained in Section 3 (2) (d) and Section 11 (2) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances and the related infractions regulated in Section 36 (1) (b) and (k) and Section 36 (10) (b) of the same Act. It is the prohibition to sell tobacco and similar products at an event intended primarily for persons under 18 years of age and the prohibition to sell or serve alcoholic beverages at any such event. By violating these special prohibitions both the vendors, either as natural persons or legal entities, and any natural person [cf. Section 35 (1) (a) of the Act] commit an infraction, the latter only in the case of sale of these products or sale or serving in the case of alcoholic beverages.

70. At the same time, the Petitioner aptly points out that these prohibitions differ from the general prohibition to sell or serve tobacco and similar products and alcoholic beverages to persons under 18 years of age (cf. Section 3 (4) and Section 11 (5) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances). Its arguments aim at protecting the "traditional" alcohol consumption of children's parents, while challenging the ambiguity of the concept of the "event intended primarily for persons under 18 years of age", which may result in the arbitrariness of inspection bodies.

71. Above all, the Constitutional Court dealt with the objection of ambiguity of the concept of the "event intended primarily for persons under 18 years of age". The indefiniteness of legal concepts is not unusual in the law, and in essence, it stems from the abstract and regulatory nature of legal norms. It does not in itself establish the unconstitutionality of a legal regulation. Nevertheless, it could be deemed inconsistent with the requirement of legal certainty, which is one of the constituent elements of the rule of law (Art. 1 (1) of the Constitution), if its intensity excluded the possibility of providing for the normative content of a legal act using the usual interpretative procedures [e.g. Judgment dated 5 April 2005, file reference Pl. ÚS 44/03 (N 73/37 SbNU 33; 249/2005 Coll.) or Judgment dated 13 March 2007, file reference Pl. ÚS 10/06 (N 47/44 SbNU 603; 163/2007 Coll.)]. Since the interpretation of abstract or ambiguous concepts is not excluded from judicial review, it may be expected that they will be completed with the actual content by the decision-making activity of ordinary courts. The space for any derogatory intervention by the Constitutional Court would be provided "only in the case when at the same time, it concerns a breach of constitutional order and the inaccuracy, ambiguity and unpredictability of the legal regulation disturbs extremely the fundamental requirements of the law in the conditions of the rule of law state" [Judgment dated 27 March 2008, file reference Pl. ÚS 56/05 (N 60/48 SbNU 873; 257/2008 Coll., paragraph 50).

72. A significant ambiguity of the concept of the "event intended primarily for persons under 18 years of age" is largely due to the word "primarily". A category defined in such a manner may include various events aimed at the general public, the "primary" focus of which on a specific age group may not be unambiguous. For entities interested in selling tobacco or similar products at such events or selling or serving alcoholic beverages, this results in uncertainty consisting in the fact that they may not be able to objectively recognise the nature of the event and through their activities, they expose themselves to the risk of committing an infraction, which is the state that cannot be accepted from the constitutional perspective. On the contrary, the concept of the "event intended for persons under 18 years of age", not containing the word "primarily", was already contained in the previous legal regulations [cf. e.g. Section 6 (2) or Section 12 (1) (b) of Act No. 379/2005 Coll., on Measures Protecting against the Damage Caused by Tobacco Products, Alcohol and other Addictive Substances and on Amendments to Related Acts, as amended by Act No. 305/2009 Coll.], not resulting in any substantial interpretation issues. The Constitutional Court does not deem it ambiguous enough as to defy the common possibilities of legal interpretation. The established ambiguity of the contested provisions, constituting the inconsistency with Art. 1 (1) of the Constitution, thus impacts only the word "primarily". Its removal will nevertheless maintain the sense of the prohibition concerned. This conclusion applies to the above word in Section 3 (2) (d), Section 11 (2) (d), and Section 36 (1) (b) and (k) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll.

73. As regards the assessment of compliance with individual constitutionally guaranteed fundamental rights and freedoms, the contested provisions are directed against vendors of tobacco and similar products and alcoholic beverages and the stipulated restrictions interfering with the right to engage in enterprise of these vendors guaranteed by Art. 26 (1) of the Charter. By affecting even natural persons not engaged in enterprise and restricting them in their disposing of things by prohibiting the sale and in the case of alcoholic beverages, even prohibiting their being served (which may be conceived as serving them to other persons), they also interfere with their property right protected by Art. 11 of the Charter. The constitutionality of these interventions shall be assessed by the Constitutional Court in accordance with the procedures outlined in Section VII of this Judgment.

74. The Constitutional Court first conducted a reasonableness test in which it assessed whether the prohibition to sell tobacco and similar products at an event intended for persons under 18 years of age and the prohibition to sell or serve alcoholic beverages at such an event did not affect the substance and sense of the right to engage in enterprise (cf. paragraph 51). It concluded that it was not the case. These prohibitions do not prevent entrepreneurs from pursuing their profit-making activity as such. It is either a restriction affecting the assortment which as vendors, they may offer at such an event or, if they specialise exclusively in the sale of such restricted products, it is a restriction affecting them in terms of where or on which days they may pursue their activities. At the same time, they are not prevented from adapting their activity to these legal restrictions, for instance by expanding the assortment or by selecting the location of their establishment so as not to fall under this statutory restriction.

75. With regard to the assessment of whether the legal regulation pursues a legitimate aim, the contested provisions may be referred to the general objectives of the Act defined by the Constitutional Court above (paragraph 53) and considered as legitimate in the light of their constitutional guarantee in the Charter. What may be mentioned in particular is the protection of health and life, as well as the special protection of children and youths. Thus, the legal regulation does not appear to be an arbitrary substantial reduction of the overall standard of fundamental rights. The Petitioner believed that this intervention was redundant with respect to the general prohibition to sell or serve tobacco and similar products or alcoholic beverages to persons under 18 years of age. However, the objective pursued by the contested provisions is obviously wider. It pursues not only the protection of health of persons under the age of 18 years against the effects of alcohol and tobacco products, but it also protects the overall environment at events intended for them, making them safe for them in this respect.

76. The Constitutional Court may also hold that the contested prohibitions are a reasonable legal means aimed at achieving the objectives described above. Ad absurdum, it would have also been possible to attain the objectives pursued by a total ban on events intended for persons under 18 years of age, yet it would have been an unreasonably rigorous solution substantially interfering with the right to engage in enterprise. If special enclosed smokers' rooms or bars were supposed to be established at such events, the objectives described would not be fulfilled, whether for the possible risks associated with neglecting the adult supervision over minors accompanied by them at the event, or in terms of protecting the overall health of the population.

77. The contested provisions thus represent a constitutionally conforming interference with the right to engage in enterprise, being its limitation set by law pursuant to Art. 26 (2) of the Charter.

78. With regard to the limitation of the right to own property, the first question, i.e. whether the contested provisions pursue a legitimate or a constitutionally approved objective, has already been answered affirmatively (paragraph 75). In addition, it may be emphasised that the Charter expressly states in Art. 11 (3) that the exercise of the property right shall not harm human health, nature, or the environment beyond the limits laid down by law. Therefore, it limits the exercise of the right to own property by the same values the protection of which is pursued by the contested provisions.

79. The contested provisions are capable of achieving the objectives pursued, thus being a suitable means of achieving them. As for their need and the issue of whether there are more moderate means to achieve these objectives in an equally effective manner, the Constitutional Court has not found any such means in relation to the right to engage in enterprise and does not even find them in relation to the right to own property. Other conceivable manners of the legal regulation either do not achieve the set objectives at all or not in an equally effective manner [in order for the contested legal regulation to be unsuitable, there would have to be a more moderate measure which would nevertheless achieve the pursued objectives in an equally effective manner, cf. e.g. the Judgment dated 18 July 2017, file reference Pl. ÚS 2/17 (313/2017 Coll.), Paragraph 42, or the Judgment dated 8 August 2017, file reference Pl. ÚS 9/15 (338/2017 Coll.), Paragraph 33]. The Petitioner failed to submit any alternative solutions either.

80. It is therefore a matter for the Constitutional Court to assess the proportionality of the contested provisions in the narrower sense, namely whether the protection of the aforementioned objectives pursued by the contested provisions should take preference over restricting the right of ownership conceived in the limitations on handling tobacco and similar products and alcoholic beverages. This assessment shall also reflect the already-described importance of protection of life and health, as also emphasised in Art. 11 (3) of the Charter, as well as the international legal protection of health, affecting, in particular, the treatment of tobacco and similar products. One may refer to the above-mentioned commitment of the Czech Republic under Art. 8 (2) of the Framework Convention, according to which each Party shall adopt and implement or actively promote the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, "other public places". Compared to this, the limitations imposed on handling tobacco and similar products and alcoholic beverages consisting in the prohibition of their sale at events intended for persons under 18 years of age appear to be marginal, since natural persons not engaged in enterprise cannot be expected to attend such events with the intention, let alone predominant, to sell such products there. Regarding the limitation consisting in the prohibition to sell alcoholic beverages, it is acceptable also due to the fact that without it, any prohibition to sell alcoholic beverages, intended for both persons engaged and not engaged in enterprise, could be circumvented, thus leaving the objectives pursued by the statute unfulfilled. Consequently, in assessing proportionality in the narrower sense, the Constitutional Court favours the protection of the objectives pursued by the contested provisions.

81. The Constitutional Court therefore found that the contested provisions represented a constitutionally conforming intervention in the right to own property.

82. In so far as the Petitioner relies on the so far allowed and "traditional" consumption of alcoholic beverages by the children's parents "in Bohemia, Moravia and Silesia" for instance at children's days, the Constitutional Court must point out that the traditional character of a certain activity or rule is not an argument constituting its constitutionality or unconstitutionality. According to Judge O. W. Holmes, "it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past" [Oliver Wendell Holmes, Jr. The Path of the Law. 10 Harv. L. Rev. 457, 469 (1897), quoted in the dissenting opinion of Justice H. Blackmun to the Judgment of the U.S. Supreme Court in the case of Bowers v. Hardwick, 478 U.S. 186, 199 (1986)]. Moreover, according to Art. 24 of the Convention on the Rights of the Child quoted above, the Czech Republic shall take all effective and appropriate measures with a view "to abolishing traditional practices prejudicial to the health of children". It should be noted, however, that the contested provisions do not prevent the actual consumption of alcohol brought by children's parents at events intended for persons under the age of 18 years. Exemptions will include events in which municipalities will exercise their authority under Section 17 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, according to which they may prohibit, among other things, the consumption of alcoholic beverages by means of a generally binding ordinance at certain publicly accessible events. However, the petitioner did not raise any objections to that provision.

83. For all the above reasons, the Constitutional Court therefore concluded that it was necessary to annul the word "primarily" in Section 3 (2) (d), Section 11 (2) (d) and Section 36 (1) (b) and (k) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll. The provisions assessed at present have not been found unconstitutional for other reasons.

VIII.2

Provisions concerning the notice sent to the Ministry of Health by the vendor of tobacco and similar products

84. By means of the second group of objections, the Petitioner sought the annulment of Section 6 (5) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, regulating one of the requirements concerning the notice sent to the Ministry of Health by the vendor of tobacco and similar products. It is the information on the list of "the Member States of the European Union and the Contracting States of the Agreement on the European Economic Area, where potential consumers are located, in the case of cross-border sales pursuant to Section 7".

85. The obligation to send notifications to the Ministry of Health is imposed only onto vendors of tobacco and similar products who conduct the sale through means of distance communication. For the purpose of such sales, the vendor must be equipped with a computer system that electronically uniquely verifies the age of the

consumer (cf. Section 6 (1) of the Act). In accordance with Section 6 (4) and (5) of the Act, the vendor shall notify the Ministry of Health in writing of the data on the age verification system and its functioning.

According to Section 6 (5) of the Act, the information shall include, in addition to the requirements prescribed by the Code of Administrative Procedure, the identification number of the vendor, the address of the website used for sale by means of distance communication, a description of the age verification system and its functioning, and finally the contested list of the Member States of the European Union and the Contracting States of the Agreement on the European Economic Area, where potential consumers are located, in the case of cross-border sales pursuant to Section 7.

86. The Petitioner did not, therefore, challenge the obligation itself of the vendor of tobacco and similar products who sells them by means of distance communication to notify the Ministry of Health in writing of the information prescribed by the statute. The Petitioner only challenged a piece of the notified data for its unreasonableness, considering it as a manifestation of arbitrariness contradictory to the operation of distance sale.

87. The provisions of Sections 6 and 7 of the Act on the Protection of Health from Harmful Effects of Addictive Substances governing the sale of tobacco and similar products by means of distance communication are the transposition of Directive 2014/40/EU, in particular its Art. 18. According to that provision, Member States may prohibit cross-border distance sales of tobacco products to consumers. Member States shall cooperate to prevent such sales. Retail outlets engaging in cross-border distance sales of tobacco products may not supply such products to consumers in Member States where such sales have been prohibited. Member States which do not prohibit such sales shall require retail outlets intending to engage in cross-border distance sales to consumers located in the Union to register with the competent authorities in the Member State, where the retail outlet is established, and in the Member State, where the actual or potential consumers are located. All retail outlets intending to engage in cross-border distance sales shall submit at least the following information to the competent authorities when registering: (a) name or corporate name and permanent address of the place of activity from where the tobacco products will be supplied; (b) the starting date of the activity; (c) the address of the website or websites used for that purpose and all relevant information necessary to identify the website. The competent authorities of the Member States shall ensure that consumers have access to the list of all retail outlets registered with them.

88. The Directive does not therefore imply the obligation to notify, when registering, the information on the list of Member States or States Parties to the Agreement on the European Economic Area, where potential consumers are located. However, it implies the obligation to register as a vendor even in these other states. Even though the statement of reasons to the Act on the Protection of Health against Harmful Effects of Addictive Substances does not provide any detailed explanation why it introduces the obligation to specify the list of Member States or States Parties to the Agreement on the European Economic Area, where potential consumers are located, it may be reasonably expected that this obligation is meant to serve cooperation between Member States when registering vendors and suppressing distance sales in those Member States where such sales are prohibited.

89. The obligation arising from Section 6 (5) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances is directed exclusively at tobacco vendors as legal entities and natural persons engaged in enterprise, thus being also sanctioned [cf. Section 36 (1) (i) of the same Act]. It is, therefore, an obligation interfering with the right to engage in enterprise under Art. 26 (1) of the Charter, the constitutionality of which is to be assessed by the Constitutional Court again using the reasonableness test.

90. Regarding the definition of the meaning and essence of the right to engage in enterprise, for the sake of brevity, reference may be made to paragraph 51 of this Judgment (the restriction affecting its essence and meaning would mean that as its consequence, a certain activity would no longer be capable of providing the means to respond to the needs of those engaged in that activity). It is obvious from this definition that the obligation to submit one additional piece of information in a notification sent to the Ministry of Health does not affect the very existence of the fundamental right to engage in enterprise or the actual exercise of its essential content.

91. The contested provision pursues one of the aforementioned objectives of the statute, which the Constitutional Court considers legitimate. As for the notification sent to the Ministry of Health, it is possible to emphasise the protection of health (as guaranteed by the State through Art. 31 of the Charter) and special protection of children and adolescents (Art. 32 of the Charter). Submitting the information on the list of the Member States of the

European Union and the Contracting States of the Agreement on the European Economic Area, where potential consumers are located, also pursues the objectives of protecting these consumers, cooperation between individual European countries, and respecting the obligations of the Czech Republic arising from its membership in the European Union (cf. Art. 1 (2) of the Constitution). It does not therefore appear to be an arbitrary substantial reduction in the overall standard of fundamental rights.

92. In the final step of the reasonableness test, the Constitutional Court has to address the issue which constitutes the essence of the Petitioner's objections: whether the legal means used to achieve it is reasonable (rational), albeit not necessarily the best, the most appropriate, the most effective or the wisest. It is conceivable that sending the list of Member States or the Contracting States of the Agreement on the European Economic Area, where potential consumers are located, will meet the objectives described above, including the contribution to cooperation between European states. The Petitioner perceives the unreasonableness of the contested provision especially in the fact that a vendor will only estimate the information on the list of such States, which will reduce its information value. However, the Constitutional Court disagrees with that. If a reasonably prudent vendor (see Art. 4 (1) of the Civil Code) plans to allow cross-border distance sales, they must consider the countries in which they are willing to sell. Not only do they take this into consideration when establishing a website in order to determine the language versions which they will commission to create, but they also have to do so in relation to the States in which they are willing to ship their goods or to which countries the delivery is still worth it and at what price. If they are willing to deliver the goods to any European country, incorporating this fact in the notification to the Ministry of Health is not irrational or overly burdensome. Considerations about where the prospective customers are located are also beneficial to vendors, as they should lead to their registration in these other States prior to commencing the sales, just as vendors of tobacco products established in other Member States or third countries are required to register in the Czech Republic (see Article 13c (3) of Act No. 110/1997 Coll., on Food and Tobacco Products and on Amendments to Certain Related Acts, as amended). For these reasons, the Constitutional Court does not consider the contested obligation to be unreasonable in itself or in relation to the attainment of the pursued objectives.

93. The contested 6 (5) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances thus represents a constitutionally conforming interference with the right to engage in enterprise, thus being its lawful limitation under Art. 26 (2) of the Charter.

VIII.3

The provisions concerning the prohibition to smoke in the indoor space of catering services establishments

94. By means of the third group of objections, the Petitioner challenged the constitutionality of Section 8 (1) (k) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, which prohibits smoking in the indoor space of the catering services establishment, with the exception of the use of water pipes. The catering services establishment is defined in Section 2 (i) of the same Act as the premises of a food enterprise in which catering services are provided, including serving meals intended for direct consumption in that establishment. When violating this prohibition, the natural person commits an infraction for which they may be imposed a fine of up to CZK 5,000 [cf. Section 35 (1) (e) and (2) (a) of the Act].

95. The Petitioner proceeded from the fact that Section 8 (1) (k) of the above-mentioned Act was a special provision to Section 8 (1) (a) of the Act, prohibiting smoking in a publicly accessible indoor space, except for the structurally separated space reserved for smoking. It perceived the special prohibition affecting catering services establishments as unjustified and paternalistic, preventing the establishment of smoking rooms. According to Section 10 of the Act, they would constitute specially ventilated premises with prohibited access for an employee when performing their job at the time when smoking takes place in these premises. Based on a special ban, restaurants at airports cannot have smoking rooms, even though smoking rooms may otherwise be established on the premises of an international airport. According to the Petitioner, the prohibition is unreasonable and unjustified, not even corresponding to the purpose of the protection of health of non-smokers as declared by the Government, thus being unconstitutional. The Petitioner believes that in fact it is impossible to accept an intervention of the public authority motivated by the protection of health of smokers, rather than non-smokers.

96. To start the assessment of this group of objections, the Constitutional Court emphasises that the prohibition to smoke in the indoor space of the catering services establishment affects a significant part of the population by forcing them to change their habits, whether concerning themselves or stretching to their social relations. Without questioning the fact that smoking has a negative impact on health, the persons affected by this prohibition may perceive it as interfering with their lifestyle and attribute a certain symbolic value to it in terms

of expressing the degree of individual freedom in today's society. In this respect, the prohibition under consideration has a strong cultural and social dimension.

97. The Constitutional Court is aware of these aspects and does not deny them importance in terms of public debate about the specific manner how to address, in relation to publicly accessible places, a conflict between the rights of those who wish to smoke and those who are forced to bear the negative consequences of this due to their exposure to tobacco smoke. Finding a solution to this is primarily a matter for the legislature. The role of the Constitutional Court is limited to assessing whether the selected solution does not constitute an inadmissible interference with any of the constitutionally guaranteed fundamental rights and freedoms of the persons concerned.

98. The contested provision will undoubtedly stand up to the requirement of the certainty of legal regulations (Art. 1 (1) of the Constitution), which also applies to its supplement exempting the use of water pipes from the prohibition to smoke in the indoor spaces of catering services establishments. Water pipes are a smoking aid within the meaning of Section 2 (c) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, used for smoking tobacco. The prohibition to smoke in accordance with Section 8 (1) of the Act therefore also applies to their use, with the exception of the prohibition under subparagraph (k), which concerns the indoor space of the catering services establishment and from which water pipes have been expressly exempted. In this space, you can smoke a water pipe anywhere. On the other hand, in any other publicly accessible indoor space, in accordance with subparagraph (a), water pipes may only be used in structurally separated smoking areas, as well as any other tobacco products.

99. In assessing the contested provision in terms of its consistency with the constitutionally guaranteed fundamental rights and freedoms, one needs to proceed from the fact that the prohibition contained in Section 8 (1) k) of the Act is primarily aimed at every natural person staying in the indoor space of the catering services establishment. As a consequence, it restricts the autonomy of the will of natural persons (smokers) in their capacity to dispose of the tobacco product and at the same time, it represents an interference with their right to own property under Art. 11 of the Charter. These persons thus cannot smoke in certain places.

100. Consequently, the prohibition specified in Section 8 (1) (k) of the Act is not directly applicable to operators of catering services establishments. Their duties and obligations are set out in Section 9 of the Act, which the Petitioner did not challenge: Section 9 (1) provides for their duty to ask the person failing to comply with the prohibition to smoke not to continue in this conduct or to leave the premises where smoking is prohibited. Unless the legal entity or the natural person engaged in enterprise acting as the operator of the catering services establishment challenges this person, they commit an infraction for which a fine of up to 50,000 CZK may be imposed Section 36 (8) and (10) of the Act). Section 9 (2) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances provides for the duty of the operator of the catering services establishment to mark the entrance to the premises where smoking is prohibited with a graphic symbol "Smoking Prohibited". Failure to comply with this obligation may result in a fine of up to 10,000 CZK (Section 36 (8) and (10) of the Act). Nevertheless, the contested prohibition affects the rights of entrepreneurs in the field of catering services. If customers cannot smoke in their establishment, they actually face a change in the conditions under which catering services may be provided. To put it simply, the law prohibiting smoking in a restaurant prevents its operator from operating a "smoking" restaurant by nature. The Constitutional Court accepts that this prohibition may reduce the attractiveness of catering services establishments, with the prohibition thus indirectly affecting their operators. For this reason, it will also consider the contested provision as an interference with the fundamental right to engage in enterprise in accordance with Art. 26 (1) of the Charter and assess its constitutionality, i.e. whether it constitutes a violation of the right to engage in enterprise or whether it is merely a statutory condition or a limitation on the pursuit of a particular activity under Art. 26 (2) of the Charter (cf. paragraph 48 et seq. of this Judgment).

101. The Constitutional Court first addressed the issue of the admissibility of this interference with the fundamental rights of natural persons (smokers) who are consequently restricted in the possibility to smoke in the indoor space of the catering services establishment, in particular from the perspective of their right to own property under Art. 11 (1) of the Charter. In fact, more stringent requirements will be applied to assessing the interference with this right than in the case of merely limiting the autonomy of the will without reference to a specific fundamental human right or freedom. In this case, the interference consists in limiting the possibility of using the tobacco product in certain places. At the same time, The Constitutional Court has taken into account that for these persons, the possibility of smoking in cafés or restaurants has a somewhat wider importance, as it is part of their lifestyle. In that regard, it assessed whether the contested provision would stand the proportionality test.

102. As already implied in the general definition of the purpose of the contested legal regulation, the smoking prohibition in question is primarily intended to protect the lives (Art. 6 (1) of the Charter) and health (Art. 31 of the Charter) of persons who are, in the case of other persons smoking in indoor premises, exposed to tobacco smoke against their will. This does not apply only to customers who are provided with the access to catering services to the widest possible extent without having to jeopardise their health, but also to employees in catering services. They cannot leave the catering services establishment during their working hours. In this context, it is also necessary to mention the special protection of children and adolescents and pregnant women (Art. 32 and Art. 6 (1) of the Charter).

103. The Constitutional Court considers the negative effect of smoking, whether active or passive, on human health as a fact which does not require demonstrating, as already stated in Part VII of this Judgment. It is obvious that the smoking prohibition under Section 8 (1) (k) of the Act has the capacity to achieve the objective pursued. It may therefore be considered as a means suitable for achieving the desired objective. As part of the assessment of proportionality, the Constitutional Court then addressed the issue of whether it is also a means which is as considerate as possible in relation to the fundamental right which it is to be interfered with. The question then arises whether it was possible to achieve the purpose of legal regulation even without the possibility of smoking being excluded in the entire indoor space of the catering services establishment.

104. In the case of persons within the indoor premises of the establishment, the required protection against passive smoking cannot be achieved otherwise than by disallowing smoking in this space or by dividing the space so as to allow smoking only in one part. The question then remains whether spatial separation may be considered as a solution that is at least as effective in terms of the objective pursued as a complete prohibition to smoke. Separating does not mean establishing a new, completely independent facility, but rather the reservation of a certain part of the establishment for customers who wish to smoke. In essence, it means that the establishment will include a structurally separate smoking area within the meaning of Section 10 of the Act on the Protection of Health from Harmful Effects of Addictive Substances.

105. Such a solution, however, is not capable of completely preventing the negative effects of smoking by the persons following it. Even in this case, it cannot be ruled out that smoke will penetrate to some extent elsewhere in the premises. In a situation in which food and beverages are being consumed in these areas, even if brought by a customer, it is hardly possible to imagine that at least occasionally the employees would not be required to enter the premises. This includes not only cleaning outside the hours when smoking takes place there. The need to enter these premises may occur, for instance, in order to remove food remainders and dishes used in the area, left by the customers and preventing the use of the parts of these areas by other customers, to avoid damage to the equipment or to address acute cases, for instance even medical ones, which sometimes occur when operating such premises.

106. The health of catering staff is damaged in smoking rooms even if the service staff prohibition is observed. Even though it remains true that the employee performing their work duties cannot stay in such areas at the time when smoking is allowed there, the employee inhales fumes even at the time when smoking no longer takes place there, such as when cleaning the room or even after an extended period of time, as tobacco smoke persists in the walls and interior textiles located in these areas. The operators of catering facilities are then imposed even higher demands, as they are required to make sure that persons under the age of 18 years do not enter smoking rooms.

107. Lastly, it must be pointed out that, in the case of an occupied non-smoking part, non-smokers are forced to use seats in the smoking area of the catering facility. Non-smokers cannot bear such a burden that they must also be exposed to health threats when they need to use a catering establishment, on the contrary, they need to have the opportunity to participate in social life without their health being jeopardised (cf. paragraph 127 of the Judgment of Federal Constitutional Court of Germany dated 30 July 2008, file reference 1 BvR 3262/07, BVerfGE 121, 317). The Petitioner also points to the fact that, in the case of areas reserved for smokers, the prohibition to smoke is not observed and fails to be enforced on page 7 of the petition. The German Federal Constitutional Court pointed out the same facts (paragraph 132 of its Judgment).

108. The assertion that in terms of the protection of the lives and health of customers and employees, there are no equally efficient alternatives may also be supported by reference to Art. 8 of the Framework Convention quoted above (cf. paragraph 63). On the basis of the Framework Convention, a Conference of the Parties has been established (see Art. 23 of the Framework Convention), adopting, among other things, the Guidelines for Implementation of Article 8;

http://www.who.int/fctc/treaty_instruments/adopted/Guidelines_Article_8_English.pdf) for the purposes of assisting the Parties in "meeting their obligations under Article 8 of the Convention" (see the purpose of the guidelines for implementation, para. 1).

109. According to Principle 1 of the Guidelines for Implementation, "[e]ffective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 [of the Framework Convention], require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke free environment. There is no safe level of exposure to tobacco smoke (…). Approaches other than 100% smoke free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific or otherwise, that engineering approaches do not protect against exposure to tobacco smoke". According to Principle 3, "[l]egislation is necessary to protect people from exposure to tobacco smoke. Voluntary smoke free policies have repeatedly been shown to be ineffective and do not provide adequate protection. In order to be effective, legislation should be simple, clear and enforceable".

110. There is no doubt that the Guidelines for Implementation only have a recommendatory rather than binding nature. The Constitutional Court is above all aware of the fact that the Czech Republic made a declaration when ratifying the Framework Convention that it does not regard the Guidelines for Implementation as directly creating legal obligations under the Framework Convention. Nevertheless, these instructions cannot be entirely ignored according to the rules of interpretation of international treaties [cf. Art. 31 and 32 of the Vienna Convention on the Law of Treaties, promulgated under No. 15/1988 Coll.], as they provide some interpretation guidance. The Guidelines for Implementation were also followed by the legislature (cf. page 189 of the statement of reasons).

111. In summary, smoking rooms represent a means not protecting the health of the population and not guaranteeing the enforceability of the Act, not even in an approximately comparable manner as the contested prohibition. At the same time, they are more costly and more demanding for catering establishment operators, who are then exposed to a greater degree of sanctions on the part of the State for failing to comply with the precise technical and functional conditions of establishing smoking rooms. The Constitutional Court did not therefore conclude that allowing the establishment of smoking areas was a measure which would enable the objective pursued by the contested legislation to be achieved as effectively as a less intense interference with the right to own property of natural persons affected by the prohibition to smoke in the indoor space of catering services establishments. A complete prohibition to smoke represents a standard solution not exceptional in other countries either.

112. What thus remains to be assessed is whether precedence is to be granted to the protection of the objectives specified above over the limitation of the right to own property perceived in limiting the smoker in handling their tobacco products. The Constitutional Court believes that, taking into account the harmful effects of smoking, precedence is to be granted to the objectives pursued, notably health protection, while pointing out that the specific limitation in handling the tobacco product is not absolute; on the contrary, it is defined in terms of the place and time, considering the nature of the matter. With respect to the value of the objectives pursued, it may therefore be inferred that the limitation of smokers in handling tobacco products is an appropriate restriction.

113. The contested prohibition thus represents a constitutionally conforming interference with the right to own property.

114. The Constitutional Court also dealt with the fact that the prohibition to smoke in catering services establishments has an impact on the autonomy of the smokers' will, having to proceed from the nature of Art. 2 (3) of the Charter. This provision, as stated in the background to the assessment of the merits, does not provide individuals with the warranty of an unlimited and invariable right to act freely, but rather the right to have the extent of the autonomy of will, prohibitions and orders affecting individuals determined exclusively by laws in an unambiguous, certain and non-arbitrary manner.

In this guidance, this provision resembles Art. 4 of the Charter, according to which duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms and limitations may be placed upon the fundamental rights and freedoms only by law [as for the autonomy of will, cf. also the Judgment dated 21 April 2009, file reference Pl. ÚS 42/08 as amended by the Corrective Resolution dated 27 May 2009, file reference Pl. ÚS 42/08 (N 90/53 SbNU 159; 163/2009 Coll.) of the Judgment dated 27 July 2010, file reference Pl. ÚS 19/09 (N 150/58 SbNU 271; 260/2010 Coll.)].

115. The assessment carried out by the Constitutional Court within the proportionality test clearly implies that the newly imposed prohibition extending the list of places where smoking is prohibited has been prescribed by law, is sufficiently unambiguous and definite and pursues a number of legitimate objectives, thus not being arbitrary. In addition, it does not interfere with the smokers' freedom to act absolutely, in essence, as they still have the possibility to smoke in the outdoor area of catering establishments (terraces), in front of their premises, or in any other places where the prohibition to smoke does not apply, which they have also been benefiting from. With respect to the value of the objective consisting in the protection of life and health, the limitation of the autonomy of smokers' will is legitimate. It may be pointed out that with reference to public values, it is possible to determine the benefit of one group of persons, while also imposing inadequate duties (limitations in this case) onto another group (cf. the above-quoted Judgment file reference Pl. ÚS 22/92).

116. Another level of constitutional review concerns whether the prohibition to smoke ban under Section 8 (1) (k) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances constitutes a constitutional or unconstitutional interference with the right to engage in enterprise under Article 26 (1) of the Charter. The Constitutional Court carried out a reasonableness test for the purpose of its assessment. In its introduction it may be stated that this prohibition does not affect the very essence and the meaning of the right to engage in enterprise, as it does not address entrepreneurs and does not impose any obligation or sanction in the event of non-compliance. At the same time, it should be emphasised that smoking in a catering services establishment does not represent the object or essence of the enterprise of the operators of these facilities, let alone the constitutionally protected nature of this enterprise. It is only a secondary activity of guests, which some operators would be willing to tolerate in their facility, while others would not.

117. It cannot be ruled out that this prohibition will indirectly affect some individuals or the operators of some catering facilities, or that some operators of some catering facilities will be affected more significantly than others. However, in order to assess whether there is an interference with the very substance of the right to engage in enterprise, the Constitutional Court finds it essential whether this interference affects the very substance of enterprise of a relevant part of entrepreneurs in the sector concerned, i.e. that a relevant part of operators of catering facilities would not be able to secure the means of subsistence by their entrepreneurial activity upon adopting the prohibition under review (cf. the above-quoted Judgment file reference Pl. ÚS 9/15). However, nothing implies this conclusion. In this regard, until issuing this Judgment, the Petitioner had failed to make any submission as to the facts, failed to refer to a single establishment which would be forced to terminate its activity as a result of this prohibition or which would become unprofitable as a result of this prohibition, and failed to refer to similar consequences of the prohibition which would occur abroad. No similar conclusions may be inferred from the Government's statement either. According to the statement of reasons to the Act, based on the studies and overseas experience, higher profits of catering facilities may be expected to due increased attendance of the facilities by non-smokers, increased productivity of the employees due to a lower sickness rate, and the lower costs of providing adequate air-conditioning (p. 194 of the statement of reasons).

118. Even the publicly available statistics of the Czech Statistical Office in the catering and restaurants sector cannot lead the Constitutional Court to conclude that the effectiveness of the Act on the Protection of Health from Harmful Effects of Addictive Substances (31 May 2017) resulted in a fundamental interference with the enterprise in this sector. The overview of the basic financial indicators in the catering and restaurants sector, covering the first three quarters of 2017, implies that enterprise in this sector demonstrates an improving trend in all three quarters. For instance, while the number of employees in this sector amounted to 87,827 persons in Q1 2017, it grew to 89,258 persons in Q3 2017. Revenues amounted to CZK 28,174,000,000 in Q1 2017, reaching CZK 31,172,000,000 in Q3 2017. At the same time, there was a growth in wages in this sector (Czech Statistical Office – Basic Financial Indicators – Quarterly. Available at https://www.czso.cz/csu/czso/1-malzfu_b). In the so-called quick information, the Czech Statistical Office reports that for the whole year 2017, revenues in the catering and restaurants sector grew annually by 8.1% (available at https://www.czso.cz/csu/czso/cri/sluzby-4-ctvrtleti-2017), while there was an increase of 5.7 % for 2016 (available at https://www.czso.cz/csu/czso/cri/sluzby-4-ctvrtleti-2016_). The Constitutional Court does not have any other statistical data available.

119. From the above statistics, the Constitutional Court cannot obviously ascertain the increase in revenues contributed by originally smoking catering facilities compared to non-smoking ones or catering facilities in cities compared to those in the country. However, the growing number of employees in the sector means that even if some establishments terminated their activity, it did not at all impact the performance in the sector, while apparently not resulting in a loss of the subsistence source of employees of an establishment closed down due to the adopted prohibition to smoke.

120. In addition, the consideration of the interdependence of the possible closing down of a catering facility with the prohibition to smoke itself is largely speculative without any additional data – some establishments may have ceased operating prior to the actual prohibition becoming effective based on their own decision, while others may have ceased operating due to the accumulation of measures affecting catering facilities in the previous few years, in particular the duty of electronic sales records and control statements. It was in the case of electronic sales records that the Court faced an identical issue in that theoretically, it was possible to assume that some catering facilities were affected by the duty of electronic sales records more significantly than others. Yet even at that time, it did not conclude on an interference with the very essence and meaning of the right to engage in enterprise (cf. the above-quoted Judgment file reference Pl. ÚS 26/16), and has not drawn any such conclusions in the instant case for the reasons described above.

121. In addition to the impact of the prohibition to smoke onto the enterprise of catering establishments, what is also neglected is its impact on the tobacco industry itself, which is significantly larger from the legal perspective owing to the nature of this enterprise and its object or the link between the object of the enterprise and the subject of the contested provision. Even in this case, however, the Constitutional Court does not conclude that it would interfere with the very essence and meaning of the right to engage in enterprise. The tobacco industry has long been subjected to gradual regulation, and there is no reason to believe that a smoking limitation at one designated place, without prohibiting smoking as a whole, would interfere with its very essence.

122. With regard to the reference to the electronic sales records and the control statement, it particularly emphasises the importance of objectives pursued by the contested prohibition. The aforementioned administrative measures, however significantly they could have impacted the ordinary and formerly usual course of enterprise, pursued "only" the objectives of higher efficiency in the collection of taxes, i.e. in fact the higher efficiency of the State's operation and the reconciliation of the enterprise environment.

123. On the contrary, the prohibition to smoke in the indoor spaces of catering services establishments undoubtedly pursues the fundamental objectives of the protection of health (Art. 31 of the Charter) and life (Art. 6 (1) of the Charter), special protection of children and adolescents and pregnant women (Art. 32 and Art. 6 (1) of the Charter), improving the environment (Art. 35 (1) of the Charter), as well as a substantial reduction in the State's healthcare expenditure. With regard to the wording of the Framework Convention and the other international treaties mentioned above, it may be concluded that one of the objectives pursued by the contested prohibition also consists in compliance with the obligations binding on the Czech Republic from international law (cf. Art. 1 (2) of the Constitution).

124. In terms of assessing the legitimacy of the objectives of the measure adversely affecting operators of catering facilities in the past years, the prohibition to smoke is not the measure to which the Constitutional Court should adopt the most critical approach, not at all merely due to the fact that it has been assessed chronologically the most recently. Compared to other measures, the prohibition to smoke is, on the contrary, most justified by the protection of fundamental rights and freedom, rather than merely by the effectiveness of the State's operation and the "cleanliness" of enterprise. It is the Constitutional Court that has had to defend the protection of health against the legislature or the facts influencing the legislature [cf. e.g. the Judgment dated 20 June 2013, file reference Pl. ÚS 36/11 (N 111/69 SbNU 765; 238/2013 Coll.), Judgment dated 25 March 2014, file reference Pl. ÚS 43/13 (N 39/72 SbNU 439; 77/2014 Coll.), and Judgment dated 30 May 2017, file reference Pl. ÚS 3/15 (231/2017 Coll.)]. In this case, when adopting the Act, the legislature succeeded in, as expressed by the wording of Art. 5 (3) of the Framework Convention, protecting the pursued objectives of the protection of life "from commercial and other vested interests of the tobacco industry". This should also contribute to the Constitutional Court's moderate approach. It should be noted that the statement of reasons implies that the legislature cautiously considered the interference with enterprise in the field of the tobacco industry and the catering industry. For all these reasons, the Constitutional Court may conclude that the contested prohibition to smoke pursues legitimate objectives, thus not being an arbitrary interference with fundamental rights.

125. What remains to be assessed in the reasonableness test is whether the legal means used to achieve the objectives described above is reasonable, albeit not necessarily the best, the most appropriate, the most effective, the wisest or the simplest one.

126. However drastic as a measure the complete prohibition to smoke in the indoor premises of catering services establishments may seem, for the purposes of the Constitutional Court's interpretation, it is important that it is a standard and factually substantiated solution. It is possible to refer to the above argumentation concerning the issue of the effectiveness of this solution (cf. paragraphs 105–111), as well as to the fact that the adopted prohibition is a measure based on Art. 8 of the Framework Convention.

127. Beyond the arguments already specified above, it may be added that a stricter prohibition to smoke in catering services establishments is justified compared to, for instance, airports to which the Petitioner refers without explaining why catering facilities are supposed to be comparable with airports. A structurally separated smoking area is only provided in the transit area of an international airport, i.e. a part of an airport not open to the public and generally an exclusively indoor area. Particular emphasis has been placed on interdepartmental comments procedure on travellers with varying degrees of tobacco addiction, especially those travelling long distances and only transiting at the airport, therefore not having any other option how to deal with withdrawal symptoms, taking into account the prohibition to smoke in the aircraft. Such reasons obviously do not apply to establishing smoking rooms in catering services establishments, as smokers may leave freely the catering services establishment in order to smoke. On the contrary, similar reasons to smoking rooms at airports may be found for the possibility of establishing a structurally separated smoking area in a closed psychiatric ward or any other addiction treatment facility [Section 8 (1) (e) of the Act on the Protection of Health from the Harmful effects of Addictive Substances].

128. In addition, the Petitioner's arguments are not supported by the decisions of German courts referred to by the Petitioner. On the contrary, they provide argumentation support for the regulation opted for by the Czech legislature.

129. In its Judgment dated 30 July 2008, file reference 1 BvR 3262/07, BVerfGE 121, 317, the Federal Constitutional Court repeatedly stressed the constitutional indisputability of the blanket prohibition to smoke justified by the protection of public health as a fundamental public good and the protection of life and the uncontested negative consequences of active and passive smoking on health. It also referred to a study according to which employees in catering services face a risk of death almost fourteen times higher due to passive smoking, compared to the statistical data concerning the population as a whole (paragraph 110). It also pointed to the broad discretion of the legislature if the objective of protecting health is pursued. For these reasons, it stated that the legislature had no constitutional obligation to create, with regard to the right to engage in enterprise, exemptions to the prohibition to smoke in catering establishments (paragraph 122), even with respect to small businesses or their limited supply (paragraph 123), just as such exemptions do not even apply in other areas, such as public transport [cf. also Section 8 (1) (c) and (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances]. It also concluded that a strict prohibition to smoke was not an unreasonable restriction on the autonomy of the smokers' will, as they retain the possibility of temporarily leaving the restaurant (paragraph 126). It stated that any exemption to the prohibition to smoke meant that the legislature had partially renounced the objective of health protection.

130. The Federal Constitutional Court, however, examined the laws of the Federal States of Baden-Wuerttemberg and Berlin, which allowed the exemptions to the strict prohibition to smoke in catering establishments. However, according to the Federal Constitutional Court, they did so in an unequal and therefore unconstitutional manner, since large catering facilities were allowed to have a smoking room established, while small catering facilities had to be strictly non-smoking. It also considered unconstitutional that the exemption from the prohibition to smoke allowing for the establishment of a smoking room did not apply to discotheques. The Federal Constitutional Court therefore found unconstitutionality only in the manner in which exemptions to the prohibition to smoke in catering establishments were selected, rather than in the prohibition to smoke itself. At the conclusion of the Judgment, it reiterated that, when the new legislation was adopted, the legislature could also opt for a strict form of the prohibition to smoke imposed on all catering establishments, thereby avoiding the objections of unequal treatment (paragraph 163).

131. On the basis of similar legislation, the Constitutional Court of the Free State of Saxony reached similar conclusions in the decision also referred to by the Petitioner [Resolution dated 20 November 2008, file reference Vf. 63-IV-08 (HS)]. The unconstitutionality was again found in an unequal impact of the exemptions, namely that the exemption to the prohibition to smoke which applied to separate premises of catering establishments did not apply to casinos. There is also a similar Judgment of the Constitutional Court of the Federal State of Rhineland-Palatinate dated 30 September 2008, file reference VGH B 31/07. Interestingly, in this Judgment, the Court admitted an exemption from the prohibition to smoke in small catering establishments only if that facility is operated exclusively by its owner, thus not jeopardising the health of its employees or self-employed workers who would work in their undertaking, unless they were their own family members.

132. Even though the above would suffice to conclude on the reasonableness of the selected means, the Constitutional Court also addressed whether the legislature could determine exemptions to the smoking prohibition in a comparable reasonable manner. In general, there was nothing preventing that, yet it preferred the

highest possible degree of effectiveness when fulfilling the legitimate objectives pursued, to which it was entitled as the democratically elected legislature [cf. for instance the Judgment dated 20 December 2016, file reference Pl. ÚS 3/14 (73/2017 Coll.), paragraph 85, of the above quoted Judgment file reference Pl. ÚS 9/15, paragraph 32]. If it had proceeded to defining exceptions, it would have faced a difficult situation in searching for their appropriate legislative definition and, ultimately, as in the case of individual German states, the objections of unequal treatment. If it is currently argued in the general discourse that the smoking prohibition adversely affects small catering facilities, most frequently in villages, compared to larger ones, it would be even more questionable if the prohibition ban threshold was derived, for example, from the floor area of the restaurant. Then one municipality could directly support a smaller facility where smoking would not be prohibited and the direct liquidation of a larger one where the smoking prohibition would apply. If there was a general smoking prohibition in restaurants with the option of establishing structurally separate smoking rooms at the discretion of the catering facility operator, it would disadvantage or even possibly eliminate the owners of smaller facilities who could not set up the smoking rooms for financial or technical reasons. Therefore, it is possible to agree with the conclusions of the Federal Constitutional Court that the blanket smoking prohibition is constitutionally far less problematic from the perspective of legislative technique. The Federal Constitutional Court also appropriately pointed out, for example, a blanket smoking prohibition on public transport means, without distinguishing the size of the entrepreneur in the sector. Any indication that the currently prohibited activity is more traditional in one area of activity than another cannot be legally relevant, as has already been pointed out (see paragraph 82).

133. In addition, the reservations to the contested prohibition referring to noise disturbance or any other disturbance reproached to smokers in front of catering services facilities are not deemed convincing. If these reservations are well-founded, they may currently be addressed within the limits of the applicable rule of law, either for example as the offence of noise disturbance (Section 5 of Act No. 251/2016 Coll., on Certain Offences), or as the owner's pollution, which may be subject to an injunction order or an action for damages (see Section 1013 of the Civil Code, especially its paragraph 2, regulating the pollution of an operation of a facility or a similar establishment which has been officially approved).

134. It should also be noted that the Constitutional Court is not competent to search for exceptions unless specified by the legislature. In addition, with respect to the applicable legal status, the legislature would also be required, when defining exceptions, to consider their relation to the international legal obligations of the Czech Republic, in the light of the wording of Art. 12 of the International Covenant on Economic, Social and Cultural Rights, Art. 24 of the Convention on the Rights of the Child, Art. 11 of the European Social Charter, and the obligations under the Framework Convention.

135. Therefore, the prohibition to smoke in the indoor premises of catering services facilities stood the reasonableness test. It is a constitutionally conforming interference with the right to engage in enterprise under Art. 26 (2) of the Charter.

136. In conclusion of this section of the judgment, the Constitutional Court adds that its conclusions do not mean that it would affirm the solution selected by the legislature as the only one possible or even the best one. Within the proportionality and reasonableness test, it was only required to evaluate the solution adopted by the legislature in terms of whether there is another solution which is more moderate yet equally effective in terms of the effects required by the legislature. The choice of the desired effects (the level of health protection in this case) is at the legislature's discretion. The fact that the selected solution stood the test does not mean that there is no other solution which would more thoughtfully interfere with the rights of those wishing to smoke while maintaining the equal standard of health protection. However, the legislature is not relieved of discretion for any possible regulation of smoking in catering services facilities. It is primarily up to the legislature to assess the appropriateness of a specific solution, taking into account all relevant considerations, including the aforementioned aspects of international law. Pursuing the interest of health protection, if the legislature opted for another form of protection when adopting the smoking regulation in catering services facilities, any such regulation could represent a constitutionally admissible interference with the fundamental rights and freedoms under Art. 11 (1) and Art. 26 (1) of the Charter.

137. For all the above reasons, the Constitutional Court thus did not find unconstitutional Section 8 (1) (k) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances.

VIII.4

The provisions concerning the prohibition to sell alcoholic beverage through vending machines

138. Within the fourth group of objections, the Petitioner alleged the unconstitutionality of Section 11 (4), Section 35 (1) (a) in the wording "or 4", and Section 36 (1) (j) in the wording "or 4" of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll. The contested Section 11 (4) prohibits the sale of alcoholic beverages through a vending machine; the remaining listed provisions regulate the related offences of natural persons, legal entities and natural persons engaged in enterprise.

139. The Petitioner deemed the prohibition to sell alcoholic beverages through vending machines as unfounded. However, it only explained the doubts in relation to tasting machines in wine shops.

140. The assessment of the Petitioner's objections described above may be, to a large extent, identified with the assessment set out in Section VIII.1 of this Judgment. Even in this case, it is true that the contested provisions are primarily directed against sellers of alcoholic beverages and the related limitations interfere with their right to engage in enterprise guaranteed in Art. 26 (1) of the Charter. As they also affect natural persons not engaged in enterprise and limit their handling things (consisting in the possibility to sell alcoholic beverages through a vending machine), they interfere with their right to own property protected by Art. 11 of the Charter. The Constitutional Court will thus again conduct a reasonableness test in relation to an interference with the right to engage in enterprise and a proportionality test in relation to an interference with the right to own property, though in a more concise form taking into account the similar assessment described above.

141. Even in this case, the Constitutional Court does not believe that the limitation of a certain manner of selling alcoholic beverages, here in the form of restricting the sale of alcoholic beverages through vending machines, would concern the very essence and meaning of the right to engage in enterprise. Again, it is a limitation to which sellers may adapt their activity and which does not otherwise prevent their entrepreneurial activity.

142. In assessing whether a legal regulation pursues a legitimate aim or whether it is an arbitrary fundamental reduction of the overall standard of fundamental rights or not, in addition to the general health protection, particular emphasis is placed on the specific protection of children and youth (Art. 32 of the Charter). With respect to the difficult verifiability of the buyer's maturity in the case of selling alcoholic beverages through vending machines, the prohibition on such sales does not appear to be at all arbitrary.

143. The contested prohibition is also a reasonable legal means directed towards the objectives of the legal regulation. It would be conceivable to use vending machines verifying the buyer's age, for example, by means of an identity card reader. Yet even such vending machines could be abused to purchase alcoholic beverages by minors using intermediaries, and would also be associated with risks of misuse of personal data. Other technological alternatives are not known to the Constitutional Court nor has the Petitioner presented them.

144. The contested provisions thus represent a constitutionally conforming interference with the right to engage in enterprise, being its statutory limitation within the meaning of Art. 26 (2) of the Charter.

145. As for assessing the effects of the interference with the right to own property, it is again true that the contested provisions pursue a legitimate or constitutionally approved objective expressly stipulated in Art. 11 (3) of the Charter as a possible limitation of the exercise of the right to own property. The contested provisions are capable of achieving the objectives pursued, thus being a suitable means to attain them. The Constitutional Court did not ascertain the existence of any more moderate means to achieve the objectives of the regulation in an equally effective manner (see paragraph 143). To conclude the proportionality test, the Constitutional Court must again assess the adequacy of the contested provisions in a narrower sense, i.e. whether preference is to be granted to the protection of the above objectives pursued by the contested provisions over the limitation of the right to own property. Even in this case, with respect to the factual impacts of the limitation of the sale of alcoholic beverages through vending machines on the right to own property, which will tend to be exceptional in the case of natural persons not engaged in enterprise, the Court considers necessary to prioritise the pursued objectives of health protection and protection of children and youth.

146. Therefore, the Constitutional Court concluded that the contested provisions represented a constitutionally conforming interference with the right to own property.

147. The Constitutional Court considers the Petitioner's objections concerning tasting machines used in wine shops as completely groundless. The contested provisions expressly affect vending machines. If wine shops or any other establishments use machines with a protective nitrogen atmosphere for the purposes of alcohol tasting,

which is supposed to lead to a longer useful life of an open bottle with an alcoholic beverage and more quality tasting, the contested provisions do not at all affect any such devices. It will be up to the owner and service staff of these tasting machines to ensure that they will not be misused for the sale of alcoholic beverages. For example, they may be located near the bar so that the access to them will be solely provided to the service staff of the wine shop, being able to serve customers using the tasting machine. If these machines were previously used directly by customers with the possibility of paying or prepaying the whole degustation, the adjustment of using these machines so that the service staff of the wine shop or any other establishment could control the sale of alcoholic beverages is not any particularly burdensome measure.

148. The Constitutional Court thus concluded that the contested provisions of Section 11 (4), Section 35 (1) (a) in the wording "or 4", and Section 36 (1) (j) in the wording "or 4" of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll., were not unconstitutional.

VIII.5

The provisions concerning the prohibition to sell or serve an alcoholic beverage to selected persons

149. The fifth group of the Petitioner's objections was directed against Section 11 (6), Section 35 (1) (k), Section 35 (2) (b) in the wording "k or", Section 35 (4) (a) in the wording "k or", Section 36 (1) (m), and Section 36 (10) (b) in labelling the letter "m)" of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll. The contested Section 11 (6) prohibits the sale or serving of an alcoholic beverage to a person who can reasonably be expected to consume the alcoholic beverage immediately afterwards and subsequently to perform an activity in which, due to the previous ingestion of the alcoholic beverage, they could jeopardise human health or damage property. This provision differs from Section 11 (7) of the same Act prohibiting serving of an alcoholic beverage "to a person obviously influenced by alcohol or any other addictive substance". The remaining contested provisions regulate the related offences of legal entities and natural persons both engaged and not engaged in enterprise.

150. The Petitioner saw the shortcoming in these provisions in the fact that they create a large extent of legal uncertainty with the possibility of arbitrariness and shift the individual responsibility onto other persons.

151. In the context of the contested legal regulation, it can be recalled that if an offender goes into a state of irresponsibility with the intention of committing a criminal offence, or if he/she committed a criminal offence out of negligence consisting in inducing a state of irresponsibility to him-/herself, he/she will be fully liable for any such criminal offences (cf. Section 360 (2) of the Criminal Code, the actio libera in causa). A person who would support the other person in deliberately "having a drink for courage", could be considered an accessory to the criminal offence and thus punished under the provision on the offender's criminal liability (cf. Section 24 of the Criminal Code).

152. Therefore, Section 11 (6) and (7) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances represents a means of deterring any potential accessories to criminal offences. Introducing administrative liability for less serious conduct (not supporting and affirming a person in having a drink for courage but mere conscious selling or serving alcoholic beverages to potential offenders) is supposed to lead to prevention of criminal liability of these persons by not supporting them in having a drink for courage at all. It creates a smooth and interdependent legal framework where pouring a glass of an alcoholic beverage for friends without any other anticipated harmful consequences is permitted without any further conditions, yet the same sit-down with a friend who is known to have violent tendencies after consuming alcoholic beverages may be prosecuted as a minor offence and pouring an alcoholic beverage for a person expressing an intention to commit a criminal offence is punishable within the criminal law.

153. Even in this case, the assessment of the Petitioner's objections will be similar to assessing the previous groups of the contested provisions. It is true again that primarily, the currently reviewed contested provisions are directed against sellers of alcoholic beverages and the related limitations interfere with their right to engage in enterprise guaranteed in Art. 26 (1) of the Charter. By also affecting natural persons not engaged in enterprise and limiting them in handling their things, they interfere with their right to own property protected by Art. 11 of the Charter. The Constitutional Court will again perform the reasonableness test in relation to the right to engage in enterprise and the proportionality test in relation to the interference with the right to own property.

154. According to the Constitutional Court, the prohibition to sell or serve alcoholic beverages to selected persons does not affect the very essence and meaning of the right to engage in enterprise. Even in this case, it is a limitation to which sellers may adapt their activity and which does not otherwise prevent their entrepreneurial activity.

155. According to the Constitutional Court, the legal regulation pursues a legitimate objective, namely the protection of health, life and property, as well as ensuring safety and preventing unlawful conduct and its repression. It is thus not an arbitrary and substantial reduction of the overall standard of fundamental rights.

156. The contested prohibition is a reasonable legal means directed towards the objectives of the legal regulation. Regarding whether the contested regulation is reasonable, doubts may arise in this case concerning the definiteness of the contested Section 11 (6) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, especially in defining the person who may be "reasonably expected" to subsequently jeopardise people's health or damage property. Even now it is true that it is an indefinite legal concept which is already a common part of the legal order. The Constitutional Court does not conclude that the intensity of its indefiniteness would rule out the possibility of determining its normative content by means of standard interpretation procedures (cf. paragraph 71). Any excessive hardship in applying the contested provision is supposed to be eliminated by the subsequent application practice of administrative authorities, while not excluding even an intervention of the Constitutional Court in the proceedings on constitutional complaints.

157. The contested provisions thus represent a constitutionally conforming interference with the right to engage in enterprise, thus being its lawful limitation within the meaning of Art. 26 (2) of the Charter.

158. When assessing the impacts of the interference with the right to own property, it is again true that the contested provisions pursue a legitimate or constitutionally approved objective expressly stipulated in Art. 11 (3) of the Charter as a possible limitation of the exercise of the right to own property. The contested provisions are capable of achieving the objectives pursued, thus being a suitable means to attain them. The Constitutional Court did not ascertain the existence of any more moderate means to achieve the objectives of the regulation in an equally effective manner, and the Petitioner failed to submit any alternatives. As for assessing the reasonableness of the contested provisions in the narrower sense, i.e. whether preference is to be granted to the protection of the above objectives pursued by the contested provisions over the limitation of the right to own property, even in this case, the Constitutional Court prefers the protection of the pursued legitimate objectives. This is due to their multiplicity, also including the protection of property itself, i.e. the protection of the right to own property of third parties, as well as their seriousness. The intrinsic nature of the interference with the right to own property is minimal compared to the objectives pursued, as the contested prohibition limits owners in handling things only in the manner in which they are not allowed to dispose of them (selling or serving them). In addition, this only applied to isolated cases, rather than in a blanket manner, i.e. when jeopardy or violation of the interests protected by the statute may be reasonably expected.

159. The contested provisions thus represent a constitutionally conforming interference with the right to own property.

160. The Constitutional Court thus concluded that the contested provisions of Section 11 (6), Section 35 (1) (k), Section 35 (2) (b) in the wording "k or", Section 35 (4) (a) in the wording "k or", Section 36 (1) (m), and Section 36 (10) (b) in labelling the letter "m)" of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll., were not unconstitutional.

VIII.6

The provisions concerning punishing self-threats

161. By means of the sixth group of the objections, the Petitioner contested Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances in the wording "themselves or". It thus opposed the fact that the person who conducts an activity in which they may jeopardise the life or health of themselves or another person or damage property or in respect of whom any other legal regulation provides for a prohibition of consuming alcohol or using other addictive substances is forbidden to consume alcohol or use other addictive substances when conducting any such activity or prior to conducting it in order to ensure that any such activity is not conducted under the influence of alcohol or any other addictive substance.

162. Even though the Petitioner was aware that violating Section 19 of the Act is sanctioned in Section 35 (1) (o) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll., it failed to contest this provision, not specifying it in the heading or its petition. Section 35 (1) (o) of the Act describes the minor offence committed by a natural person when, contrary to Section 19:

1. They consume an alcoholic beverage or use any other addictive substance even though they are aware that they will perform an activity in the course of which they could jeopardise the life or health of themselves or another person or damage property;

2. After consuming an alcoholic beverage or using any other addictive substance, they conduct an activity in the course of which they could jeopardise the life or health of themselves or another person or damage property.

163. In its established case law, the Constitutional Court emphasises that in the proceedings on the abstract review of norms, it is bound by the claim for relief contained in the petition rather than by its reasoning, i.e. the arguments submitted by the petitioner. Even though it also assesses the petition from other perspectives of the protection of constitutionality than those specified in the reasoning behind the petition, it cannot hold on annulling any other provisions than those specified in the claim for relief. An exception consists in a situation in which as a consequence of annulling a certain statutory provision by a judgment of the Constitutional Court, another provision, dependent on the previous one in terms of the content, would lose sense, i.e. lose the legitimacy of its normative existence, which would constitute a reason for annulling even this statutory provision, without representing an ultra petitum procedure. In fact, the validity of any such provision expires on the basis of the cessante ratione legis cessat lex ipsa principle; the derogation performed by the Constitutional Court is therefore merely of a recording or technical nature [for example, cf. the Judgment of 20 June 2001, file reference Pl. ÚS 59/2000 (N 90/22 SbNU 249; 278/2001 Coll.), Judgment of 31 October 2001, file reference Pl. ÚS 15/01 (N 164/24 SbNU 201; 424/2001 Coll.), or Judgment of 27 January 2015, file reference Pl. ÚS 16/14 (N 15/76 SbNU 197; 99/2015 Coll.)].

164. With respect to the above, the petition under review is not such a case. The Petitioner's objections are directly only against a part of the provision of Section 19 of the Act; yet this provision is reiterated, in terms of its content, in Section 35 (1) (o) of the Act, which serves as a basis for imposing penalties for a minor offence. If the Constitutional Court thus annulled only two contested words of Section 19 of the Act, the facts of the minor offence, punishing the conduct which is not supposed to be sanctioned according to the Petitioner, would remain included in the Act. If the Constitutional Court itself selected individual words from Section 35 (1) (o) to be annulled so that its approach factually corresponded to the Petitioner's petition, it would act inadmissibly beyond the scope of the petition (ultra petitum).

165. The Constitutional Court will thus not address the constitutionality of Section 35 (1) (o) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll.; however, it is not prevented in doing so when reviewing the contested part of Section 19 of the same Act. Failure to contest "correct" or all related provisions does not constitute a defect of the petition owing to which the Constitutional Court could not proceed to review the merits of the provisions contested by the Petitioner.

166. The Petitioner's objections were directed against the fact that the contested part of Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances also sanctions threats to oneself, even though human life and health are not property of the State. The provision was considered redundant and to be a manifestation of the government's attempt at an all-powerful interference with privacy.

167. Above all, the Constitutional Court must assess whether the prohibition to jeopardise one's own health by consuming alcoholic beverages or using any other addictive substances in association with another activity interferes with any fundamental right. Owing to the link to the subsequent activity, it would be possible to consider whether it represents a limitation of the right to engage in enterprise (typically in the case of professional drivers) or the limitation of the right to own property (the individual who is not sober will be limited in handling things in order not to conduct an activity during which they may jeopardise their heath); ad absurdum it would also be possible to consider for example the limitation of the freedom of assembly if the individual knew that they have violent tendencies after consuming alcoholic beverages and intended to participate in a demonstration. However, it is obvious that these hypothetical limitations of fundamental rights do not constitute the essence of the specific prohibition. It is not even an interference of the State with the physical or psychological integrity of an individual. Thus, in line with the Petitioner, the Constitutional Court

does not perceive the essence of the prohibition in restricting the subsequent activity, but rather in the prohibition itself "to consume alcoholic beverages or use any other addictive substances". This prohibition may then be perceived as a limitation in handling things, i.e. an interference with the right to own property (Art. 11 of the Charter). At the same time, this imposed self-limitation applies to every individual in their everyday life or in their dwelling (for example) in the presence of their own family. It is thus also an interference with the right to protection of private and family life guaranteed in Art. 10 (2) of the Charter. In relation to these provisions, the Constitutional Court will therefore examine the contested part of Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. At the same time, it is noted that interference with the right to protection of private life as a fundamental human right is assessed by means of a proportionality test.

168. The contested provision pursues a legitimate or constitutionally approved objective, namely the protection of life, health and property. As for the words "themselves or" only, they pursue the objective of health protection (cf. again Art. 11 (3) of the Charter, which lists health protection as a possible reason for limiting the exercise of the right to own property). If these words were to be removed from the contested provision, the level of the pursued objective, i.e. health protection, would be reduced precisely by the protection of the individual engaged in the conduct.

169. The Petitioner wrongly believes that the individual's health may never be protected even against their will (cf. also paragraph 58). This Petitioner's assumption does not apply especially if the self-inflicted harm or self-threats also jeopardise other values, such as other persons' health or property. For instance, it is possible to refer to the road traffic rules, typically the duty of the driver and the passenger to fasten their seatbelts [Sections 6 and 9 of Act No. 361/2000 Coll., on Road Traffic and Amendments to Some Other Acts (Road Traffic Act), as amended] or the pedestrian's duty to primarily use a pavement or pedestrian path (Section 53 of the Road Traffic Act). Similar examples may also be found in the case of occupational health protection, for instance the duty to use personal protective equipment and protective devices (Section 106 of the Labour Code). The Constitutional Court has already decided that in these cases, it is possible to protect health even against the will of the persons concerned (see the above-quoted Judgment file reference Pl. ÚS 11/08).

170. Although it is conceivable that in the specified examples, the person affected by the limitation jeopardises only themselves, in most cases, the self-inflicted threat and jeopardy to other values will be inseparably associated. A driver who failed to fasten their seatbelt may have an accident in which no one else is injured and no damage is caused; yet more frequently, there will be multiple harmful consequences.

171. However, the cases covered by Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances may be very different. It is conceivable that there will be a close link between self-threatening and jeopardising the life or health of other persons or damage to property. Typically, these will include situations in which a drunk driver, cyclist or pedestrian causes a traffic accident the harmful consequences of which will be mutually linked. However, in so far as the contested provision includes the words "themselves or", there may be a number of situations in which an individual consumes an alcoholic beverage or uses another addictive substance and then carries out an activity in which they only jeopardise their own health. Due to the fact that the contested provision applies to every natural person in any of their activities, it limits completely routine activities performed in a personal home environment not affecting any other person. As an example, the Petitioner mentioned picking apples in which an individual may fall from a tree. However, the contested provision also applies to grass mowing, ironing or washing dishes in which there is a possibility for an individual to cut him or herself. If it is not an activity performed within employment but at an individual's private home, it is absurd to think that these activities could not be performed merely due to the possible jeopardy to their health and they could not have a glass of an alcoholic beverage when carrying out these activities.

172. At the same time, it is true that if the words "themselves or" are removed from the contested provision, the legitimate objective of this provision will remain unaffected. In the cases of protecting the individual's health with regard to the interconnection of other protected values, i.e. the protection of life and health of other persons or the protection of property, the prohibition to consume alcoholic beverages or use any other addictive substances will continue to apply. In the case of protecting these other values, it will indirectly protect individuals against themselves. However, removing the words "themselves or" will mean that the prohibition to consume alcoholic beverages or use any other addictive substances will not apply to situations in which the individual would jeopardise only themselves (and no one else) as a consequence of consuming alcohol or using any other addictive substance. This will also maintain at least the minimum space for the individual's self-realisation and their autonomous existence with which the State will not interfere. It will thus protect the individual's right to privacy and interfere less with their right to own property.

173. The Constitutional Court therefore concluded that Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances pursued a legitimate or constitutionally approved objective only if it does not contain the words "themselves or". Incorporating these words in the specific provision actually caused the objectives pursued to conflict with the right to protection of private life. Owing to the fact that when assessing the legitimate objective, it concluded on the need to annul the above words from Section 19 of the Act, it did not perform any further steps of the proportionality test. It concluded that the interference with the right to protection of private life and the right to own property, consisting in the fact that Section 19 the Act on the Protection of Health from the Harmful Effects of Addictive Substances also included the words "themselves or" did not stand the proportionality test for the reason described above.

174. Yet it needs to be emphasised that the Court dealt with only Section 19 containing the above-quoted prohibition. With respect of the extent of the petition, it could not address the constitutionality of Section 35 (1) (o) of the same Act, i.e. it is constitutionally conforming to sanction the violation of the above-quoted prohibition, especially in relation to the person jeopardising only themselves. The Constitutional Court's conclusion is thus supposed to be primarily taken into consideration by the legislature. Until the legislature has removed the inconsistency between the wording of Section 19 of the Act following the derogation performed by the Constitutional Court, the authorities applying Section 35 (1) (o) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll. must proceed from the fact that according to this provision, the natural person commits an offence only by conduct "contrary to Section 19". At the same time, they will be required to take into account that the Constitutional Court removed the words "themselves or" from Section 19 of the Act.

VIII.7

The provisions concerning the reimbursement of costs of medical or toxicological examinations

175. By the seventh group of objections, the Petitioner alleged the unconstitutionality of parts of Section 24 (2), (3), (4), and (5) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. The contested parts of these provisions regulate the reimbursement of costs in the case of minors by their legal representatives concerning the costs of specialist medical or toxicological examinations to determine if they are influenced by alcohol or any other addictive substances and the costs of transporting the examined minor to the health facility.

176. In general, these costs are reimbursed to the health services provider by the Police of the Czech Republic, Military Police, Municipal Police, Prison Service, the employer, an inspection body or the health services provider within whose competence an examination was requested or in the case of a toxicological examination, by the person requesting it. Only if the presence of alcohol or any other addictive substance is established or if a medical examination is performed due to refusal to have an indicative examination performed on the side of the examined person, the duty to cover the costs passes onto the examined person or legal representatives in the case of minors.

177. The Petitioner's objections were directed against the fact that these provisions establish the objective responsibility of legal representatives even though the minor is, for example, placed in an educational facility and in such a case, their parents do not have any control over the minor's potential intoxication. It was the parents' responsibility without the possibility to take into account the individual circumstances of the case that the Petitioner deemed unconstitutional. It also disagreed with the fact that these provisions of a public law regulation interfere with the private law regulation of the relationships between parents and children.

178. First of all, the Constitutional Court does not find that the objection of incorrect overlapping of the private law and public law regulation is of constitutional relevance. Previously, it has also expressed that "at present, private and public law is not separated by a "Chinese wall". There has been more frequent and narrower overlapping, combination and mutual intensive interaction of private law and public law elements" [the Judgment of 10 January 2001, file reference Pl. ÚS 33/2000 (N 5/21 SbNU 29; 78/2001 Coll.)]. Also, removing such boundaries between private and public law frequently takes place within a single regulation, yet this fact itself does not result in the unconstitutionality of the legal regulation [cf. also the Judgment in the case of the Labour Code of 12 March 2008, file reference Pl. ÚS 83/06 (N 55/48 SbNU 629; 116/2008 Coll.)].

179. If the above-mentioned provisions oblige the legal representatives to cover certain costs for minors, they may be seen as interference with the right to own property protected by Art. 11 of the Charter. Therefore, the Constitutional Court will assess this interference in the proportionality test.

180. The objective of the contested parts of Section 24 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances may be perceived primarily in the special protection of children and adolescents (Art. 32 of the Charter). The Constitutional Court has already addressed in detail the fees and charges imposed on minors in the above-quoted Judgment file reference Pl. ÚS 9/15, in which it emphasised that "the public authority cannot impose obligations on minors the extent or manner of which excessively burden the possibility to adapt their lives according to their needs. This possibility is not preserved if minors start their adult life with substantial debts (after all, debt burden is one of the significant criminogenic factors). It is this constitutionally protected interest of the child not to enter adulthood with obligations which may have a choking effect (the Judgment file reference I. ÚS 1775/14 of 15 February 2017). This applies all the more in the cases of debts determined in an authoritarian manner (thus not applying the pacta sunt servanda principle) at the time when the public authority also limits the possibilities of gainful activities of such debtors." In this context, it should be pointed out that according to Section 20 (1) (d) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances, persons under the age of 18 years are required to undergo an orientation and expert medical examination under the prescribed conditions, without specifying a lower age limit. It may also apply to children under the age of 15 years who have only a limited opportunity to obtain income through their own efforts and, as a rule, will not have sufficient assets to pay the fees.

181. The contested parts of Section 24 of the above Act are capable of attaining the objectives of the special protection of children and adolescents, thus protecting them against obligations which they are unable to repay due to their minority. For this reason, they represent a suitable means of achieving them.

182. The Constitutional Court has not concluded that there are more moderate means which could achieve the objectives of the regulation in an equally effective manner. It cannot be required for the State to bear all the costs of drunk or intoxicated persons under the age of 18 years, releasing their legal representatives from this obligation. Without any legitimate reason, any such solution would burden the national budget and it would not have any (even indirect) educational effect on minors. Determining the extent to which their legal representatives themselves contributed to the potential intoxication of minors, for instance, by neglecting their supervision duty, which would be performed by the health facilities incurring those costs, would significantly reduce the effectiveness of the legal regulation. It would cause additional costs for these facilities, while delaying the moment when the costs originally incurred would be reimbursed. It is thus not a comparable alternative.

183. In the last step of the proportionality test, the Constitutional Court must assess in this case whether preference is to be granted to the special protection of children and adolescents against limiting the right to own property of their legal representatives. From the perspective of the importance of the objective pursued, the above-quoted Judgment file reference Pl. ÚS 9/15 may be referred to, emphasising the protection of children and adolescents against debts, especially in the situation when failure to comply with a payment duty may lead to enforcement burdens pursuing minors to their early adulthood. On the other hand, the limitation of the right to own property of legal representatives is not significantly different from the general regulation of the Civil Code, according to which the minor has the capacity to perform legal acts the nature of which is appropriate to the intellectual and volitional maturity of minors of their age. For those minors who would be capable of covering the costs themselves, it is left up to their legal representatives whether they will apply, within their parental responsibility, a requirement to use their savings to cover at least a part of the costs incurred. However, in the cases when the legal representative established that the condition of the minor under their custody was caused by another person, including, for example, neglecting the care of a facility where the minor resided, the possibility to regressively seek compensation of the costs incurred from these persons using private law means is not at all ruled out (cf. Section 2917 of the Civil Code). Yet, as a rule, the person primarily responsible for supervising the minor will be the legal representative. For these reasons, the contested legal regulation seems to be a reasonable limitation of the right to own property, appropriately protecting children and adolescents and not at all interfering with the exercise of parental responsibility.

184. The Constitutional Court thus concluded that the contested parts of Section 24 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances represented a constitutionally conforming interference with the right to own property. At the same time, it did not establish any other reason for their unconstitutionality.

IX.

Conclusion

185. In the previous section of this Judgment, the Constitutional Court concluded on the inconsistency of the word "primarily" in Section 3 (2) (d), Section 11 (2) (d), and Section 36 (1) (b) and k) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances, as amended by Act No. 183/2017 Coll. with the constitutional order. Therefore, in accordance with Section 70 (1) of Act No. 182/1993 Coll., on the Constitutional Court, as amended by Act No. 48/2002 Coll., by means of its dictum I, it held on the annulment of the word "primarily" in Section 3 (2) (d), Section 11 (2) (d), and Section 36 (1) (b) and k) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. In addition, it concluded on the inconsistency of the words "themselves or" in Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances with the constitutional order. Therefore, by means of its dictum II, in accordance with Section 70 (1) of Act No. 182/1993 Coll., on the Constitutional Court, as amended by Act No. 48/2002 Coll., it held on the annulment of the words "themselves or" in Section 19 of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. It did not conclude on the unconstitutionality of the contested provisions of the Act on the Protection of Health from the Harmful Effects of Addictive Substances. By means of its dictum III, in accordance with Section 70 (2) of Act No. 182/1993 Coll., on the Constitutional Court, it held on dismissing the remainder of the petition.

Chairman of the Constitutional Court:
JUDr. Rychetský

Dissenting opinions under Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, were submitted by Judge Josef Fiala to dictums I and II of the plenary decision and by Judges Ludvík David, Jaromír Jirsa, Tomáš Lichovník, Vladimír Sládeček, Kateřina Šimáčková, and Vojtěch Šimíček to dictum III.

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1. Dissenting Opinion of Judge Josef Fiala

Under Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, I hereby submit a dissenting opinion on dictums I and II of the Judgment of the Constitutional Court in the case of file reference Pl. ÚS 7/17.

As for dictum I:

The Constitutional Court has proceeded to annul the adverb "primarily" for the alleged indefiniteness of the contested provision establishing the inconsistency with Art. 1 (1) of the Constitutional of the Czech Republic (paragraph 72 of the reasoning behind the Judgment). At the same time, the immediately preceding text of the reasoning includes a notoriety that "indefiniteness of legal concepts is not unusual in the law, and in essence, it stems from the abstract and regulatory nature of legal norms. It does not in itself establish the unconstitutionality of a legal regulation", followed by the references to case-law conclusions on the space for a potential derogatory intervention of the Constitutional Court. I am convinced that in the instant case, the space was not provided, as it is not the case, "when at the same time, it concerns a breach of constitutional order and the inaccuracy, ambiguity and unpredictability of the legal regulation disturbs the fundamental requirements of the law in the conditions of the rule of law state a lot", when it was possible to logically expect that the interpretation of this concept would be completed with the specific content by the decision-making activity of ordinary courts. At the same time, it is an adverb commonly used in the wording of legal regulations.

As for dictum II:

In my opinion, the provisions of Section 19 of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances pursues a legitimate or constitutionally approved objective, namely the protection of life, health and property. The words "themselves or" also pursue the objective of health protection (cf. again Art. 11 (3) of the Charter of Fundamental Rights and Freedoms), the removal of which the level of achieving the objective pursued is reduced by the protection of the person engaged in the conduct. I do not perceive the prohibition to jeopardise one's own health by consuming alcoholic beverages or using any other addictive substances in association with another activity as a constitutionally inadmissible interference with any of the fundamental rights.

Conclusion:

For the above reasons, I believe that the petition of a group of Deputies seeking the annulment of the provisions set out in the heading or their parts of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances should have been dismissed by the Constitutional Court in its entirety.

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2. Dissenting opinion of Judge Tomáš Lichovník concerning dictum III of the Judgment file reference Pl. ÚS 7/17, dismissing the petition seeking the annulment of Section 8 (1) (k) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances

I disagree with the above-mentioned dictum of the Judgment of the plenum and in accordance with the provisions of 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, I hereby submit a dissenting opinion.

The same as my dissenting colleagues, I believe that the petition should have been allowed concerning the complete prohibition to smoke in the indoor space of the catering services facility, thus annulling the contested provision of Section 8 (1) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances as unconstitutional. I also agree with their reflections that this blanket prohibition excessively interferes with the right to engage in enterprise.

However, in my view, the decisive reason for annulling the prohibition consists in the interference with the right to private and family life protected by Art. 10 of the Charter. Smokers represent a considerable part of our society. And the contested provision de facto prevents this large part of our society from meeting others in restaurants and mainly in pubs, wine bars, bars, etc., which are particularly suitable for this purpose. They can obviously go there de iure, but they do not stay there for long without a cigarette. They are not only excluded from the company of non-smokers but also from the company of smokers. After all, even smokers cannot stay there together! The Act protects them from themselves and significantly interferes with the right to meet other people and spend their time with them, which forms part of the right to private and family life.

Addressing the protection against harmful effects of smoking adopted by the legislature is merely a seeming solution. Smokers have moved from the above-mentioned restaurants, pubs, wine bars, bar, etc. to the front of these establishments. If we walk through a city or town (not only) in the evening, we will see a group of smokers in front of practically every such establishment. Cigarette smoke is thus not mandatorily inhaled by the attendees of the above establishments, but by all passers-by and especially the owners and tenants of flats located above these establishments. It is also necessary to add noise and cigarette butts on the ground. The prohibition is a solution lacking in dignity for both sides, i.e. smokers and passers-by. We are concerned about the consequences of this state. It may lead to a blanket prohibition to smoke in streets and public spaces in general. It may also lead to the situation when addicted smokers will smoke only at home, "under the noses" of their children.

The legal prohibition is inconsistent: it follows the recommendations of the Implementing Guidelines to Article 8 of the World Health Organization Framework Convention on Tobacco Control only in relation to the indoor space of the catering services facility, but not in relation to the transit area of an international airport or a health facility, where Section 8 (1) (b) and (e) of the Act on the Protection of Health from the Harmful Effects of Addictive Substances admits an exemption from the prohibition. The categorical statement on the insufficient effect of the technical solution of the structurally separated space which would be capable of completely preventing smoke penetration to other spaces of the establishment (paragraph 105 ad.) is thus probably not legitimate. The statutory prohibition is also inconsistent with the imperative of Art. 4 (4) of the Charter, i.e. when employing the provisions concerning the limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Within the right to private and family life, they undoubtedly include the opportunity of mutual communication between non-smokers and smokers. Annulling the prohibition would thus provide space for respect for persons addicted to smoking, i.e. handicapped in a certain manner, which is required in society, without weakening the effectiveness of the tools for gradual limitation of this addiction in protecting public health.

I fully support the thesis that the freedom of an individual ends where the freedom of someone else begins. However, the selected regulation fails to address the problem, while interfering with the right to private and family life of a considerable part of society. If the contested provision were annulled, all the above-mentioned catering services establishments would be non-smoking as a matter of principle. All of them without any exception. It would be up to their operators if they established a smoking room outside the non-smoking part, i.e.

a structurally separate space for smoking, as defined in further detail in the provision of Section 10 of the contested Act. I do not at all question the harmfulness of smoking, and yet I am convinced that it is not the role of the State to reform smokers and protect them against themselves, let alone in the manner that excludes them from society without dignity and causing annoyance to anyone walking in the street. The selected solution obviously misses the ambition which the legislature is supposed to pursue in a democratic society, burdened with a number of cultural stereotypes, i.e. moderation in applying its legislative appetite to create space for informal self-regulation by acting to foster consideration among different social groups.

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3. Dissenting opinion of Judges Vojtěch Šimíček, Ludvík David, Jaromír Jirsa, Vladimír Sládeček, and Kateřina Šimáčková concerning dictum III of the Judgment file reference Pl. ÚS 7/17, dismissing the petition seeking the annulment of Section 8 (1) (k) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances

We do not agree with the plenum's judgment in this respect and in accordance with Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, we hereby submit a dissenting opinion. We do believe that the petition was supposed to be allowed in relation to the complete prohibition to smoke in the indoor space of a catering services establishment, thus annulling the contested provision of Section 8 (1) of Act No. 65/2017 Coll., on the Protection of Health from the Harmful Effects of Addictive Substances as unconstitutional. This conclusion is supported particularly by the considerations below.

1. First of all, it needs to be explained that the contested statutory provision prohibits smoking in the indoor space of a "catering services establishment". Yet this concept needs to be interpreted in accordance with Section 2 (i) of Act No. 65/2017 Coll. and particularly Art. 2 of the Regulation (EC) No 178/2002 of the European Parliament and of the Council (of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety) so that "food means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans". "Food" includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. This means that catering services establishments include not only such facilities where food is cooked and served but also, for example, catering establishments serving only beverages. We consider this terminological "introduction to the topic" to be important. To put it very concisely, the complete smoking prohibition does not apply only to restaurants where guests might be understandably bothered that somebody smokes at a neighbouring table, but also to pubs, taprooms, bars, and cafés.

2. Our fundamental starting point is the fact that the regulation in question represents an indisputable interference with the right to engage in enterprise and operate other economic activity. This interference is after all admitted by the majority of the plenum (see paragraph 100). We perceive the right to engage in enterprise not only as "one of the social rights" but as significantly more than the freedom of enterprise. This specifically means that when interfering with this right (or freedom), the State is always supposed to cautiously consider whether any such interference is necessary. Free enterprise is actually an elementary assumption of a truly free society based on the primacy of the individual before the State. It is also true that the right to engage in enterprise is derived from the right to own property and freely dispose of it.

3. We thus disagree with the procedure which infers the possibility of virtually any interferences with enterprise from Art. 26 (2) of the Charter ("conditions and limitations may be set by law upon the right to engage in certain professions or activities"). It is obvious from the quoted sentence that these conditions and limitations cannot be arbitrary but are supposed to be closely related to the performance of a certain profession or an activity, i.e. having to take into account their particularities. At the same time, the requirements of proportionality and rationality apply to them in their entirety. Similarly to the dissenting opinion of the judgment on the electronic sales record [Judgment file reference Pl. ÚS 26/16 of 12 December 2017 (8/2018 Coll.)], it may be recalled that the contested regulation cannot be assessed separately but in the context of other limitations of and interferences with enterprise. It is thus the proverbial "another drop" and it is commonly known that it might be the straw that breaks the camel's back. In other words, more and more regulations, always justified with sophisticated protection of anything, will finally lead to limiting or even to the complete suppression of that freedom in some cases. At the same time, the right to engage in enterprise is one of the main achievements of the post-Soviet development.

4. We also criticise the arguments of the majority of the plenum for its certain illogicality and inconsistency. For example, the Judgment states that the prohibition in question "does not directly affect" the operators of catering

services establishments (paragraph 99), affecting them only indirectly (paragraph 100), as their duties are specified in Section 9 of Act No. 65/2017 Coll.; in another part, it even states that this prohibition "does not address entrepreneurs and does not impose any obligation or sanction in the event of non-compliance" (paragraph 116). At the same time, the smoking prohibition results in "a change in the conditions under which catering services may be provided", and therefore, the interference with the fundamental right under Art. 26 (1) of the Charter was also assessed (paragraph 100). In other words, if the majority explicitly admits an interference with the right to engage in enterprise, it is impossible to claim at the same time that the prohibition in question does not directly (or at all!) affect the operator concerned. It obviously does, directly and with all its force! Another inconsistency lies in the performed second step of the reasonableness test, which is conducted only superficially in the Judgment. The conclusion of the majority that the smoking prohibition does not affect the essential content of the right to engage in enterprise, on the one hand, relies on the statement that the summary of basic financial indicators in the catering and restaurant sector, including the first three quarters of 2017, indicate that enterprise in this sector demonstrates an improving trend in all three quarters (paragraph 118); at the same time, however, the next paragraph admits that these statistics cannot be used to ascertain the increase in revenues contributed by originally smoking catering facilities compared to non-smoking ones or catering facilities in cities compared to those in the country.

5. We also perceive the unconstitutionality of the blanket smoking prohibition in restaurants and cafés in the fact that (similarly to other blanket regulations) it burdens individual addressees in a highly uneven manner. In big cities, even prior to the smoking prohibition, if the natural development led to the situation that it was actually not a problem to find a non-smoking restaurant and in the case of smoking ones, it was sufficient to prohibit smoking at the time of serving meals, this prohibition logically most affects typical countryside pubs where they often do not cook meals at all. The sales in these pubs are therefore almost exclusively dependent on the quantity of beverages sold, which in the case of the blanket smoking prohibition necessarily leads to the situation that they will become less interesting for typical consumers, which will necessarily result in declining sales. Consequently, the contested blanket smoking prohibition will necessarily manifest differently in individual catering establishments depending on their location, size, market positioning, typical clientele, etc. To put it concisely, the operator of a pub in a village of several tens of inhabitants must behave completely differently than a restaurant operator in the centre of Prague or any other big city. At the same time, according to the established case law of the Constitutional Court, the essence of enterprise lies in creating profit and its core is the economic meaningfulness of this activity. For this reason, the State acts unconstitutionally if it formally allows enterprise in a certain area, yet at the same time, it provides for such conditions that de facto exclude the possibility to operate them, i.e. reach an adequate profit [e.g. the Judgment file reference Pl. ÚS 19/13 of 22 October 2013 (N 178/71 SbNU 105; 396/2013 Coll.), paragraph 66]. We believe that in the case of some (mainly countryside) catering establishments, the smoking prohibition in question, in the context of further regulations and limitations, such as introducing the electronic sales records (ESR), consequently interferes with the core of this fundamental right.

6. Ultimately, the contested absolute smoking prohibition in all catering establishments substantially also interferes with the life of smokers, i.e. in their right to private and family life guaranteed in Art. 10 of the Charter, the integral part of which also includes free social interaction. As previously inferred by the Constitutional Court, the right to private and family life "necessarily also has to incorporate the right to creating relationships with other people and the outside world" [see the Judgment file reference I. ÚS 22/10 of 7 April 2010 (N 77/57 SbNU 43), paragraph 17]. The interference with the freedom of enterprise is thus also reflected as an interference with the right of private and family life and free conduct of consumers – smokers. However, at the same time, as expressed by John Stuart Mill a long time ago, "the only goal that permits mankind – individually or collectively – to interfere with the freedom of people's conduct is self-defence. The only purpose for which power may be rightfully applied against any member of society even against their own will is to prevent harm to others". The State is entitled to interfere with the freedom of enterprise to protect consumers' rights. It is thus possible to accept any such smoking limitation that will prevent bothering consumers – non-smokers or the employees of the operator of the catering establishment; in addition, it is impossible to force innkeepers to allow smoking in their establishment if they disagree with that. Yet how do we explain to a smoker who wishes to consume their coffee with a pipe or a beer with a cigarette in the company of others in a restaurant establishment operated by an innkeeper or café owner supporting smoking that it is necessary to disregard their wish?

7. In our view, the judgment of the plenum also largely underestimates the circumstance that restaurants, cafés and wine bars have always been traditional places where people can freely gather, meet, exchange their opinions and discuss. It would amount to the proverbial carrying owls to Athens if we recalled the number of associations and political parties that have been established in pubs, how many literary works have been written in cafés, and

how much inspiration artists have found in wine bars. For this reason, we do not agree with the categorical or even dishonouring rejection of the argument using a certain tradition (paragraph 82). In fact, we have exactly the opposite view: it is obviously possible for the State to change a certain practice; nevertheless, it needs to have very good reasons for doing so. However, in this case, we have not found any reasons for a blanket smoking prohibition.

8. In addition, what cannot be left out is the unjustified inequality arising as a consequence of the contested smoking prohibition among individual public spaces used for enterprise. While in the transit area of an international airport it is possible to create a structurally separated space reserved for smoking, an absolute smoking prohibition has been introduced in the indoor space of the catering establishment. In the Judgment (paragraph 127), this difference is justified by the fact that the structurally separated space reserved for smoking is permitted only in the transit area of an international airport, i.e. the not publicly accessible section of the airport, as well as by the fact that passengers travelling long distances and only transferring at the airport do not have any other option regarding how to face withdrawal symptoms, while it is possible to leave a restaurant and have a cigarette. This argumentation is highly misleading and does not correspond to any real facts either. In particular, however, we argue that this statutory exception severely contradicts the arguments of the majority in favour of an absolute smoking prohibition, which (also) includes protecting the health of staff against inhalation of smoking fumes. In the smoking rooms at the airport, cleaning staff are also exposed to smoking inhalations, as they clean up frequently and continuously and in full operation. It is therefore unclear why they should be protected less than employees in the catering establishment. In this sense, we consider as non-convincing the reference to the Judgment of the Federal Constitutional Court of 30 July 2008, file reference 1 BvR 3262/07 (paragraph 129). The question is if "the legislature has no constitutional obligation to create, with regard to the right to engage in enterprise, exceptions from the smoking prohibition in catering establishments (paragraph 122), even with respect to small companies or their limited supply (paragraph 123), just as such exemptions do not even apply in other areas, such as public transport", why does it do so in the case of smoking rooms at the airport. Then it is impossible to apply the speculative assertion of the ineffectiveness of a technical solution of a structurally separated space for smokers (paragraph 105). After all, a number of restaurants are currently equipped with efficient air-conditioning.

9. The Judgment also avoids a phenomenon which has become clear and obvious a year after the effect of the Act: a blanket smoking prohibition anywhere inside a catering facility means that smokers stand in the street on a massive scale and pollute the public space, undoubtedly jeopardise the environment, force the owner and tenants of flats above the restaurants to inhale cigarette smoke and annoy them with noise, which also interferes with their rights to own property (or any other equal rights), and they are in the eyes of young children in the daylight hours, which may jeopardise their healthy development. These are all the effects of the blanket smoking prohibition, which may be described as a "side effect"; yet the Judgment completely neglects the fact that they have a serious impact on other rights and freedoms than those to be protected by the statute.

10. What is thus the social benefit of the complete smoking prohibition in catering services establishments? It is definitely not the protection of the operator or owner of the catering establishment. They could have introduced the smoking prohibition prior to adopting the contested regulation, and as we pointed out above, it was frequently the case. It is also odd to argue with the protection of non-smokers, i.e. the guests and service staff. If the Constitutional Court had allowed the submitted petition, it would practically mean that the special prohibition contained in Section 8 (1) (k) of Act No. 65/2017 Coll. would not apply to catering services establishments, but rather the limitation arising from letter (a) of the quoted statutory provision. In other words, the smoking prohibition would apply to the freely accessible indoor space of a catering facility except for the structurally separated space reserved for smoking. This space is then defined in further detail in Section 10, which expressly provides for, among other things, the guarantee that a person under the age of 18 years or an employee performing their work cannot stay in this space. We perceive this limitation to be completely adequate and reasonable in terms of those values which need to be protected. If the famous rule that everyone's freedom ends where the freedom of another begins still applies, it is all right that smokers do not bother persons who are annoyed by smoke. However, there is no (and there should not be!) reason for protecting smokers themselves when they do not require that.

11. The majority of the plenum is therefore completely wrong in inferring the constitutional legitimacy of the smoking prohibition from the protection of life and health of "persons who are, in the case of other persons smoking in the indoor premises, exposed to tobacco smoke against their will" (paragraph 102). Even after annulling the contested legal provision, no such persons would be jeopardised or annoyed, as smoking would only be allowed in smoking rooms, i.e. separate spaces which non-smokers would not have to enter at all and if they did so (e.g. to talk to a friend – smoker), it would be on the basis of their free decision. If the majority of the

plenum argues (paragraph 111) the fact that smoking rooms are a means "not protecting the health of the population and not guaranteeing the enforceability of the Act, not even in an approximately comparable manner as the contested prohibition", they are also "more costly and more demanding for catering establishment operators, who are then exposed to a greater degree of sanctions on the part of the State for failing to comply with the precise technical and functional conditions of establishing smoking rooms", we argue that the first claim is an unfounded speculation and the other one is clearly paternalistic, as it does not allow the operators to select a solution but instead, it foists on them that the (probably) absolute prohibition will eventually be more beneficial for them. If it is implied that establishing smoking rooms would not be fully respected in practice, then we would like to point out that it is again a mere speculation and it would also be appropriate to first adapt a more moderate solution and then, after its appropriate evaluation and with the benefit of hindsight, to consider whether it is sufficiently effective or not and possibly proceed to a more radical solution. In our view, the consideration of the Constitutional Court in this matter that the absolute smoking prohibition is appropriate, as it is the simplest and leads to the objective pursued most effectively, is constitutionally unacceptable. The chain of thought in the proportionality test is the opposite in fact: only when more moderate measures fail, is it appropriate to adopt more restrictive measures.

12. It follows from the above that the smoking prohibition in the current form actually "protects" smokers exclusively from themselves. In this respect, we agree with the Petitioner that it is a manifestation of an inappropriate paternalism or possibly even messianism. The Constitutional Court, the majority of which accepts this prohibition as constitutionally conforming, de facto overturned its earlier philosophy reflected in tens of judgments and based on the primacy of the individual over the State.

13. If we explained above that the prohibition in question actually "protects" smokers only from themselves, a question arises whether identical logic is to be applied to the prohibition of the sale of alcohol and (allegedly) unhealthy food. We are highly concerned that the smoking prohibition accepted by the Constitutional Court (the majority of the plenum even attributes it with a "strong cultural and social dimension"! – paragraph 96) should not encourage the State to search for further "general good", obviously always justified in a very sophisticated manner. At the same time, in the context of adopting a new civil code, the individual personality and the right to autonomy has been restored to some extent in our legal environment. We are thus obliged to conclude this opinion by quoting the provision of Section 81 of this Code: "Every person is obliged to respect the free choice of an individual to live as he pleases." We add that the rule of law state is all the more required to respect the right to free conduct of individuals.