Pl. ÚS 14/14 of 19 May 2015
The Constitutionality of 5 per cent Threshold Clause

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

The Plenum of the Constitutional Court, consisting of Chairman Pavel Rychetský and Judges Jaroslav Fenyk, Vlasta Formánková, Vladimír Kůrka, Tomáš Lichovník, Jan Musil, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Vojtěch Šimíček, Milada Tomková and Jiří Zemánek (judge rapporteur), ruled on a petition from the Supreme Administrative Court seeking the annulment of § 47 of Act no. 62/2003 Coll., on Elections to the European Parliament, and on the Amendment of Certain Acts, as amended by later regulations, and in § 48 par. 1 of the same Act, the words "included in the scrutiny," with the participation of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, as follows:

The petition is denied.

REASONING

I. Petition to open proceedings
I.a) Course of the proceeding before the Supreme Administrative Court

1. The Supreme Administrative Court (also the "petitioner") handled the case of petitioners a) Mgr. Alexandra Uhlová, b) Pavlína Pacáková and c) the Green Party, all represented by attorney Pavel Uhl, on a petition seeking to have the elections of candidates Mgr. Tomáš Zdechovský and Ing. Mgr. Miroslav Poche in elections to the European Parliament, held on 23 and 24 May 2014, declared invalid.

2. By resolution of 24 June 2014, ref. no. Vol 16/2014-69, the Supreme Administrative Court suspended the proceeding, and under Art. 95 par. 2 of the Constitution of the Czech Republic (the "Constitution") on the same day it submitted to the Constitutional Court a petition seeking the annulment of § 47 and in § 48 par. 1 the words "included in the scrutiny," of Act no. 62/2003 Coll., on Elections to the European Parliament, and on the Amendment of Certain Acts, as amended by later regulations (the "Act on European Elections"). It suspended the proceeding until such time as the Constitutional Court rules on the petition seeking annulment of the contested provision.

I.b) Substantive content of the petition
3. The Supreme Administrative Court took as its starting point the fact that Art. 223 of the Treaty on the Functioning of the European Union (the " TFEU") assumes a uniform procedure for elections to the European Parliament, but no implementing regulation for it has been adopted yet. Therefore, the Decision of the representatives of the Member States meeting in the council, no. 76/787/ECSC, EEC, Euratom of 20 September 1976, relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage (the "1976 Act"), supplemented by Council Decision no. 2002/772/EC, Euratom, is the only common framework presently applied by Member States in adopting national regulations. Art. 1 of the 1976 Act (the consolidated version) provides that in each Member State, members of the European Parliament shall be elected "on the basis of proportional representation." Art. 2 preserves for the Member States the right to establish electoral districts for elections to the European Parliament or subdivide its electoral area in a different manner, without generally affecting the proportional nature of the voting system. And finally, Art. 3 of the 1976 Act permits Member States to "set a minimum threshold for the allocation of seats. At national level this threshold may not exceed 5 per cent of votes cast." Art. 8 [sic, 7] of the 1976 Act governs the

relationship to domestic legislation thus: "Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions. These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system."

4. On 22 November 2012 the European Parliament adopted a resolution on elections to the European Parliament in 2014 [2012/2829(RSP)], in which it called on the Member States "to establish in their electoral law, in accordance with Article 3 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage, appropriate and proportionate minimum thresholds for the allocation of seats so as to duly reflect the citizens' choices, as expressed in the elections, while also effectively safeguarding the functionality of Parliament." The European Parliament made this call in particular in view of the new arrangements for the election of the European Commission introduced by the Treaty of Lisbon (as of 1 December 2009) and the changing relationship between Parliament and the Commission which will stem from them as from the elections in 2014. The European Parliament expressed the belief that reliable majorities in Parliament will be of paramount importance for the stability of the Union's legislative procedures and the good functioning of its executive.

5. The petitioner begins with the fact that the law in the Czech Republic has introduced a five percent threshold clause for elections to the European Parliament. European law permits this provision provided that it does not affect the overall proportional nature of the electoral system. However, it does not require Member States to introduce a threshold clause, so these elections are governed by national law as a whole.

6. In elections to the European Parliament held in May 2014, based on the cited provisions of the Act on European Elections the seats for members of the European Parliament were distributed as follows:

	Party	Valid votes		Electoral divisor					Seats
no	Name	Total	in %	1	2	3	4	5	
5	Christian Democratic Union – Czechoslovak People's Party (CDU-CPP)	150,792	9.95	150,792	75,396	50,264	7,698	30,158.4	3
7	Coalition of TOP 09 and STAN	241,747	15.95	241,747	120,873.5	80,582.34	60,436.75	48,349.4	4
10	Communist Party of Bohemia and Moravia	166,478	10.98	166,478	83,239	55,492.67	41,619.5	33,295.6	3
14	Czech Social Democratic Party (CSSD)	214,800	14.17	214,800	107,400	71,600	53,700	42,960	4
16	ANO 2011	244,501	16.13	244,501	122,250.5	81,500.34	61,125.25	48,900.2	4
20	Civic Democratic Party	116,389	7.67	116,389	58,194.5	38,796.34	29,097.25	23,277.8	2
24	Free Citizens' Party	79,540	5.24	79,540	39,770	26,513.34	19,885	15,908	1

7. However, if the five percent threshold clause had not been applied, the seats would have been distributed as follows:

	Party	Valid votes		Electoral divisor					seats
no	Name	Total	in %	1	2	3	4	5	
5	Christian Democratic Union – Czechoslovak People's Party (CDU-CPP)	150,792	9.95	150,792	75,396	50,264	7,698	30,158.4	2
7	Coalition of TOP 09 and STAN	241,747	15.95	241,747	120,873.5	80,582.34	60,436.75	48,349.4	4
10	Communist Party of Bohemia and Moravia	166,478	10.98	166,478	83,239	55,492.67	41,619.5	33,295.6	3
14	Czech Social Democratic Party (CSSD)	214,800	14.17	214,800	107,400	71,600	53,700	42,960	3
16	ANO 2011	244,501	16.13	244,501	122,250.5	81,500.34	61,125.25	48,900.2	4
20	Civic Democratic Party	116,389	7.67	116,389	58,194.5	38,796.34	29,097.25	23,277.8	2
23	Green Party	57,240	3.77	57,240	28,620	19,080	14,310	11,448	1
24	Free Citizens' Party	79,540	5.24	79,540	39,770	26,513.34	19,885	15,908	1
32	Czech Pirate Party	72,514	4.78	72,514	36,257	24,171.34	18,128.5	14,502.8	1

8. In the Supreme Administrative Court's opinion, these data make clear the truth of the plaintiffs' claim that as a result of application of the statutory five percent threshold clause the candidates, Tomáš Zdechovský (CDU-CPP) and Miroslav Poche (CSSD), among others, were elected, whereas otherwise these two seats would have been won by Ivan Bartoš (Pirates) and Ondřej Liška (Greens).

9. The Supreme Administrative Court maintains that from the viewpoint of someone who voted for a party that was eliminated from the scrutiny due to the threshold clause, his vote was "lost". As a result, that voter's political opinion is not represented in any way in the representative body, and is not present in its decision making. In view of the limited number of seats and the fact that a seat is not divisible, there will naturally always be a group of thus unrepresented small party voters. However, as a result of application of the threshold clause, in elections to the European Parliament in 2014 the number of valid votes not taken into account increased to 301,245, i.e. to 19.88% of the total number of valid votes. Thus, the percentage of unrepresented voters even exceeded the election results of the most successful party in the elections (ANO, which received 244,501, i.e. 16.13% of valid votes). In addition, from the viewpoint of the candidates one can also point to the fact that as a result of applying the threshold clause a party for which they campaigned but which did not reach the specified percentage in results is automatically eliminated from the scrutiny. In terms of the number of votes cast, the seats allocated thus become "cheaper" for parties that, in contrast, exceed the minimum threshold. This can be demonstrated on the 2014 elections, when the lowest number of votes sufficient to obtain a seat was 50,264 (i.e. the number of votes cast for CDU-CPP divided by three), whereas the Pirate Party was not able to obtain even one seat despite the significantly higher number of votes cast for it, i.e. 72,514. In terms of access to elected office, it also cannot be overlooked that all preferential

votes cast are also lost due to elimination from the scrutiny. Thus, in these elections, for example, the first candidate of the Pirate Party, Ivan Bartoš, received 12,644 preferential votes and did not become a member of the European Parliament, while the more successful of the two contested candidates, Tomáš Zdechovský, did not receive even half that number of preferential votes (a total of 5,063).

10. In the petitioner's opinion, the contested statutory provisions thus limit the open or free competition among political forces in a democratic society [Art. 5 of the Constitution, or Art. 22 of the Charter of Fundamental Rights and Freedoms (the "Charter")], the equal voting rights of all voters (Art. 21 par. 3 of the Charter) and citizens' right to equal access to elective office (Art. 21 par. 4 of the Charter). This limitation of political rights would be acceptable on the assumption that it pursued a legitimate aim and was capable of achieving that aim, was necessary, and also that the framework chosen by the legislature limited constitutionally guaranteed rights only to the extent necessary for reaching the pursued aim. However, the petitioner did not find these grounds to exist in this case.

11. The petitioner pointed to the Constitutional Court's case law concerning the issue of a threshold clause in elections to the Chamber of Deputies of the Czech Republic [cf. judgment file no.Pl. ÚS 25/96 of 2 April 1997 (N 37/7 SbNU 251; 88/1997 Sb.); all Constitutional Court decisions are also available at http://nalus.usoud.cz], and in elections to municipal representative bodies (cf. resolution file no. IV. ÚS 54/03 of 25 August 2004). In judgment file no. Pl. ÚS 25/96 the Constitutional Court accepted a certain disproportion in terms of equal voting rights, which it justified on the basis that "other serious reasons, arising from the purpose and function of elections in a democratic society ..." may come into play, "... [because] the aim of elections ... is not merely expressing the political will of individual voters and obtaining only a differentiated mirror image of the opinions and political positions of voters." In the Constitutional Court's opinion, it is therefore "admissible to build into the election mechanism certain integrative stimuli," e.g. in the form of an artificial 5% threshold clause, whose integrative role helps create a majority (or majorities) capable of reaching a decision, and enables a functional government to be put together. If it were not applied, the result could be "a political representative body that is splintered into a large number of small groups with diverse interests, which would considerably hinder the formation of a majority, or make it completely impossible." However, the Constitutional Court did not forget to emphasize that "in every case the existence of a limiting clause must be conditioned only on serious grounds," and "the limiting clause is also subject to ... the principle of minimizing state interference proportionately to the stated aim. Therefore, it is necessary to interpret the need for voting restrictions narrowly." (emphasis added). In the spirit of this argument the 5% threshold applied in the municipal elections was also accepted, although in that case the arguments in favor of the constitutionality of a 5% threshold are weaker.

12. The petitioner believes that the European Parliament and elections to it are sufficiently different from the previously adjudicated cases that the reasons in the cited Constitutional Court decisions cannot be transferred without anything further to the adjudicated matter. This is because the European Parliament plays a qualitatively different role in the functioning of the European Union than do the national parliaments in the functioning of the Member States. As a unit, it does not even have any direct legislative initiative (it must turn to the European Commission) and to adopt a legal regulation it must reach an agreement with the EU Council, composed of the appropriate ministers of the Member States. Also, this representative body's influence on the form of the primary executive body, the European Commission, is still limited – the European Parliament elects its president and makes a statement of confidence in the European Commission as a whole, but the Commission is composed of candidates from the individual Member States, and need not reflect the political composition of the European Parliament. Member States still retain the decisive influence on the operation of the European Union, and the European Parliament has only in recent years gradually approached the position of an equal "player". Therefore, the wide spectrum of political representation in the European Parliament can contribute to increasing the legitimacy of adopted decisions, and concerns about reducing the ability to function of the European legislative and executive branches, which would arise from the variety of political opinions represented, do not have a credible basis. Therefore, in view of the current status of the European parliament in the system of European Union institutions, the contested statutory provision does not pursue the otherwise legitimate aim of integration of the

political will of the electorate. According to the petitioner, this conclusion cannot be overturned by the fact that the European Parliament resolution of 22 November 2012 called on Member States "to establish in their electoral law, in accordance with Article 3 [of the 1976 Act], appropriate and proportionate minimum thresholds for the allocation of seats so as to duly reflect the citizens' choices, as expressed in the elections, while also effectively safeguarding the functionality of Parliament." Although the mere political proclamation of the momentary majority of the European Parliament cannot be a relevant referential criterion for reviewing whether the 5% threshold clause is consistent with the constitutional order of the Czech Republic, one cannot fail to see that according to the cited parliamentary resolution the minimum limits for allocating seats are supposed to be "appropriate" and "proportionate." If the legislature's motive in establishing the artificial threshold clause at a maximum of 5% based on the (optional) provision of Art. 3 of the 1976 Act was only the fact that it is – in the words of the background report – usual in the Czech Republic, it is hard to speak about the appropriateness and proportionality of this artificial interference into equal voting rights and equal competition between political parties in European elections.

13. However, even if the need for an "integration incentive" increased in the future, together with the gradually expanding powers of the European Parliament, in the petitioner's opinion the threshold clause is not capable of fulfilling this aim. One can only think about integrative or differentiating effects through the prism of a collective body at the level of the whole, not from the viewpoint of individual sectors of the European Parliament elected in individual Member States. Candidate lists are not put together by all-European political parties, and thus integration of political powers in the European Parliament takes place across the national contingents. Thus, even one representative elected for a particular party in a particular country can become part of a large coalition of parties with the same political orientation, and in contrast a large number of representatives from a strong national party may not find a common language with any of the existing political blocs, and may thus be a de-integrative element. Thus idea that the threshold clause at the national level could contribute in any way to the integrity of the political spectrum in the European Parliament is rather illusory. Only a small sector of all representatives is elected in the Czech Republic (21 out of a total of 751 representatives), so the integrative effect of the threshold clause applied in the Czech Republic on the overall ability to act of the European Parliament will necessarily always be very limited.

14. Finally, the petitioner believes that even if the threshold clause could contribute to reaching the pursued aim (if that is to be the integration of political representation at the European level), it is not a solution that is necessary in a democratic society, because – at least in the Czech Republic, in view of the low number of seats allocated – its role is sufficiently played by the "natural" threshold resulting from the method used to allocate seats. For example, in the last elections to the European Parliament held in the Czech Republic (without applying the threshold clause) the election results of the Green party, 3.77% of valid votes, would be sufficient to obtain one seat in the European Parliament. The natural threshold is represented by the election results of the party Dawn of Direct Democracy, 3.12% of valid votes, which would not be sufficient to obtain a seat even if the artificial threshold clause did not exist. Of course, it is difficult to predict the natural threshold in advance, and its value as determined after elections always depends, among other things, on the number of competing parties (sometimes also on the size of the electoral district, which, however, does not play a role in elections to the European Parliament, because the entire Czech Republic is a single electoral district *de lege lata*). Nevertheless, one can demonstrate on the practical example of the last elections to the European Parliament that the natural threshold limits the access of small political parties to the European Parliament and plays a certain integrative role in and of itself. That, together with the previous arguments, undermines the idea that another artificial limitation on equal competition between political parties, in the form of a threshold clause, is necessary.

15. The petitioner also points to the fact that in this year's elections to the European Parliament roughly half of Member States applied an artificial threshold clause. The highest permissible threshold clause (5%) was implemented, in addition to the Czech Republic, by countries such as France (where it even applied separately in each electoral district), Croatia, Lithuania, Latvia, Hungary, Poland, Romania and Slovakia; a lower threshold clause is applied in, e.g., Italy, Austria, Sweden and Greece

(3%). It must be pointed out that in countries with a very small number of seats in the European Parliament a threshold clause has no practical significance, because many more votes are necessary to obtain at least one seat than corresponds to the highest permissible threshold clause (e.g., in elections to the European Parliament in 2009 the Slovenian party DeSUS received 7.2% of votes, whereby it exceeded the then minimum threshold of four percent, but it was not sufficient to obtain any of the then allocated seven seats). Nevertheless, states that do not apply the threshold clause for elections to the European Parliament include states represented in the European Parliament by a large number of seats, e.g. the United Kingdom (73 seats), Spain (54 seats) and the country with the highest number of seats of all (96 out of the total 751), i.e., Germany, where the previously implemented threshold clause is no longer applied, based on a decision by the German Constitutional Court.

16. The petitioner also points out that the German Constitutional Court found unconstitutional not only a threshold clause of 5% (cf. decision of 9 November 2011 in joined cases 2 BvC 4/10 and others), but also the subsequently enacted clause of 3% (cf. decision of 26 February 2014 in joined cases 2 BvE 2/13 and others), despite the fact that in the German context deliberations about deformation of equal voting rights as a result of an artificial threshold clause are perceptibly weakened compared to the Czech context, because in the last European elections the natural threshold in Germany was around a mere half a percent.

I.c) Dissenting opinion of some judges

17. A dissenting opinion to the cited resolution, ref. no. Vol 16/2014-69, was filed by Judges Zdeněk Kühn, Radan Malík and Miloslav Výborný. In the opinion they stated their doubts concerning whether the petition in question could be considered, because the result of a proceeding before the Constitutional Court could have no effect on the validity of the election of both contested candidates. The elections have already taken place, fully in accordance with the law as valid and in effect. It is an incontrovertible fact that voters made their choices not only based on their political preferences but also based on the existing election rules, i.e. including the five percent threshold clause. A partial "erasure" of the election results and allocation of a seat to two different candidates, even in the event that the Constitutional Court (perhaps) concluded that the threshold clause was unconstitutional, would completely obscure the election results. It would deny the will of the voters, who voted based on one set of rules, and who would learn ex post that they actually voted based on different rules. If the Constitutional Court's decision cannot have any significance for the matter itself, the court cannot submit the petition in question.

18. The dissenting judges also believe that the majority of members of the election panel has a simplified understanding of the principle of equal voting rights. As the Constitutional Court repeatedly stated, "the principle of equality is not of an absolute (abstract) nature; there is only relative equality. Therefore, it cannot be understood mechanically, or believe that this is a special case of equality. In certain cases a certain restriction on equal voting rights is even permissible (judgment file no. Pl. ÚS 25/96, see above). This specific equality manifests itself in particular in issues such as the threshold clause, requirements for submitting candidate lists, election campaigns, election geometry, and election arithmetic " [point 60 of judgment of 29 March 2011 file no. Pl. ÚS 52/10 (N 56/60 SbNU 693)]. The Constitutional Court emphasized that "the principle of equal voting rights must be understood to mean that every voter has the same number of votes as any other, but not that every vote cast has – in relation to the final election result (the number of seats obtained) – the same weight" [Id. point 61, here the Constitutional Court quotes and summarizes its existing case law].

19. Moreover, the constitutional order does not recognize the proportional system in relation to elections to the European Parliament. The proportional system arises from European law. The Constitutional Court has traditionally distinguished situations where the Constitution prescribes a proportional system and situations where the Constitutional is silent as regards the electoral system. Therefore, point 68 of judgment file no. Pl. ÚS 52/10 must be identified as a key passage – and quite incompatible with the present petition; the passage indicates that increasing the level of the limiting clause merely must not endanger – generally expressed – the democratic substance of elections. The Constitutional Court has spoken regarding the natural threshold set for elections to the Chamber of

Deputies – where the proportional system is prescribed by the Constitution (!) – file no. Pl. ÚS 25/96 and file no. Pl. ÚS 42/2000 of 24 January 2001 (N 16/21 SbNU 113; 64/2001 Sb.). In both of them it stated that it is not until the ten percent threshold is crossed that the threshold can be considered such interference in the proportional system as endangers its democratic nature. Therefore, it is not clear what the reason is for setting a stricter standard for elections to the European Parliament; moreover in a situation where the Constitution, as with regional or municipal elections, does not prescribe the proportional system, but in contrast, European law expressly allows a threshold clause.

20. The majority of the election panel allegedly also has a simplified understanding of the role of the European Parliament. It is unquestioned, that the powers of the European Parliament have been gradually strengthening in recent decades. This happened most recently and visibly in the Treaty of Lisbon. Thus, although the European Parliament still does not have legislative initiative, it can ask the European Commission to submit a draft European Union statute – it does not need to comply, but it must inform the European Parliament of its reasons (Art. 225 of the TFEU). The European Parliament is not an exclusive legislature, as on the national level, but it shares in the ordinary legislative process in equal measure with the EU Council (Art. 294 of the TFEU). It also elects the chairman of the European Commission (Art. 14 of the TEU, Art. 17 par. 7 of the Treaty on the European Union, the "of the TEU"), approves its other members as a body (Art. 17 par. 7 of the TEU), can pass a motion of non-confidence in the European Commission (Art. 17 par. 8 of the TEU, no. 234 of the TFEU), elects the European Ombudsman (Art. 228 of the TFEU), etc. The role of the European Parliament in the ordinary legislative process is complicated, but it is evidently inconsistent with the idea of a fragmented body endowed with many unaligned solo players. The European Parliament takes part in adopting legislation in equal measure with the Council of the EU. If agreement is not found, there is a Conciliation Committee composed of an equal number of members of both institutions. If agreement is not reached, a bill is either rejected, which has been rare in practice thus far (this can supposedly change, if the opinions presented by the current majority of the election panel dominate). It is precisely this that fully corresponds to how the European Parliament sees itself. On 22 November 2012 it adopted a (legally non-binding) resolution concerning elections to the European Parliament in 2014, in which it called on Member States "to establish in their electoral law … appropriate and proportionate minimum thresholds for the allocation of seats so as to duly reflect the citizens' choices, as expressed in the elections, while also effectively safeguarding the functionality of Parliament." The cited European Parliament decision was addressed to Member States in particular in view of the new arrangement for elections to the European Commission implemented by the Treaty of Lisbon and the changing relationship between the European Parliament and the European Commission that will arise from it beginning with elections in 2014. It thus expressed its belief that a reliable majority in the European Parliament will have fundamental significance for the stability of European Union legislative procedures and the good functioning of its executive branch. An appropriately set threshold clause in national election systems, which European law expressly allows, can help this aim.

21. The strength of any institution within the political system is not given only by written rules, but also by the development of the political system itself, and the gradually forming constitutional conventions; the current developments in relation to selection of the President of the European Commission is a perfect example. It is precisely in this that the dissenting judges see the considerable simplification of the majority's petition. An artificial threshold clause for elections to the European Parliament is used by half of the Member States of the European Union, which send 380 representatives to the European Parliament. These 380 representatives are chosen with emphasis on integrative elements. Emphasis on integration in multiple countries can, as a whole, significantly contribute to the greater functionality of the European Parliament.

22. If the natural threshold for electing a representative to the European parliament were 1/21, i.e. ca. 4.76%, the artificial threshold would cease to make sense in the Czech system. However, the natural threshold for obtaining a seat is moveable, and lies considerably lower than 4%. In the present situation, it is evident that annulling the artificial threshold clause would lead to the Czech Republic sending to the European Parliament representatives of nine parties, rather than seven, i.e. almost a third more Apart from the effect of "overpopulation" of political parties, such a situation would also

weaken the position of Czech political parties in the caucuses formed in the European Parliament. Fragmentation of the Czech political representation in the European Parliament would generally lower the importance of Czech representatives in it.

23. The current elections to the European Parliament are the third to be held in the Czech Republic. Experience shows that the threshold clause does not in any way limit the variety of parties and representativeness of political parties. In the 20014 elections six political parties and movements qualified for the European Parliament (apart from the then-strong parties, the Civic Democratic Party, the Communist Party of Bohemia and Moravia, the Christian Democratic Union – Czechoslovak People's Party, and the Czech Social Democratic Party, two mandates were obtained by independent candidates and three mandates by the Association of Independent Candidates - European Democrats); in the more exceptional elections in 2009 only four parties won seats (the Civic Democratic Party, the Czech Social Democratic Party, the Communist Party of Bohemia and Moravia, and the Christian Democratic Union – Czechoslovak People's Party, and), and in the 2014 elections the variety in the Czech election system culminated in a total of seven successful parties and movements. The success of the Free Citizens' Party demonstrates that the five percent threshold clause is not an insurmountable threshold that gives exclusivity only to large, rich or traditional parties. In any case, these results and the variety of party representation more or less correlates with the effect of the threshold clause in elections to the Chamber of Deputies.

II. The proceeding before the Constitutional Court

24. The Constitutional Court, pursuant to § 69 of Act no. 182/1993 Coll., on the Constitutional Court, sent the petition to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic (the "Chamber of Deputies" and the "Senate") as parties to the proceeding, to the government, and to the public defender of rights, who are entitled to join the proceeding as secondary parties.

II.a) Statements from the Chamber of Deputies and the Senate

25. In his statement of 11 July 2014, the Chairman of the Chamber of Deputies summarized the legislative process, and stated that the bill of the Act on Elections to the European Parliament and on the Amendment of Certain Acts was submitted to the Chamber of Deputies by the government on 19 September 2002; it was approved in the 3rd reading on 3 December 2002; out of 170 deputies present 124 deputies were in favor of passing it and 3 deputies voted against. Debate in the Chamber of Deputies did not discuss in detail the purpose or the constitutionality of the proposed 5% threshold clause for elections to the European Parliament. The bill was passed to the Senate on 9 December 2002. The senate returned it to the Chamber of Deputies with amending proposals. The Chamber of Deputies discussed the returned bill on 18 February 2003 and adopted it in the wording approved by the Senate; out of 180 deputies present, 170 deputies were in favor of passing it and no one voted against. After the Act was passed and signed by the appropriate constitutional officials, the Act was promulgated on 4 March 2003 in the Collection of Laws as no. 62/2003 Coll. The contested statutory provisions have not been amended since they went into effect.

26. In his statement of 21 July 2014, the Chairman of the Senate stated that the bill of the Act on Elections to the European Parliament was passed to the Senate on 6 December 2002 and was discussed on 9 January 2003. In the general part of the debate, discussion also focused on §47 of the bill, which introduced the 5% threshold clause. The Senators were aware of the function of this instrument, the application of which has a limiting effect on equal voting rights in the proportional representation system. In this regard, the percentage level was considered, and, as a result of differing opinions, in detailed debate an amending proposal was made to reduce it to 3%, which, however, was not passed; out of 75 senators present, only 19 senators were in favor of this proposal. However, the constitutionality of introducing the threshold clause was not cast in doubt during the debate. By resolution no. 38 of 9 January 2003, the Senate returned the bill to the Chamber of Deputies with two adopted amending proposal, which, however, did not concern the issue of introducing the threshold clause. In voting, all 75 senators present voted in favor of adopting the resolution. The Chamber of Deputies discussed the bill returned by the Senate at its 10th session on 18 February 2003, and approved the bill, in the wording approved by the senate, by resolution no. 244.

27. For completeness, the Chairman of the Senate states that on 29 May 2014 a group of senators submitted a bill (Senate Publication no. 294, 9th electoral term), which includes a proposal to annul the threshold clause for elections to the European Parliament.

II.b) Statement from the Government and the Public Defender of Rights

28. The Prime Minister informed the Constitutional Court that the Government of the Czech Republic will not exercise its right under § 69 par. 2 of the Act on the Constitutional Court and will not join the proceeding.

29. Likewise, the Public Defender of Rights stated that, under § 69 par. 3 of the Act on the Constitutional Court, she was not joining the proceeding as a secondary party.

II.c) Hearing

30. Under § 44 of the Act on the Constitutional Court, the Constitutional Court ruled on the matter without a hearing, because a hearing could not be expected to further clarify the matter.

III. Petitioner's active standing

31. The Constitutional Court states that the petitioner is the Supreme Administrative Court, which acted according to Art. 95 par. 2 of the Constitution ("Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court."), implemented in more detail in § 48 par. 1 let. a) of Act no. 150/2002 Coll., The Administrative Procedure Code, as amended by later regulations (the "APC"). The Constitutional Court is considering this issue in particular in view of the content of the dissenting opinion of several judges of the Supreme Administrative Court, who questioned the petitioner's active standing.

32. The Constitutional Court states that this case involves a "specific" (more precisely: incidental; for more see, e.g., Hesse, K. Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland. 20. edition. Heidelberg: C. F. Müller Verlag, 1999, p. 282 et seq.), and not an abstract review of norms. No significant opinions that would cast doubt on this starting point can be found in Czech constitutional doctrine. Therefore, it will suffice to quote P. Holländer, who defines the specific normative review as a "proceeding on the conformity of a statutory of sub-statutory norm with the constitution in a case initiated by a general court as a result of handling a specific case, or by a natural or legal person in connection with the fact that application of the norms affected the person's fundamental rights or freedoms. In other words, specific review of norms is a constitutional review of statutes, or other legal regulations, only in connection with handling and deciding a specific matter. (Základy všeobecné státovědy [Foundations of General Political Science], 3rd ed. Pilsen: Vydavatelství a nakladatelství Aleš Čeněk, 2012, p. 275).

33. Therefore, a constitutional ground for reviewing the petition generally exists in a case where a finding that the election of a candidate was invalid as a result of annulment of the contested statutory provisions would lead to removing a seat already obtained. That is the objective of the petition from the Supreme Administrative Court under Art. 95 par. 2 of the Constitution.

34. Therefore, it is justified to consider that the petitioner has active standing to submit a petition for review of the constitutionality of the contested provisions of the Act on European Elections. The petitioner's active standing is given by the significance of the Constitutional Court's decision for the handling of a specific matter in a proceeding before a general court concerning a filed electoral complaint, and it fulfills one of the requirements for a proceeding before the Constitutional Court under § 64 par. 3 of the Act on the Constitutional Court.

IV. Review of competence and the constitutionality of the legislative process

35. Thus, the Constitutional Court states that it has jurisdiction to review the subject petition, which was filed by an authorized petitioner, is permissible, and meets all the statutorily set requirements. Therefore, the court could turn to a substantive review of the contested statutory provisions; in accordance with § 68 par. 2 of the Act on the Constitutional Court it first considered the issue of whether they were adopted and issued in a constitutional manner and within the bounds of constitutionally determined jurisdiction. However, in view of the fact that this issue was not questioned in any way by the petitioner or the other parties to the proceeding, there is no need for a detailed review the entire legislative process that led to adoption of the contested statutory provisions.

36. Under § 68 par. 2 of the Act on the Constitutional Court, review of constitutionality of a statute consists of answering three questions: whether it was adopted and issued within the bounds of constitutionally provided jurisdiction, whether it was adopted in a constitutionally prescribed manner, and whether its content is consistent with constitutional laws. In the case of the contested provisions there is no doubt whatsoever that parliament was competent to adopt them under Art. 15 par. 1 of the Constitution. As regards the manner of adoption of the Act on European Elections, the Constitutional Court determined from the statements by the parties to the proceeding, as well as from other publicly accessible documents relating to the legislative process, that the Act was adopted in a constitutionally prescribed manner. Therefore, nothing prevents the Constitutional Court from turning to a substantive review of the contested provisions.

V. Review of the constitutionality of the contested statutory provisions

37. The essence of constitutional review of the contested provisions of the Act on European Elections is to determine whether the claimed restrictions on equal voting rights (Art. 21 par. 3 of the Charter), citizens' access to elective office on an equal basis (Art. 21 par. 4 of the Charter) and free competition among political forces (Art. 5 of the Constitution, or Art. 22 of the Charter) are permissible in a democratic society in view of the legitimacy of the aim they pursue, the capacity to reach that aim, their necessity and the degree of restriction, which is to preserve the essence and significance of these fundamental rights (Art. 4 par. 4 of the Charter) and may not change the essential requirements of a democratic state governed by the rule of law (Art. 9 par. 2 of the Constitution). Insofar as the alleged restrictions on fundamental rights are justified on the basis of the specific position of the European Parliament as the representative body for citizens of the European Union, it is necessary first to note the expressions of the supra-national nature of that body and then to review whether they were appropriately reflected in the Act on European Elections, in view of the referential criteria of the constitutional order.

V. a) The European Parliament

38. The European Parliament is – apart from domestic parliaments, to which the representatives of Member States in the European Council and the EU Council are democratically responsible – as a representative of the spectrum of public opinion across the European Union, expressing the interests of EU citizens, one of the pillars of representative democracy in the European Union (Art. 10 of the TEU). It does not compete with domestic parliaments as regards the citizens of individual Member States, because it is active only the areas of decision making within the scope of powers the independent exercise of which the Member States have relinquished and which they entrusted through primary law to the European Union (Syllová, J., Pítrová, L., Paldusová, H. and collective of authors, Lisabonská smlouva. Komentář, [The Treaty of Lisbon. Commentary] 1st edition, Prague: C. H. Beck, 2010, p. 87). Although the European Parliament does not have (with certain exceptions) the right to initiate legislation, or an exclusive position in adopting EU legislation, nor has it yet become the institutional center of gravity of European Union political life, its role as the source of direct democratic legitimacy for EU decisions is of irreplaceable significance. This was reflected in a certain shift in the conception of its representative function: whereas before adoption of the Treaty of Lisbon it was composed of representatives "of the peoples of the States brought together within the Community" (Art. 189 of the Treaty Establishing the European Community), after its adoption it is composed of representatives of "the Union's citizens" (Art. 14 par. 2 of the TEU). This not only emphasized the political weight of the European Parliament after adoption of the Treaty of Lisbon, but

also strengthen the human rights dimension of European constitutionalism (cf. Tichý, L., Arnold, R., Zemánek, J., Král, R., Dumbrovský, T. Evropské právo [European law], 5th edition, Prague: C. H. Beck, 2015, p. 124 et seq.).

39. The European Parliament reached this form through gradual evolution, that, from the creation of the first of the European Communities – the European Coal and Steel Community – affected in parallel its composition and structure, its powers, and finally also the manner in which it was constituted. The predecessor of the present European Parliament was the European Parliamentary Assembly, created in 1958 as a joint body of the European Economic Community, the European Atomic Energy Community, and the European Coal and Steel Community, on the basis of the Treaty of Rome of 25 March 1957. The name "the European Parliament" became settled in 1962. Originally its members were not directly elected, but delegated by national parliaments. Although the role of this body was not a decision making one, but only consultative, the potential advantage of this interconnectedness of personnel was a close connection between the political agendas discussed at the supranational level and domestic parliamentary debate in individual Member States, facilitating knowledge of the creation of community law regulations and the resulting requirements for its implementation and application in Member States. The significance of this connection between both levels in the beginning phase of the integration process proved valuable in particular in building a common market, because it eased the resolution of complicated domestic effects that accompanied European Community measures.

40. At the summit of heads of state in Paris in 1974 a fundamental decision was made to implement the principle of direct election of members of the European Parliament effective 1 June 1978. The historic first direct elections took place on 7-10 June 1979. Until 1973 the European Parliament had 142 members; at present the total number of representatives is 751 (of those, 21 are elected in the Czech Republic). The Treaty on the European Union provides in Art. 14 par. 2 that the number of members of the European Parliament may not exceed 750, not counting the chairman.

41. Although the powers of the European Parliament and its status inside the system of European Union institutions have increased considerably since the first direct elections, in particular as a result of the emancipation of the European parliament as a norm creator in relation to the Council, and with the strengthening of democratic legitimacy and the responsibility of the EU executive branch, authoritative introduction of the "large themes" of European politics still takes place primarily in the European Commission or the European Council. Therefore, the first disputes about these themes take place outside the European Parliament, or in national parliamentary forums, and they reach the European Parliament at a later phase, in a form that is more demanding in terms of expertise, but less attractive for the media. Therefore, [the Parliament] must consistently confront the problem of how to capture the attention of the wider public with its structure debates (a high number of European MPs, political caucuses, committees, etc.), how to communicate with it understandably and how to influence European public opinion, how to provide Union citizens an opportunity to express their opinions about European Union activities and conduct a dialog with a civil society, in short, how to thoroughly fulfill its democratic mission in the formation of European public space. Connection between political caucuses in the European Parliament and political parties in individual Member States, given the de facto non-existence of political parties on the European level, as assumed in Art. 10 par. 4 of the TEU, is inadequate. In contrast, standard political parties at the national level are – thanks to their established organizational structures and access to media publicity for their activities – far more capable of influencing public opinion. The result of this situation is noticeably low public interest in events in the European Parliament, declining citizen participation in European elections, and its questionable de facto legitimacy.

V.b) The contested provisions and their connection with EU law

42. The provision of § 47 of the Act on European Elections, which introduced the threshold clause for elections to the European Parliament in the Czech Republic, reads as follows:
"§ 47

Inclusion in Scrutiny
(1) Using the voting results of individual election districts provided by designated local authorities in compliance with §45, the Czech Statistical Office shall determine the overall amount of valid votes given to all political parties, movements and coalitions.
(2) Every political party, movement and coalition acquiring at least 5% of the overall amount of valid votes shall be included in scrutiny."
This is continued in the following provision, §48 par. 1, which states: "The overall amount of valid votes given to each political party, movement and coalition included in the scrutiny shall be successively divided by 1, 2 and 3 and then always by a figure higher by 1." etc.

43. The Constitutional Court also had to consider the question of how the threshold clause is enshrined in EU law and to what extent this creates a mandatory assignment for the legislature.

44. The present legal framework for elections to the European Parliament developed from procedures governing the allocation of seats in the European Parliamentary Assembly. The Treaty on the European Economic Community enshrined the designation of representatives from the ranks of national legislative assemblies and left the substantial part of the mechanism up to national legislation. Since the end of the 1970s, there have been strengthening efforts by the European Communities to converge election processes in the individual Member States as much as possible by setting common principles. The result was the adoption of the Act concerning the election of the representatives of the European Parliament by direct and universal suffrage in 1976, later supplemented by Directive 93/109/EC, which provided more detailed measures for European Union citizens' exercise of the right to vote and be elected in elections to the European Parliament, and Council Decision 2002/772/EC, Euratom. Although by the form of their adoption these are secondary law regulations, in similar domestic cases, i.e. elections to national parliaments, the principles that they set forth are usually regulated at the level of constitutional norms (the time frame for holding elections, principles of the electoral system, threshold clause, possibility of preferential voting, determination of electoral, the incompatibility of exercising a mandate with other public office, etc.). However, they do not regulate issues such as the size of electoral districts, the possibility of preferential voting, or the method of allocating seats based on the number of votes received. Therefore, the Council's Act is more in the nature of a harmonizing Union-constitutional regulation (in the substantive sense), as is the related uniform Statute for Members of the European Parliament (Council Decision 2005/684/EC, Euratom). This, moreover, should also be the nature of provisions on a uniform procedure or common principles for European elections anticipated in Art. 223 par. 1 of the TFEU, apparently in the form a generally binding directive from the EU Council, issued at the proposal of the European Parliament; the condition for their entry into force is unanimity in the Council, the consent of the European Parliament expressed by a majority of the votes of all its members, and approval by Member States in accordance with their constitutional regulations. These are also the prerequisites for amendments to the primary law of the European Union, implemented through "evolving" clauses (see Art. 48 par. 6 of the TEU or Art. 311 of the TFEU).

45. Thus, the 1976 Act is not an instance of EU "soft law" that makes recommendations without being directly binding and enforceable for Member States, nor a mere international law obligation, the interpretation and implementation of which would be outside the exclusive review powers of the European Commission and the Court of Justice. By violating this obligation a Member State is exposed to penalties on the bases of Art. 258-260 of the TFEU; if failure to observe the obligation also leads to serious breach of the values of democracy, the rule of law, human rights, etc., on which the European Union is founded (Art. 2 of the TEU), it would also be possible – including at the initiative of the European Parliament itself – to apply corrective measures under Art. 7 of the TEU, potentially leading to sanctions (suspension of certain membership rights). Obligations arising from the Act are also subject to the general waiver by Member States of methods of resolving disputes concerning interpretation or implementation of EU law other than those provided by the Treaties (Art. 344 of the TFEU), as well the dynamically developing judicial concept of the liability of Member States for damages caused by violation of EU law, arising from Art. 340 of the TFEU. Even residual use of general international law rules does not apply. In domestic implementation of the 1976 Act, Member

States are subject to the principle of loyal cooperation, which – generally under Art. 4 par. 3 of the TEU, and specially under Art. 291 par. 1 of the TFEU – guides them to such exercise of legislative discretion provided by the Act as will ensure the full effect of EU rules for the conduct of European elections.

46. Under Art. 1 of the 1976 Act, "1. In each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote. 2. Member States may authorise voting based on a preferential list system in accordance with the procedure they adopt. 3. Elections shall be by direct universal suffrage and shall be free and secret." Under Art. 3 [sic, 2A], "Member States may set a minimum threshold for the allocation of seats. At national level this threshold may not exceed 5 per cent of votes cast. Council Decision no. 2002/772/EC then leaves Member States discretion in applying preferential votes and establishing constituencies, in which, however, voters must always have sufficient mandates available to preserve the proportional nature of the voting system.

47. As adopting domestic implementing regulations for the Act, including exercising the space provided for legislative discretion of the national discretion is "application" of EU law under Art. 51 par. 1 of the Charter of Fundamental Rights of the European Union (the "CFREU"), review of the constitutionality of these regulations in Member States, can be done using, along with the referential criteria of the constitutional order, provisions of the CFREU – depending on their nature – whether through "permeating" into the constitutional order or by direct application in the case of a higher level of provided protection (Art. 53 of the CFREU). This applies to the right of EU citizens to vote and stand as a candidate in elections to the European Parliament (Art. 39 of the CFREU). In contrast, principles that are primarily intended for legislative and executive bodies of the European Union and Member States, though they are sometimes formulated as the "right" of an individual, can be exercised before the EU or domestic courts only for purposes of interpretation and review of the legality of acts adopted by these bodies (Art. 52 par. 5 of the CFREU). This applies to the requirement that political parties should contribute at the European Union level to the expression of the will of EU citizens (Art. 12 par. 2 of the CFREU, Art. 10 par. 4 of the TFEU), just as to the right of every citizens to participate in the democratic life of the European Union (Art. 10 par. 3 of the TFEU). The provision on equality before the law (Art. 20 of the CFREU) supports equal treatment in access to rights that are provided by the law of the European Union, or to their implementation by Member States, and is among the general legal principles: "However, direct complaints requiring action by the bodies of the Union or bodies of Member States cannot be filed on that basis, which corresponds to the case law of the Court of Justice (...) and to the approach of the constitutional systems of Member States to the 'principles' (...)[see Explanation of the CFREU (2007/C 303/02), concerning Art. 52 par. 5]. Limitation of the exercise of fundamental rights guaranteed by the CFREU is permissible under conditions that are defined in more detail than is the case in Art. 4 of the Charter: it must be provided by law, respect the essence of these rights, and "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." (Art. 52 par. 1 of the CFREU).

48. European Union law does not require Member States to have a threshold clause, but if a Member State implements one on the national level, or within electoral districts (if they are created), it may not exceed 5% of votes cast. In the context of other parameters of the voting system, more intensive interference in voting rights might not necessarily be consistent with the principles of proportional representation, free competition among political parties, and citizens' equal access to elective office. Thus, the national regulation of a threshold clause for European elections is not a fully autonomous legislative provision by a Member State, because its primary legal basis, and also limit, is the law of the European Union, which sets not only the normative framework for the specific rules for European elections at the national level, but also authorizes Member States to adopt them (Art. 8 of the Act). The Constitutional Court is of the opinion that the significance and purpose of the EU framework consist of authorizing the national legislature to set such conditions for elections to the European Parliament as will, in view of the local situation, reflect the requirement of proportional representation formulated by the EU framework independently of the conditions provided for elections to domestic

representative bodies. The Constitutional Court sees this limitation of the national legislature's autonomy as a necessary step on the path to a uniform procedure or the adoption of joint principles for European elections anticipated in Art. 223 of the TFEU, which is meant to strengthen the democratic legitimacy of the norm-creating process in the European Union.

49. The Constitutional Court also considered the question of whether annulling the threshold clause in the Act on European Elections, while preserving it for elections to national representative bodies would not violate the principle of equivalence as a principle that is applicable across the board to the entire institutional framework ensuring national application of EU law (further, see, e.g. Bobek, M., Bříza, P., Komárek, J. Vnitrostátní aplikace práva Evropské unie. [National Application of European Union Law] Prague: C. H. Beck, 2011, esp. p. 229 et seq.). According to the principle the law of a Member State may not set discriminatory deadlines, processes or conditions for the application of EU norms, in comparison with the deadlines, processes and conditions for application of national norms. Regarding this the Constitutional Court states that the minimum threshold is an institution that has different significance for different elections. However, this interference in equal voting rights must always be sufficiently supported by specific public interests or values that are able to persuasively justify the resulting disproportion. However, the Constitutional Court does not see the two situations as fully comparable, because – unlike elections to the European Parliament – EU law does not at all guarantee the citizens of other Member States who are residents in the Czech Republic access to elections to the Parliament of the Czech Republic, even though it plays a significant role in the application (legislative implementation) of EU law. Therefore, by the nature of the matter, annulment of the minimum threshold in the Act on European Elections would not, from that viewpoint, violate the principle of equal treatment.

50. From a comparative viewpoint, we can say that out of the 28 European Union Member States today, threshold clauses exist in 14 countries (the Czech Republic, France, Croatia, Italy, Cyprus, Lithuania, Latvia, Hungary, Poland, Austria, Romania, Greece, Slovakia and Sweden). In some of them the minimum threshold is set below 5%: in Italy, Austria, and Sweden at 4%, in Greece 3%, in Cyprus 1.8% (http://www.evropsky parlament.cz/resource/static/images/eouroffice/S:/volby2014_mapa.jpg). The Federal Constitutional Court in Germany, which has the highest number of seats (96), completely annulled the minimum threshold, which was originally 5%, and later 3% (BVerfG 2 BvC 4/10 and others; BvE 2/13 and others). We can agree with the petitioner that in smaller Member States, where the statutory minimum threshold more or less approaches the "natural" threshold, its practical significance is reduced to a psychological effect for the voters. On the other hand, in other countries implementation of a greater number of smaller constituencies raised the natural threshold, which can be seen as proof that even despite the low level of the minimum threshold these countries continue to consider domestic integration incentives as significant. Countries with a higher number of electoral districts are Belgium (3), France (8), Ireland (4), Italy (5), Poland (13) and Great Britain (12) (further, see, e.g. Cibulka, L. and collective of authors. Optimálny model volebného systému do Európskeho parlamentu. [The Optimal Model for the System of Elections to the European Parliament] Comenius University. Bratislava, 2010; Šaradín, P. and collective of authors. Volby do Evropského parlamentu v České republice. [Elections to the European Parliament in the Czech Republic] Periplum, 2004). Member states in which a threshold clause applies and which thus ascribe significance to the integrative function of artificial intervention into equal voting rights have 380 seats (out of a total of 751) in the European Parliament. Reducing that share would have clear de-integrative effects on the formation of the will of the representative body.

51. Therefore, constitutional review of the contested threshold clause in the Act on European Elections must concentrate on the question of whether the legislature exercised the discretion provided by the 1976 Act for implementing a threshold in a constitutional manner, one which preserved the principle of proportional representation, and with regard for the fundamental rights guaranteed by the Charter or by the CFREU that were affected thereby.

V.c) Equal voting rights, free competition among political parties, and equal access to elective office

52. A key objection that the petitioner raises against the contested statutory provisions concerns the acceptable limitation of voting rights guaranteed in Art. 21 par. 3 of the Charter, free competition among political parties under Art. 5 of the Constitution and Art. 22 of the Charter, and equal access to elective office under Art. 21 par. 4 of the Charter.

53. The Constitutional Court states, first of all, that the constitutional order of the Czech Republic does not expressly set forth the form of the election system for elections to the European Parliament. In contrast to elections to the Chamber of Deputies and the Senate, where the Constitution defines (Art. 18) the fundamental principles of voting rights as well as what voting system is to be used for elections, in the question of elections to the European Parliament the constitutional framers respected the fact that defining the parameters of these elections is primarily a matter of EU law, and at the level of implementation, a matter for the "ordinary" legislature. However, this statement does not mean that none of the constitutional rules for elections to national representative bodies could be useable – in addition to the fundamental rights in the Charter – as a referential criterion for constitutional review of the Act on European Elections, implementing the rules of the 1976 Act.

54. This applies both to the rules for elections to the Parliament of the Czech Republic, and to elections to representative bodies of territorial self-governing units under Art. 102 par. 1 of the Constitution. In the case of elections to the Chamber of Deputies, the connection with the system ("according to the principles") of proportional representation, which, in its pure form, means allocation of seats among political parties according to the proportion of votes they received, modifies the principle of equality (in the sense of equal weight for individual votes in the voting results) as a result of correcting full proportionality, the insufficient integrative function of which would otherwise mean political fragmentation of the chamber, making it difficult to form governments, which would be unstable. As the Constitutional Court repeatedly ruled, "the principle of equality is not of an absolute (abstract) nature, there is only relative equality. Therefore, it also cannot be understood mechanically, not can one believe that there is a special case of equality. In certain cases it is even permissible to have a certain limitation of equal voting rights (judgment file no. Pl. ÚS 25/96 cited above). This specific equality manifests itself in particular in issues such as a minimum threshold, requirements for submitting candidate lists, an election campaign, election geometry, and election arithmetic." [point 60 of judgment of 29 March 2011 file no. Pl. ÚS 52/10 (N 56/60 SbNU 693)]. As the Constitutional Court further pointed out, "the principle of equal voting rights must be understood to mean that each voter has the same number of votes as any other voter, not, however, that every vote cast has – in relation to the final election result (the number of seats obtained) – the same weight." (Id., point 61).

55. However, such correction of election differentiation, in particular using a statutory threshold clause, must not remove the essence and significance of equal voting rights or limit the democratic nature of elections [judgments file no. Pl. ÚS 25/96 of 2 April 1997 (N 37/7 SbNU 251, 88/1997 Coll.) and file no. Pl. ÚS 42/2000 of 24 January 2001 (N 16/21 SbNU 113, 64/2001 Coll.); Syllová, J. In Sládeček, V., Mikule, V., Syllová, J. Ústava České republiky. Komentář. [The Constitution of the Czech Republic. Commentary.] 1st edition. Prague: C. H. Beck, 2007, p. 158]. The statutory regulation of voting rights must permit and protect the free competition among political forces in a democratic society (Art. 22 of the Charter), which results in the requirement of equal access to review of the entitlement of campaigning parties to success in elections, corresponding to votes cast. However, in fulfilling this task the legislature has some room to maneuver to weaken the principle of formal voting equality for legitimate reasons such as forming a representative body that is functional and capable of acting, and creating mechanisms to integrate the formation of political will, reasons which are also accepted by the Supreme Administrative Court and the German Federal Constitutional Court (Šimíček, V. In Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil, I. and collective of authors, Listina základních práv a svobod. Komentář. [The Charter of Fundamental Rights and Freedoms. Commentary.] Prague: Wolters Kluwer, 2012, p. 505). Similar conclusions can also be drawn in relation to passive voting rights in connection with the right to equal access to elective office.

56. The Constitutional Court is convinced that the "democratic and human rights framework" also similarly limits the legislature in setting the parameters of voting rights for elections to the European

Parliament, as this too involves the exercise of a subjective constitutional right, although the scope of the limitation need not be the same in both situations – in view of the differences between representative bodies at the national and supra-national levels. European Union law does not regulate the principle of equality for elections to the European Parliament because the representation of citizens –across the entire European Union – is ensured by the degressively proportional method that sets the number of seats for individual Member States, based on a European Council decision under Art. 14 par. 2 of the TEU, in disproportion to the number of their residents. This "degressive" proportional representation need not, but may, indirectly manifest itself in national regulation of European elections by the fact that in the most populous Member States, such as Germany, where the nominal number of votes falling to one voter is the lowest, in comparison to all of Europe, it is understandable that there is an effort not to further deform its weight by introducing or maintaining artificial limitations such as a threshold clause. However, this problem does not apply to the Czech Republic, as a medium-sized state; the votes of its voters in elections to the European Parliament is fundamentally not deformed compared to more populous states.

57. The Charter of Fundamental Rights of the European Union guarantees each Union citizen the right to elect members of the European Parliament "by direct universal suffrage in a free and secret ballot" under the same conditions as nationals of the Member State where he or she resides (Art. 39 of the CFREU), but it does not guarantee equal participation in the election results under election legislation adopted for implementation of the Act in individual Member States. Thus, the non-discriminatory approach to European elections only implements the fundamental right of Union citizens to reside freely within the territory of a different Member State than his state of origin (Art. 45 par. 1 of the CFREU). The referential criteria for constitutional review of national laws on European elections in terms of equal participation in the election results are only the standards of the constitutional order and the proportionality of the electoral system set forth by the 1976 Act.

58. In terms of the constitutional order and European constitutionality, there is a single parallel process of the exercise of public power, the source for which in both cases is the people and the intermediaries of executive branch bodies (Art. 2 par. 1 of the Constitution) – the Parliament of the Czech Republic, or the European Parliament, authorized on the basis of the transfer of certain powers by an international treaty under Art. 10a of the Constitution. In terms of protection of constitutionality under Art. 83 of the Constitution, equal referential criteria apply in both cases, although the degree of acceptable limitation on constitutional rights that they tolerate may be different for each situation, in view of the specific situation of various representative bodies, as stated above. Point 68 of judgment file no. Pl. ÚS 52/10 cited above indicates that raising the minimum threshold must only not endanger the democratic nature of elections. The Constitutional Court spoke on the natural threshold in elections to the Chamber of Deputies, where the proportional electoral system is prescribed by the Constitution, in judgments file no. Pl. ÚS 25/96 and file no. Pl. ÚS 42/2000. In both of them it stated that only exceeding a threshold of ten per cent could be considered such interference in the proportional system as endangers its democratic nature. Therefore, we can agree with the petitioner's dissenting judges that it is not evident what the reason was supposed to be for setting a stricter standard for elections to the European Parliament, moreover, in a situation where the Constitution, as with regional or municipal elections, does not prescribe a proportional system, and, on the contrary, European law expressly permits a minimum threshold.

59. As regards the principle of equality, it must be said that it is directly connected to the principle of universality, because where the universality of voting rights determine who participates in elections, equality decides on the degree and significance of that participation. Specifically, this principle means that (1.) every voter has the same number of votes (one man - one vote; equal voting rights) and (2.) a voter's vote should have the same weight (one man - one value; equal voting power), regardless of, for example, his education, property, nationality, status, sex, etc. Similarly, in the past the Constitutional Court stated (see judgment file no. Pl. ÚS 25/96) that "the principle of equal voting rights can be considered from two basic perspectives. The first perspective consists in comparing the numerical weight of individual votes. The weight of individual votes in counting and in voting results is examined. Equal voting rights always require that all votes have equal value during counting, i.e. they

have the same numerical weight (quantitative equality) and the same importance, and that counting make possible a precise numerical differentiation of the electorate, i.e. a precise numerical "identification" of voter support for individual candidate lists. The second aspect of equal voting rights captures equality of votes in terms of the democratic principle i.e. in terms of the entitlement of votes cast for various candidate lists to a degree of election success that is proportionate to the numerical values that these lists received in elections. Thus, it is an entitlement to a valuation of the voting results that is based on equal access to review of the entitlements of candidate parties to success and thus an entitlement to a proportional number of seats, i.e. one corresponding to the proportion of votes cast."

60. The Constitutional Court points out that the cited requirements for equal voting rights in its structure form also arise from the Code of Good Practice in Electoral Matters, European Commission for Democracy through Law (Venice Commission), CDL-AD (2002)23, 30 October 2002; (the "Codex"]. Point 2 of the Codex enshrines both the cited equal voting rights, and equal voting power. The second requirement is for equal allocation of seats among electoral districts; the criterion for this allocation can be the number of residents, citizens, registered voters, or votes cast. A certain degree of inequality is accepted, e.g. for historic, geographic, or administrative reasons. However, the acceptable deviation from the average should not exceed 10% and may not be higher than 15% (except in unusual circumstances – e.g. protection of a minority that is concentrated in a particular territory or a sparsely populated administrative unit). The Codex also enshrines another aspect of equality, equality of opportunity. This means a guarantee to candidate parties and candidates in the sense of neutrality of the state power, in particular in an election campaign, in access to media and public financing of parties and campaigns.

61. If we leave aside the abovementioned Union deformation of the election rights of Union citizens, there is no dispute that the first of the two aspects of equality – a nominally equal vote – was not undermined by the contested provisions, because for elections to the European Parliament each voter has only one vote (see § 37 par. 1 of the Act on European Elections). However, with the second requirement – the same real weight of all votes cast – the situation is more complicated.

62. Nonetheless, the Constitutional Court considers it important to state that strict insistence on always preserving the completely identical weight for all votes cast is not possible. If that were the legislature's ambition, then, for example, it would be practically impossible to vote according to the principles of the majority system, as that is conceptual (in its purest form) based on the idea "winner takes all," i.e. votes cast for other candidates are necessarily lost and thus do not have the same real weight as votes cast for the winner. For this reason too, for example, the German legal literature and case law distinguish between the equality of the numerical value of each vote (Zählwert), which must be insisted on in every electoral system, and the equal chance of each vote to succeed (Erfolgswert), which is typical only for a system of proportional representation (Schreiber, W. Handbuch des Wahlrechts zum Deutschen Bundestag - Kommentar zum Bundeswahlgesetz. 7the edition. Carl Heymanns Verlag, 2002, p. 106).

63. The Constitutional Court considers undisputed the petitioner's statement pointing out the inequalities arising in the allocation of seats. The official website of the Czech Statistical Office (http://vwww.volby.cz/pls/ep2014/ep141?xjazyk=CZ) shows the following list of parties and movements that progressed to the scrutiny:

Party		Valid Votes	
Number	Name	Absolute	In %
16	ANO 2011	244,501	16.13
7	TOP 09 and Mayors	241,747	15.95
14	Czech Social Democratic Party	214,800	14.7
10	Communist Party of Bohemia and Moravia	166,478	10.98
5	Christian and Democratic Union – Czechoslovak People's Party	150,792	9.95

20	Civic Democratic Party	116,389	7.67
24	Free Citizens' Party	79,540	5.24

64. In terms of the order of the proportion of votes based on which seats were allocated to individual parties and movements according to the method applied in § 48 par. 1 of the Act on European Elections, if the minimum threshold did not exist, then the number of votes received, according to the Notification of the State Election Commission no. 92/2014 Coll., on Declaring and Publishing Overall Results of Elections to the European parliament Held in the Czech Republic on 23 and 24 May 2014, by the Czech Pirate Party (72,514) would be enough to obtain the 15th seat in the list, and the Green Party (57,240) would reach the 19th seat. Thus, in the elections, these parties received 914 (Czech Pirate Party) or 1,748 (Green Party) votes more than the number of votes of the successful parties, recalculated for these seats (Czech Social Democratic Party – 71,600; Christian Democratic Union – Czechoslovak People's Party – 55,492). From this viewpoint, as a result of the effect of the minimum threshold there was a certain disproportion in the weight of votes received, which, in one case exceeded the deviation of 15% designated as acceptable by the Codex.

65. Equal voting rights, the principle of free competition among political parties, and the right to access to elective office under equal conditions have their immanent limits at the point where unlimited application of them would thwart citizens' effective participation in the democratic life of society (the state, the European Union) and markedly limit the possibility, or even make it impossible to connect various particular interests in solutions implementable through practical politics to problems shared by persons with those interests. Therefore, the petitioner's objection to justification of a threshold clause in the Act on European Elections is concentrated into the question of whether such a limitation, without compensation, eliminates citizens' actual opportunity to participate, through the European parliament, in the joint exercise of powers entrusted at the supra-national level, has a neutral effect, or perhaps even strengthens the realistic exercise of these opportunities.

V.d) Reasons justifying the legislature's intervention in equal voting rights, free competition among political parties, and equal access to elective office

66. The Constitutional Court also considered the question of whether there are legitimate reasons that would justify the intervention in voting rights for elections to the European Parliament through an artificial threshold clause. The Constitutional Court's relevant case law, as well as doctrine, accepts a proportionate deviation from the principle of absolute equality of voting rights, if there are sufficient public interest reasons. In this regard the Constitutional Court points, in particular, to judgment file no. Pl. ÚS 25/96, guided by the principle of minimizing interference by the judicial branch in the sphere of the legislative branch.

67. One such sufficiently serious reason is the need to create a functional European parliament, capable of generating a clear majority will as the expression of the democratic principle. In resolving conflict between constitutional principles (here: protection of fundamental rights v. the democratic principle) one must start with the rule of "practical concordance," which arises from the requirement that a constitution be unified, and eliminates one-sided giving of priority to one of the principles to the detriment of the other (i.e. a "zero-sum" result), but preserves as much as possible on each side of the conflict, with a "win-win" result (Dörr, O., Grote, R., Marauhn, T. (Hrsg.). EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz. 2nd edition. Mohr Siebeck, 2014, p. 1710).

68. That is also why the Constitutional Court accepted (file no. Pl. ÚS 42/2000) a certain limitation on differentiation when allocating seats under the Act on Elections to the Parliament of the Czech Republic, because "the aim of elections is not merely expressing the political will of individual voters and obtaining only a differentiated mirror image of the opinions and political positions of voters. Because the people also exercise the state power, and because exercise of state power presupposes the ability to make decisions, elections and the election system must also bear in mind the ability to make

such decisions based on the will of the majority. The consequential proportional image of the results of voting in the composition of the Chamber of Deputies could create political representation split into a large number of small groups with diverse interests, which would considerably hinder the formation of a majority or make it completely impossible. Thus, in the stage of the election process in which mandates are distributed, the principle of differentiation comes into conflict with the principle of integration, because elections should create a Chamber of Deputies whose composition permits the creation of a political majority which is capable of forming a government and performing the legislative activity for which the Constitution authorizes it. Therefore, in terms of the principle of representative democracy, it is admissible to build into the election mechanism itself certain integrationist stimuli where serious reasons for this exist, in particularly on the assumption that an unlimited proportional assembly would result in fragmenting votes between a large number of political parties, in unlimited "over-multiplication" of political parties, and thus in endangering the functionality and ability to act, as well as the continuity of the parliamentary system. In this fact lies the admissibility of the existence of a restricting clause, conditioned, however, in every case on serious reasons and in the stage of rising thresholds justifiable on by especially intense seriousness. The increasing of thresholds in the restrictive clause cannot be unlimited, so for example the 10 % clause can already be considered intervention in the proportional system which endangers its democratic substance. "

69. Similarly in the case of a minimum threshold in elections to municipal representative bodies the Constitutional Court stated (resolution file no. IV. ÚS 54/03), that "in relation to elections of municipal representative bodies the thesis also applies that, as regards equality in the entitlement to be taken into account in an appropriate (proportional) manner in allocating seats, a certain limitation of differentiation in allocating seats is unavoidable, and therefore acceptable. The purpose of voting is indisputably differentiation of the electorate. However, the aim of elections is not merely expressing the political will of individual voters and obtaining only a differentiated mirror image of the opinions and political positions of voters. It is also true with municipal representative bodies that the consequential proportional image of voting results in the composition of the representative body could result in a political representation that is split into a large number of small groups with diverse interests, which would considerably hinder the formation of a majority or make it completely impossible. On the other hand, it is always necessary, and naturally here too, to compare whether limiting equal voting rights in the form of a threshold clause and modification of it is the minimum measure necessary to ensure the degree of integration of political representation that s is necessary to enable the representative body to form a majority or majorities necessary to make decisions. In this case the question can be answered in the affirmative."

70. With the background of this case law the Constitutional Court states that with the passage of time, especially after the adoption of the Treaty of Lisbon, the European Parliament strengthened, primarily in the exercise of the legislative powers entrusted to it. Within "ordinary legislative procedure" under Art. 294 of the TFEU, which became the rule for norm creation in the absolute majority of most Union policies, it decides jointly *ex aequo* with the Council on the adoption of European Union legal regulations. It has an even stronger position in the adoption of the European Union annual budget under Art. 313 par. 4 of the TFEU. However, its position may be weakened if it is unable to adopt a position by the prescribed deadline. The consent of the European Parliament is also necessary when concluding international treaties in the areas of Union policy, where the ordinary legislative procedure is used for adopting decisions (Art. 218 par. 6 of the TFEU). It also has powers of a "constitutional framing" nature: it may submit proposals to amend the Treaties and take part in a convention (if one is convened) to discuss such proposals (Art. 48 par. 2 and 3 of the TEU). The consent of the European Parliament is also necessary for the application of transitional provisions on the basis of a European Commission decision within the simplified procedure for adopting amendments to the Treaties (Art. 48 par. 7 of the TEU), etc. The lack of an exclusive power to submit legislative initiatives is a specific expression of the "communitarian" method for creation Union law, where the European Commission has primary responsibility for proposing the legislative agenda. However, the European Parliament can turn to the Commission with its legislative proposals, and the European Commission must respond to them (Art. 225 of the TFEU), because otherwise it would fail to act, for which an action can be

brought before the Court of the European Union under Art. 265 of the TFEU. A mechanical comparisons of the functions of the European Parliament with the position of national parliaments, which does not fully appreciate the specific features of representing the interests of the Member States (the Council), Union citizens (the European Parliament) and the European union as a whole (the European Commission) is not appropriate. On the contrary, it is appropriate to require that the European Parliament have the ability to reach consensual solutions that fulfill the expectations of voters, including Czech voters, who entrusted the exercise of part of their sovereign power (Art. 2 par. 1 of the Constitution) to precisely this body.

71. The same applies as regards the creative function. Upon a proposal from the Council, adopted in view of the results of elections to the European Parliament, that body elects the chairman of the European Commission and then approves its composition. The European Commission as a body is responsible to the European Parliament, which can have a vote of no confidence and thus force it to resign (Art. 17 par. 7 of the TEU). Moreover, in the election campaign to the European Parliament in 2014 participating political groupings, informally created across the Member States, for the first time nominated candidates for the position of Chairman of the European Commission. Electing the candidate of the victorious grouping as Chairman of the European Commission was then a real political election in the European Parliament, which gave the European Commission a strong democratic mandate. The Chairman's periodic confirmation then requires the support of a stable majority of representatives in the European Parliament, as the vote of a majority of members is sufficient to pass a motion non-confidence in the European Commission, made on the basis of a motion adopted by a two-thirds majority of votes cast. If we consider that the current European Commission was elected by 56.3% votes coming from the three largest political factions, which is virtually 9% of votes fewer than the previous European Commission received, it is evident that fragmentation of the political spectrum represented in the European Parliament as a result of the arrival of new political subjects, often with a narrow political program, in marginal numbers, and therefore with weak influence, can become a serious threat to the stability of the Union's executive branch. The representatives of these groupings can, in the aggregate, be a force sufficient to destabilize the Union executive, though not strong enough to form their own "European government." This destructive potential of the European Parliament can then lead to stalemate situations, familiar from the parliamentary practice of a number of Member States; for the European Union however – in view of its incomparable greater political responsibility for the agenda entrusted to it – these are considerably risky stimuli. Therefore, strengthening the creative function of the European Parliament in relation to the Union executive requires, more than before, that it be able to form a reliable majority that will guarantee the fulfillment of voters' aspirations, expressed by elections as an act of self-determination, as the holders of sovereign power under Art. 2 par. 1 of the Constitution.

72. Thus, the experience from the last European elections confirmed the increasing significance of stable voting proportions and the strengthening polarization in the European Parliament, which justifies the existing limitation of proportional representation in the Act on European Elections. Therefore, not weakening these integrative stimuli by denying the proposal to annul the minimum threshold, which will reduce the spectrum of interests of Czech voters represented, is an acceptable and proportional intervention in constitutionally guaranteed equal voting rights and the principle of free competition among political parties.

73. The Constitutional Court also took into account that "discipline" [participation] in the voting of European Members of Parliament declines with the size of political groups in the European Parliament. While with the factions of the European People's party (221 members) and the Group of the Progressive Alliance of Socialists and Democrats (191 members) individual voting reaches 90-92%, in the faction of the European Unified Left (52 members) and Europe of Freedom and Direct Democracy (48 members) it is only 79% and 49%; with non-aligned MPs (52) one cannot say there is consistent voting (Kreilinger, V. Prognosen zur Zusammensetzung und Arbeit des Europäischen Parlaments nach der Wahl 2014. Integration 2014, p. 9). Not limiting the weight of an individual vote as a result of annulling the minimum threshold would lead to dispersing the seats obtained by small parties primarily into the factions of the European Parliament, where the real weight of their vote is

low, precisely because of the low voting "discipline" [participation] of their members. That would weaken the effectiveness of the act of voting as the expression of the will of a citizen, or a people, as the original source of public power under Art. 2 par. 1 of the Constitution.

74. Insofar as the Constitutional Court stated in judgment file no. Pl. ÚS 29/09 (Treaty of Lisbon II, point 139), that democratic processes at the Union and national levels mutually complement and condition each other, and that the principle of representative democracy is one of the standard principles for the organization of larger entities, both inter-national and non-state organizations, that does not mean that the strength of the pillar of Union representative democracy formed by the European Parliament is less important if it is complementarily supplemented by national parliaments. The model of the "decisive responsibility" of a national parliament for European integration ("Integrationsverantwortung"), to a large extent abandoning the democratic-legitimizing role of the European Parliament, as put forth by the German Federal Constitutional Court in its "Lisbon" judgment, is difficult to reconcile with this judgment of the Constitutional Court. Modification of the principle of proportional representation, resulting from the continuing application of the minimum threshold in the Act on European Elections, strengthens this line of argument taken by the Constitutional Court.

75. In any case, the conclusion that the European Parliament deserves to be designated a true "parliament" also flows from the case law of the European Court of Human Rights (the "ECHR"). That court, in the decision by the Grand Chamber, Matthews v. the United Kingdom (of 18 February 2009, no. 24833/94), i.e. long before the adoption of the Treaty of Lisbon, stated that the European Parliament is a "legislative assembly" under Article 3 of Protocol No.2 to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). Here the ECHR inclined to an evolving interpretation of the Convention, as it did not agree with the British government's objection that the Protocol cannot apply to the European Parliament because that body did not exist at all at the time the Protocol was adopted. According to the court – which based its decision on the then existing development of the legislative powers of the European Parliament, in particular after the entry into effect of the Single European Act and the Maastricht Treaty – this is definitely a "legislative assembly," and the fact that it is supranational, and not purely national, cannot exclude it from that definition. The ECHR also stated that "as to the context in which the European Parliament operates, the Court is of the view that the European Parliament represents the principal form of democratic, political accountability in the Community system. The Court considers that whatever its limitations, the European Parliament, which derives democratic legitimation from the direct elections by universal suffrage, must be seen as that part of the European Community structure which best reflects concerns as to 'effective political democracy'." (§52).

76. Therefore, it remains to answer the question of whether the Czech regulation of European elections, if it did not contain a 5% minimum threshold, could – in view of the number of 21 Euro MPs – endanger or significantly weaken those functions of the European Parliament that make it a true "parliament," and therefore it is necessary – in view of the constitutional guarantee of proper exercise of powers transferred to the supranational level – to preserve this regulation as it is.

77. In this regard the Constitutional Court states that one can consider the integrating or differentiating effects of election rules only through the prism of the collective body as a whole, not from the perspective of its sectors elected in individual Members States. The special nature of the commitment of loyalty by Member States in relation to the ability to act of the European Parliament (not comparable with the principle pacta sunt servanda in international law) lies in the fact that it is a multilateral commitment erga omnes, aiming at the joint (in solidarity) responsibility of all Member States for violation of it by any one of them. That is how we must see the guaranteeing function of Art. 1 par. 2 of the Constitution. This commitment is incompatible with the idea of a "stowaway" that annuls the domestic measures preventing fragmentation of the European Parliament, claiming that this step has a negligible effect on the whole entity. If others were to follow those steps the negative effect would no longer be negligible. In that regard, the Constitutional Court's review of the petition was

guided by restraint in relation to the legislature, which should be able to review the international (European) aspects of its legislative activity.

78. The non-existence of European political parties, whose constituting is assumed by Art. 10 par. 4 of the TEU, with a membership base at the level of individual Member States of the European Union complicates the sharing of agenda information between legislative assemblies. National implementation of Union regulations, one of the main obligations arising from their membership ("Member States shall adopt all measures of national law necessary to implement legally binding Union acts", Art. 291 par. 1 of the TFEU), at the constitutional level guaranteed by Art. 1 par. 2 of the Constitution, therefore makes considerable demands on representatives in national parliaments to understand the agenda of the European Parliament. However, the members of the European Parliament also face a need to understand the functioning of national legislative tasks and processes. Removing the minimum threshold in the Act on European Elections and simultaneously preserving it for elections to the Parliament of the Czech Republic could further complicate these processes of two-directional understanding, especially given awareness of the fact that since 2004 Union regulation of European elections no longer permits personnel overlap between national parliaments and the European Parliament (Art. 7 par. 2 of the Act, in the consolidated version).

79. Integration of political forces in the European Parliament takes place across national contingents, and even a single member elected for a particular party in a particular state can thus become part of a large faction of political parties with similar programs, while in contrast, a large group of members from a strong national party need not be aligned programmatically with any of the political factions in the European Parliament, and will thus be a de-integrative element. The limiting effect of a minimum threshold prevents the occurrence of formally classifiable individual players who are marginal in terms of real political influence. Votes cast for them would not be lost to such a degree in a proportional electoral system without a minimum threshold, but representation of the will of their voters would not correspond to the constitutional principle of an "effective political democracy" which is defended by the European Court of Human Rights, among others (ECHR no. 66289/01, Rep. 2005-I, § 41 - Py).

80. It has not yet been possible to verify how the partial strengthening of the plurality of political representation after the 2014 elections, resulting from annulment of the minimum threshold in Germany (compared to 7 political parties in the previous electoral term there are now 14 parties and movements represented, half of which have only one European MP), increased plurality of opinion in the European Parliament, which brings together more than 160 political subjects. Rather, what appears is the absence of a reasonably small number of competing positions capable of reaching functional compromises based on the will of the majority. This only confirms the assumption that free competition among political forces, which is the foundation of every democratic constitutional system, does not depend on maximizing the number of players who take part in it. However, the necessity and degree of potential limitations on that competition is primarily up to the judgment of the legislature.

81. In its deliberations, the Constitutional Court also considered that in the Czech Republic there is, in additional to the fixed, artificial minimum threshold, also a "natural" threshold and other factors capable of strengthening the integrative function of the electoral system (e.g., setting a contribution to cover election campaign costs). This constitutional instrument is an important indicator for evaluating the proportionality of electoral systems, especially the representation of small parties, because it shows the smallest possible percentage of votes that a party has to obtain in an electoral district in order to obtain at least one seat. The level of the natural threshold is not known in advance, and depends on several variable factors, in particular the number of seats being allocated (see Lebeda, T. Přirozený práh poměrných systémů, teorie a realita [The Natural Threshold of Proportional Systems: Theory and Reality], Politologický časopis [Political Science Magazine] no. 2/2001, p. 134 et seq.). In the 2014 elections to the European parliament (without the minimum threshold), 3.77% of valid votes would have sufficed for the Green Party to obtain one seat; in contrast, Dawn of Direct Democracy, with 3.12% of valid votes, would not have had enough to obtain a seat. In other words, in view of the 21 seats assigned to the Czech Republic by decision of the European Council, a certain integrative element is given by the existence of this factual threshold. Thus, even if the artificial minimum

threshold did not exist, only those parties that received about 3.5% of votes would have a realistic chance at obtaining a seat.

82. On this issue the Constitutional Court agrees with the dissenting opinion by judges of the Supreme Administrative Court, because if the natural threshold for electing a member of the European Parliament were 1/21, i.e. ca. 4.76%, the artificial threshold (the minimum threshold) in the Czech system would really fail to make sense. However, the natural threshold for obtaining a seat is moveable, and lies below the 4% level. In the present situation it is evident that if the artificial threshold were annulled, the Czech Republic would send to the European Parliament representatives of nine parties, rather than seven, i.e. almost one third more. Aside from the effect of "overpopulation" of political parties, that situation would also weaken their position in the political factions in the European Parliament. The 2014 elections to the European Parliament were the third to be held in the Czech Republic. Experience showed that the minimum threshold did not in any way limit the variety of political representation of the citizens. While in the 2004 elections six political parties and movements qualified for the European Parliament, and in the rather exceptional elections in 2009 it was only four parties, in the 2014 elections the variety of the Czech electoral system was demonstrated by the success of seven parties and movements. The success of the Free Citizens' Party shows that the five percent minimum threshold is not an insurmountable obstacle that gives exclusivity only to large, wealthy, or traditional parties. This development is not in conflict with the principle of free competition among political forces under Art. 5 of the Constitution, or Art. 22 of the Charter.

83. However, the integrative effect of the "natural threshold" is eliminated by the fact that the threshold level is not known in advance, and the ordinary voter does not even know that it exists. In contrast, the statutory threshold clause is known in advance, and its psychological effect functions; on the one hand the threshold may discourage voting for parties whose popularity has been under the threshold for some time, on the other hand, however, it also increases the pressure on voter behavior according to their political preferences. Only a voter acting in accordance with his or her internal convictions is the true foundation of a democratically organized society.

84. Although the integration or de-integration of political parties depends on the factors of the political culture in the Czech parliamentary democracy and on the degree of trustworthiness of individual players in the competition among political forces, confirmed (or not) in everyday political life in the country, minimum thresholds play a not insignificant role in this development: it is only the need to overcome obstacles raised by them that turns someone seeking a share in power into a valid support for the state, or for a supra-nationally structured union. Here the Constitutional Court also refers to its resolution denying a petition to annul the minimum threshold in the Act on Elections to the Parliament of the Czech Republic (file no. Pl. ÚS 2/14): "The functioning of electoral systems on the national level cannot be evaluated on its own. It is gradually becoming an integral component of the functioning of the principle of representative democracy in the multi-level union of the European Union and its Member States, the functioning of which as a whole is also a condition for the proper conduct of democratic processes at the national level." It remains only to add that the importance of the stability of election results for public confidence in the system of representative democracy is fundamental, both at the national level and at the supra-national level. Forming a reliable majority will in the European Parliament, made possible by suitably setting rules for the electoral system, including the minimum threshold, is an important prerequisite for smooth legislative procedures in the European Union, the good functioning of its executive, and on that basis also for citizens' confidence that their participation in elections is meaningful.

85. The Constitutional Court found the limitation of equal voting rights, the free competition among political parties, and equal access to elective office, guaranteed by the Constitution and the Charter, as a result of the minimum threshold in the Act on Elections to the European Parliament to be compatible with the principles of a democratic, constitutional state. It is a proportional measure, not conflicting with the principle of proportional representation, capable of effectively contributing to reaching the aims pursued by these principles – the effective representation of the will of the citizens in the European Parliament – and is necessary for the due exercise of powers entrusted to it based on Art.

10a of the Constitution, and it respects the requirement of minimizing interference in the fundamental rights and affected constitutional principles.

VII. Conclusion

86. In view of the fact that the contested provisions are not inconsistent with Art. 5 of the Constitution or with Art. 21 par. 3 and 4 and Art. 22 of the Charter, there are no grounds to annul these provisions. Therefore, the Constitutional Court, in accordance with § 70 par. 2 of the Act on the Constitutional Court, denied the petition from the Supreme Administrative Court.

Instruction: Decisions of the Constitutional Court cannot be appealed.