CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

It may be summarised that although Section 88a of the Criminal Procedure Code contains the complete legal regulation of the access of the bodies active in criminal proceedings to the telecommunication traffic data, this access is expressly conditioned only by stipulating that the relevant data may be identified exclusively for the purposes of clarification of the circumstances significant for the criminal proceedings. Although the assessment as to whether this condition has been met is granted to the presiding judge or the judge within the preliminary proceedings who decides on ordering such data, its very general and vague definition cannot be deemed sufficient, taking into account the absence of any further regulation concerning the subsequent disposal of the data, as well as in view of the fact that disclosing the data in question represents, in relation to the affected users of electronic communications services, an interference with their fundamental right to privacy in the form of the right to informational self-determination pursuant to Art. 10, para. 3 and Art. 13 of the Charter and Art. 8 of the Convention. Above all, the legislature failed to reflect at all in the contested provision the requirement of the proportionality of interference with fundamental rights with respect to the pursued goal, since the access to the data in question is provided for, in essence, as a common means of collecting evidence for the purposes of criminal proceedings, conducted even for any criminal offence. In view of the seriousness of the relevant interference with the private sphere of the individual, this limitation will only stand the test provided that it meets the conditions arising from the proportionality principle. This means that the access of the bodies active in criminal proceedings to the telecommunications traffic data may only come into question on condition that the purpose of the criminal proceedings cannot be achieved in any other way, that the legal regulation contains sufficient guarantees preventing the use of such data for any other purposes than those assumed by law, and that the restriction of the individual's right to informational self-determination does not amount to an excessive interference with respect to the importance of specific societal relationships, interests or values that are subject to the criminal offence for which the corresponding criminal proceedings are conducted. The contested provision does not respect these limitations, while this deficiency may not be eliminated even by means of the stipulated judicial review. In their decision making on ordering disclosure of the relevant data, courts may grant protection to the right to informational self-determination with respect to the facts of a particular case, yet their case law cannot replace the absence of a sufficiently definite and legitimate legal regulation, which is, pursuant to Art. 4, para. 2 of the Charter, a condition for placing limitations upon fundamental rights and freedoms in general.

VERDICT

On 20 December 2011, under file reference Pl. ÚS 24/11, the Plenum of the Constitutional Court consisting of Chief Justice Pavel Rychetský (Justice Rapporteur) and Justices Stanislav Balík, František Duchoň, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová, and Michaela Židlická ruled on the petition filed by the District Court of Prague 6, represented by JUDr. Kryštof Nový, Chairman of the Chamber 37 Nt, seeking the annulment of Section 88a of Act No. 141/1961 Coll., on Criminal Judicial Proceedings (Criminal Procedure Code), as amended, in the presence of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic, acting as parties to the proceedings, as follows:

The provision of Section § 88a of Act No. 141/1961 Coll., on Criminal Judicial Proceedings (Criminal Procedure Code), as amended, shall be annulled upon the expiration of 30 September 2012.

REASONING

I.
Summary of the Petition

1. On 27 May 2011, the Constitutional Court received the petition filed by the District Court of Prague 6 (hereinafter referred to as "the Petitioner"), completed by means of a submission filed on 1 July 2011, seeking the annulment of Section 88a of Act No. 141/1961 Coll., on Criminal Judicial Procedure (Criminal Procedure Code), as amended (hereinafter referred to as "the contested provision").

2. The Petitioner, conducting legal proceedings at the request of the Military Police seeking an order to be provided with telecommunications traffic data pursuant to Section 88a of the Criminal Procedure Code, assumes that it cannot decide on such a request due to the inconsistency of the afore-mentioned provision with the constitutional order. In this respect, the Petitioner refers to the conclusions contained in the Judgment of the Constitutional Court issued on 22 March 2011, file reference Pl. ÚS 24/10 (94/2011 Coll.), particularly paragraph 54, according to which the contested provision is inconsistent with some constitutional limits and requirements. The Petitioner assumes that this provision is inconsistent with the fundamental right to protect the confidentiality of communications sent by telephone, telegraph or by similar devices pursuant to Art. 13 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter"), since the instance when access to telecommunication services information is ordered for the purposes of detecting circumstances significant for criminal proceedings does not contain sufficient guarantees of the rights of users of electronic communication services that would be comparable to those anticipated in Section 88 of the Criminal Procedure Code in the event of enacting interception and records of a telecommunications operation. In the case of both institutes, there are major procedural differences without any clear reason why the legislature took a restrictive approach to the regulation concerning the procedural approach pursuant to Section 88 of the Criminal Procedure Code, while conceiving the procedural approach pursuant to the contested provision in a largely benevolent manner. Through its official activities, the Petitioner is aware that such benevolence results in an inflation of requests under the procedural approach in question, filed in particular by the Police of the Czech Republic, the bodies of the General Directorate of Customs and of the bodies of the Military Police, which hampers the role of the court as a guarantor and protector of rights of individuals within criminal proceedings as guaranteed by the constitutional order.

II.
Summary of the Proceedings before the Constitutional Court

3. Pursuant to Section 42, para. 4, and Section 69, para. 1 of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter referred to as the "Constitutional Court Act"), the Constitutional Court sent the petition seeking the annulment of the contested provision to the parties to the proceedings.

4. In its statement issued on 29 July 2011 and signed by its Chairman Milan Štěch, the Senate briefly outlined the legislative process. The contested provision was introduced in the Criminal Procedure Code on the basis of an amendment enacted as Act No. 265/2001 Coll., amending Act No. 141/1961 Coll., on Criminal Judicial Procedure (Criminal Procedure Code), as amended, Act No. 140/1961 Coll., the Criminal Code, as amended, and some other Acts related to major reformatory amendments to criminal proceedings. Discussion of the amendment in the Senate did not touch upon this provision, although it was nevertheless recorded that it was added to the government draft bill on the basis of one

of the two proposed amendments adopted by various committees. Despite the fact that the government supported one of them with regard to its constitutional suitability, the Chamber of Deputies opted for the other one, which did not specify any further the seriousness of the criminal offence in relation to which criminal proceedings are conducted as a condition for enacting the disclosure of interception and records of telecommunication services data. In conclusion, the Senate stated that at the time of adopting the contested provision, Section 88a of the Criminal Procedure Code referred to a somewhat more sparing scope of used telecommunication and localisation data as defined by Act No. 151/2000 Coll., on Telecommunications and on Amendments to other Acts.

5. In its statement issued on 1 August 2011 and signed by its Chairperson Miroslava Němcová, the Chamber of Deputies also briefly summarised the course of the legislative process, adding that in response to the Judgment file reference Pl. ÚS 24/10, the Ministry of the Interior, in cooperation with the Ministry of Justice and the Ministry of Industry and Trade, was preparing a draft amendment to the Act on Electronic Communications and the Criminal Procedure Code. It might thus be anticipated that in the autumn of the same year, the relevant government draft bill will be discussed in the Chamber of Deputies.

6. All the parties to the proceedings consented to dispensing with an oral hearing. Since the Constitutional Court did not expect from such a hearing any further clarification of the matter, it dispensed with it pursuant to Section 44, para. 2 of the Act on the Constitutional Court.

III.
Wording of the Contested Provision

7. The subject of the assessment of the consistency with the constitutional order is the provision of Section 88a of the Criminal Procedure Code, which reads as follows:

(1) If it is necessary, for the purposes of clarification of the circumstances significant for the criminal proceedings, to identify the data of the telecommunication traffic, which are subject to telecommunication secrecy or to which the protection of personal and mediation data applies, the presiding judge, or the judge in the preliminary proceedings, shall order that the legal or natural persons performing the telecommunications services disclose this information to him, or to a public prosecutor or police body in the preliminary proceedings. The order to identify the data of the telecommunication services must be issued in writing including its grounds.

(2) No order in accordance with subsection 1 is required if the user of the telecommunication device, which the data of the telecommunication services are to apply to, gives their consent to disclose the data.

IV.
Conditions for the Petitioner's Standing to Sue

8. Pursuant to Art. 95, para. 2 of the Constitution of the Czech Republic (hereinafter referred to as the "Constitution") and Section 64, para. 3 of the Act on the Constitutional Court, any court is entitled to file a petition seeking the annulment of a statute or its individual provisions to be applied in its decision-making activity provided that it reaches a conclusion on their inconsistency with the constitutional order.

9. The District Court of Prague 6 filed a petition seeking the annulment of Section 88a of the Criminal Procedure Code in relation to making a decision regarding the request of the Military Police seeking an order to disclose the data on the telecommunication services and transmissions made in the matter of a reasoned suspicion of a criminal offence of threatening classified information pursuant to Section 317, para. 1 of Act No. 40/2009 Coll., the Criminal Code. The proceedings concerning this request are being conducted before the Petitioner under file reference 37 Nt 2309/2011. Since it is the contested provision that prescribes the relevant authority of the presiding judge or the judge within the

preliminary proceedings, as well as the conditions under which an order to disclose the afore-mentioned data may be issued, it is obvious that it may be applied in the instant case. This also provides the court with the standing to sue, thus allowing a petition seeking its annulment to be filed.

V.
Assessment of Authority and Constitutional Conformity of the Legislative Process

10. Within the proceedings seeking annulment of statutes or any other enactments, the Constitutional Court assesses, pursuant to Section 68, para. 2 of the Act on the Constitutional Court, whether the statute or any other enactment has been adopted and issued within the confines of the powers set down in the Constitution and in the constitutionally prescribed manner and whether its contents are in conformity with constitutional acts, or if the matter concerns some other type of enactment, or statutes.

11. As already mentioned in the Senate's statement, the contested provision was introduced in the Criminal Procedure Code by means of Act No. 265/2001 Coll., while after this Act came into force, it was not subject to any further amendments or modifications. Owing to the fact that in the instant case, there is no doubt that the Parliament of the Czech Republic possessed the authority to adopt this statute pursuant to Art. 15, para. 1 of the Constitution, the Constitutional Court proceeded to assess whether the Act had been adopted in the constitutionally prescribed manner. For this purpose it proceeded from the statements of the parties to the proceedings, as well as from stenographical reports of the Chamber of Deputies and the Senate and other publicly accessible documents relating to the legislative process.

12. The contested provision was introduced in the government draft bill which was distributed to the Deputies as the document of the Chamber of Deputies No. 785/0 (Chamber of Deputies, 3rd term of office, 1998–2002), on the basis of the proposed amendment of the Committee for Defence and Security. The draft bill in the wording of this proposed amendment was adopted by the Chamber of Deputies in the third reading on 25 May 2001 at its 36th session, 169 out of 174 Deputies present voting for it, none of them voting against and five of them abstaining from voting. The Senate discussed and adopted the draft bill, which had been distributed to the Senators as the document of the Senate No. 66/1 (Senate, 3rd term of office, 2000–2002), on 29 June 2001 at its 8th session. Out of 60 Senators present, 58 voted for it, with 2 abstaining from voting. On 2 July 2011, the statute was delivered to the President of the Republic, who signed it on 11 July 2011. On 31 July 2001, the Act was published in the Collection of Laws in volume 102 under number 265/2001 Coll., taken into effect on 1 January 2002.

13. The Constitutional Court considered the afore-mentioned findings as sufficient to conclude that the contested provision was introduced in the Criminal Procedure Code by means of an act adopted in the constitutionally prescribed manner. In addition, it also took into account that the Petitioner had not challenged, in the relevant petition, the constitutionality of adopting and publishing this act. For this reason, it proceeded to the material assessment of the contested provision.

VI.
Right to Respect for Private Life in the Form of the Right to Informational Self-determination

14. At the very beginning of the adjudication itself, it should be pointed out that the Constitutional Court has already offered a partial statement to the question of the consistency of the contested provision with the constitutional order in its Judgment file reference Pl. ÚS 24/10, in which – following a petition filed by a group of Deputies – it annulled Section 97, para. 3 and 4 of Act No. 127/2005 Coll., on Electronic Communications and Amendment of some related Acts (Act on Electronic Communications), as amended, as well as the implementing decree to these provisions. These provisions imposed on any natural person or legal entity operating a public communication network or providing publicly accessible service of electronic communications the duty to retain created traffic and processed operating and localisation data for a certain period of time while

providing such services. Even though the contested provision was not subject to the proceedings in the relevant matter, the Constitutional Court could not overlook its material connection with the then contested enactment since it was not until then that the purpose of the duty referred to above was defined (albeit not exclusively), as well as the conditions under which such data could be used. From this perspective, all the afore-mentioned provisions thus created a certain comprehensive enactment of retaining the given data for the purposes of criminal proceedings. For this reason, the Constitutional Court was obliged, in its adjudication, to take this into consideration as a whole.

15. The legal conclusions contained in the afore-mentioned judgment may also be followed in the instant case, from the perspective of not only defining the general conditions for reviewing the contested provision, but also the adjudication itself. In agreement with the Petitioner, the Constitutional Court considers Art. 13 of the Charter a relevant criterion for reviewing the contested provision, since as it states in its established case law, the protection granted to the confidentiality of communications sent by telephone, telegraph, or by other similar devices does not apply only to their very contents, but also to other data retained when recording the telecommunication traffic in relation to particular persons [for instance, cf. the Judgment issued on 22 January 2001, file reference II. ÚS 502/2000 (N 11/21 SbNU 83); the Judgment issued on 13 February 2001, file reference IV. ÚS 536/2000 (N 29/21 SbNU 251); the Judgment issued on 27 August 2001, file reference IV. ÚS 78/01 (N 123/23 SbNU 197); the Judgment issued on 13 September 2006, file reference I. ÚS 191/05 (N 161/42 SbNU 327); or the Judgment issued on 27 September 2007, file reference II. ÚS 789/06 (N 150/46 SbNU 489)]. From the perspective of a systematic approach to the fundamental rights guaranteed by the constitutional order, it is nevertheless necessary to adjudicate the contested provision in a wider context, particularly from the perspective of the rights of users of electronic communications services to respecting their private life, the guarantee of which may be inferred from Art. 7, para. 1, Art. 10, 12, and 13 of the Charter, as well as from Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention"). The fact that the Charter defines this fundamental right in a number of provisions does not mean that it should not be considered in its integrity when interpreting it. Due to the close relation between the requirements concerning the respect for privacy and the protection thereof with the development of technical and technological possibilities increasing the potential of the state to jeopardise freedom, when interpreting the individual provisions, it is necessary to respect the purpose of the generally understood and dynamically developing right to privacy on its own and to consider it in its integrity at the given time (cf. the Judgment file reference Pl. ÚS 24/10, paragraphs 28 and 31).

16. The latter judgment stated that "the primary function of the right to the respect of private life is to provide space for development and self-realisation of the individual personality. Apart from the traditional definition of privacy in its spatial dimension (protection of the home in a broader sense) and, in association with an autonomous existence and the creation of social relationships (in a marriage, family or society), undisturbed by public authority, the right to the respect of private life also includes the guarantee of self-determination in the sense of primary decision-making of an individual about themselves. In other words, the right to privacy also guarantees the right of an individual to decide, at their own discretion, whether and to what extent, how and under what circumstances the facts and information concerning their personal privacy should be made accessible to other entities" (paragraph 29). The afore-mentioned aspect of this right is expressly stipulated in Art. 10, para. 3 of the Charter, pursuant to which everyone has the right to be protected from the unauthorized gathering, public revelation, or other misuse of their personal data. The fundamental right defined in this manner, which, in association with Art. 13 of the Charter, can be labelled in short as the right to informational self-determination [as for this concept, cf. Judgment issued on 17 July 2007, file reference IV. ÚS 23/05 (N 111/46 SbNU 41), paragraphs 34 and 35; Judgment issued on 1 December 2008, file reference I. ÚS 705/06 (N 207/51 SbNU 577), paragraph 27; and Judgment file reference Pl. ÚS 24/10, paragraphs 29 to 35], and it contributes to establishing, together with personal freedom, freedom in the spatial dimension (dwelling), communication freedom, and certainly other constitutionally guaranteed fundamental rights, the personal sphere of the individual, whose individual integrity, as an absolutely essential condition of the dignified existence of the individual and the development of human life as a whole, must be respected and protected in a consistent manner

(paragraph 31). Failure to guarantee to the individual the possibility to monitor and control the content and scope of personal data and information provided by them and to be published, retained or used for other than its original purposes, i.e. when the individual thus loses the possibility to recognise and assess the credibility of their potential communication partner and possibly adjust their behaviour accordingly, this necessarily results in restricting or even suppressing their rights and freedoms, which is unacceptable in a free and democratic society (cf. also the decision of the Federal Constitutional Court of Germany issued on 15 December 1983, BVerfGE 65, 1 – Volkszählungsurteil, para. 154).

17. The afore-mentioned conception of the right to informational self-determination is also compatible with the conclusions of the European Court of Human Rights, inferring its protection from the right to respect for private and family life pursuant to Art. 8 of the Convention. In a number of its decisions, this court has emphasised that collecting and retaining data concerning the individual's private life falls within the scope of the afore-mentioned article, since the expression of "private life" must not be interpreted in a restrictive manner. Among other things, the Court considered as interference with the individual's privacy interferences in the form of data and correspondence content surveillance or the interception of telephone conversations (e.g. the Judgment issued on 6 September 1978 in the matter of Application No. 5029/71 – Klass and Others vs. Germany, paragraph 41; the Judgment issued on 2 August 1984 in the matter of Application No. 8691/79 – Malone vs. the United Kingdom, paragraph 64; the Judgment issued on 24 April 1990 in the matter of Application No. 11801/85 – Kruslin vs. France, paragraph 26; or the Judgment issued on 25 March 1998 in the matter of Application No. 23224/94 – Kopp vs. Switzerland, paragraph 50) or collecting data on telephone connections (e.g. G the Judgment issued on 25 September 2001 in the matter of Application No. 44787/98 – P. G. and J. H. vs. the United Kingdom, paragraph 42; or the Judgment issued on 16 February 2000 in the matter of Application No. 27798/95 – Amann vs. Switzerland).

18. The Constitutional Court points out that the afore-mentioned general background concerning the right to respect for private life in the form of the right to informational self-determination, including the relevant case law of the European Court of Human Rights or foreign courts, were interpreted in detail in paragraphs 26 to 35 of the Judgment file reference Pl. ÚS 24/10, to which it refers at this point owing to their relevance in the instant case.

VII.
Review of the Contested Provision from the Perspective of the Fundamental Right to Informational Self-determination

19. The contested provision allows the bodies active in criminal proceedings, for the purposes of clarification of circumstances significant for the criminal proceedings, to obtain from operators of electronic communications services the data of the telecommunication traffic, which are otherwise subject to telecommunication secrecy or to which the protection of personal and mediation data applies. Owing to the possibility to identify information on the location, time, participants and manner of the communication from such data, it is obvious that the access of public authorities to such data without the consent of the users of these services immediately and substantially affects their right to informational self-determination, since in this scope, it deprives them of the possibility to decide, on their own, whether they will make such information available to any third parties. Although this fact does not exclude the admissibility of such interference, it must still satisfy the conditions arising from the constitutional order. Above all what matters is that the restriction in question was determined pursuant to the statute and that the relevant enactment complies with the requirement of definiteness arising from the principle of the rule of law state, i.e. that it was precise and unambiguous in its formulations, while also being predictable in the sense that potentially affected individuals are provided with sufficient information on the circumstances and conditions under which the exercise of their fundamental right may be restricted (cf. the Judgment file reference Pl. ÚS 24/10, paragraph 37; also e.g. the Judgment in the case of Malone vs. the United Kingdom, paragraph 67; or the Judgment issued on 4 May 2000 in the matter of application No. 28341/95 – Rotaru vs. Romania, paragraphs 55 to 57). At the same time, the restriction to the right to informational self-determination must follow the

constitutionally approved purpose, being the protection of any other fundamental right or public goods, whereas the assessment of the mutual collision of these values must follow the imperative of minimising interferences with fundamental rights and freedoms, taking into account their essence and purpose. Any interference with this fundamental right must thus stand the proportionality test, whose assessment (in a broader sense) consists of three steps pursuant to the established case law of the Constitutional Court. The first step assesses the capacity of a specific measure to pursue its objective (or its suitability), which means whether it is at all capable of achieving the pursued legitimate goal, being the protection of any other fundamental rights or public goods. Furthermore, its necessity is examined from the perspective of whether the chosen means was the most thoughful in relation to the fundamental right. And finally, the third and last step examines its proportionality in a narrower sense, i.e. whether the restriction on the fundamental right is not disproportionate in relation to the intended objective. This means that in the event of the collision of the fundamental right or freedom with the public interest, any measures imposing restrictions on fundamental human rights and freedoms must not, in their negative consequences, exceed the positives represented by the public interest in such measures [cf. e.g. the Judgment issued on 12 October 1994, file reference Pl. ÚS 4/94 (N 46/2 SbNU 57, 214/1994 Coll.); the Judgment issued on 13 August 2002, file reference Pl. ÚS 3/02 (N 105/27 SbNU 177, 405/2002 Coll.); or the Judgment issued on 28 January 2004, file reference Pl. ÚS 41/02 (N 10/32 SbNU 61, 98/2004 Coll.)].

20. Undoubtedly, prosecuting for criminal offences, or preventing, detecting and investigating them, as well as just punishment of offenders, may be labelled as a constitutionally approved public interest or purpose which, in general terms, legitimises the interference with the exercise of this right [cf. the Judgment issued on 23 May 2007, file reference II. ÚS 615/06 (N 88/45 SbNU 291), particularly paragraph 16; Judgment file reference II. ÚS 789/06, paragraphs 15 to 22; or the Judgment issued on 29 February 2008, file reference I. ÚS 3038/07 (N 46/48 SbNU 549)]. It is aimed at penalising the most serious interferences with fundamental rights and freedoms or the cases of damage to public goods protected by the constitutional order or the statute on the side of the state, which at the same time provides legal protection in a broader sense. The relevant public interest also stands the test as the purpose approved by Art. 8, para. 2 of the Convention, which allows, if necessary in a democratic society, to interfere with the right to respect for private and family life in the interests of the protection of the rights and freedoms of others, national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, and for the protection of health or morals. This is also anticipated in harmonising the obligations of providers of publicly available electronic communications services to retain certain data and arrange for their accessibility pursuant to the Directive of the European Parliament and of the Council 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (hereinafter referred to as the "Data Retention Directive"). As stipulated in its Art. 1, para. 1, the aim of retaining certain data by the providers of the relevant services under this Directive is to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.

21. From the perspective of the afore-mentioned criteria, there is no dispute that any potential interference with the fundamental right to informational self-determination as a consequence of ordering the disclosure of data on the telecommunication traffic of a certain person has its legal basis in the contested provision. In addition, it may also be stated without any further detail that such a measure is capable of achieving the pursued goal, and thus stands up to the first step in the proportionality test. For this reason, the Constitutional Court proceeded to the second step, i.e. assessing its necessity.

22. In the instant case, the Constitutional Court adjudicates the contested provision in a specific supervision of constitutionality, i.e. upon a petition filed by a court whose primary concern is that the proceedings conducted before it or its decision do not result in violating the constitutional order. In spite of this, its assessment may not be limited to the question whether of its provision, with respect to the circumstances of the matter and the seriousness of the criminal offence the committing of which

the bodies active in criminal proceedings reasonably suspect, allows, in the specific case, a disclosure of the telecommunication traffic data to be ordered, while respecting the limitations arising from the proportionality principle. Undoubtedly, the petitioning court would be authorised to perform such an assessment even without a decision of the Constitutional Court, since the contested provision does not impose a duty on it to issue the relevant order. On condition that the court reached a conclusion on its inadequacy from the perspective of the right to informational self-determination, there would be no obstacle to dismissing the request of the body responsible for criminal proceedings.

23. However, the contested provision has a wider overlap on the abstract level, since it represents a complete enactment concerning detection of telecommunication traffic data in criminal proceedings, thus defining not only what is subject to the enactment in force but also the fact that there is something not subject to it. The deficiencies objected to by the Petitioner are capable of being negatively reflected in the fundamental rights and freedoms of the users of electronic communications services, since they may be aggrieved not only as a result of disclosing the relevant data themselves to the bodies active in criminal proceedings but also as a result of disposing of them further, for instance by making them available to other persons or abusing them for other purposes. What matters is whether the contested provision offers, from the perspective of the fundamental right to informational self-determination, sufficient guarantees against abusing the relevant data in the whole course of the criminal proceedings. These guarantees must be perceived both as defining the conditions under which the relevant authorities should have access to the telecommunication traffic data, and as the existence of efficient supervision of compliance with them. In this respect, the Constitutional Court has already held that "on condition that the criminal law allows for exercising the public interest to prosecute criminal activity by means of robust tools the use of which results in serious limitations of the personal integrity and fundamental rights and freedoms of an individual, then when applied, constitutional limits have to be respected. Restrictions imposed on personal integrity and individual privacy (i.e. breaching the respect towards them) may only be applied as an absolute exception, … and if it is acceptable from the perspective of the legal existence and respecting effective and specific guarantees against arbitrariness" [cf. the Judgment file reference Pl. ÚS 24/10, paragraph 36; or also the Judgment issued on 7 November 2006, file reference I. ÚS 631/05 (N 205/43 SbNU 289), paragraph 26]. The need to have such guarantees available is becoming even more important to the individual at this time owing to the current enormous and fast-moving development and occurrence of new and more complex information technologies and electronic communications (in the so-called cyberspace), every single minute, especially owing to the development of the Internet and mobile communication, thousands or even millions of items of data and information are recorded, collected and virtually made accessible, interfering with the private (personality) sphere of the individual, yet if asked, they would probably be reluctant to knowingly let someone else in (cf. the Judgment file reference Pl. ÚS 24/10, paragraph 50).

24. The wording of the contested provision implies that the order for disclosure of the telecommunication traffic data is only expressly conditioned by the fact that such measures must pursue the goal of "clarification of the circumstances significant for criminal proceedings". The Constitutional Court believes that the limits of the fundamental right to informational self-determination regulated in this manner are formulated too widely and vaguely, and in essence, they allow the relevant data to be requested and used by the bodies active in criminal proceedings each time a certain connection with the ongoing criminal proceedings may be associated with them. At the same time, the Court is aware of the obligation of public authorities to apply sub-constitutional legal regulations in compliance with the constitutional order, which in this case implies their duty to examine, in every specific matter, whether apart from identifying the telecommunication traffic data of a specific person there is not, in respect to the seriousness of the criminal offence, any other possibility to achieve the goal of the criminal proceedings otherwise or whether it does not amount to an inadequate interference with the individual's fundamental right. It also considers important that the protection of fundamental rights and freedoms is subject to, in every individual case, review of an independent and impartial court, since decision making on issuing the relevant order is granted by the contested provision to the presiding judge or the judge within the preliminary proceedings, whereas such orders must be issued in writing and accompanied with reasoning. Nevertheless, these are

guarantees that allow protection to be provided against an inadequate interference with the right to informational self-determination with respect to the facts of a particular case, yet they cannot eliminate the deficiencies consisting in indefiniteness and too general a character of the contested legal regulation in such a way that they would replace, on their own and in general terms, the consideration of the legislature on the intensity of a certain public interest in restricting a fundamental right or freedom in the case of individual criminal offences and the manner (i.e. specific form) of such restriction, including the afore-mentioned subsequent guarantees when disposing of the relevant data, which represent a political decision adopted within the limits defined by the constitutional order, with their own detailed abstract consideration. If adopted by courts, this approach would also be inconsistent with Art. 4, para. 2 of the Charter, pursuant to which limitations of the fundamental rights and freedoms may be placed upon them only by law, since only the legislature is provided with the constitutional capacity, upon imposing a certain duty, to give preference, at its own discretion and while respecting the proportionality principle, of the public interest approved by the constitutional order to the fundamental right in a type-defined legal relation. Furthermore, leaving the determination of the constitutionally constituent limits only on the decision-making practice of courts would not be consistent with the requirement of legal certainty, since any potential interference with the right to informational self-determination is not, as a consequence of the indefiniteness of the current legal regulation, predictable for the individual to such an extent that would correspond to the seriousness of any possible negative effects onto their privacy. It may thus be stated that it is this indefiniteness that represents the primary deficiency of the contested legal regulation, as far as its constitutional review is concerned.

25. If the legislature determined that the only condition to identify the data of the telecommunication services and transmissions made was the clarification of the circumstances significant for criminal proceedings, it established the basis for restricting the fundamental right to informational self-determination to such an extent that completely excludes the requirement of the necessity of such interference with respect to the pursued goal (cf. the Judgment file reference II. ÚS 789/06, paragraph 16). The power of bodies active in criminal proceedings to identify the data regarding with whom and how often a certain individual communicates and from what place and what means they use cannot be considered, with respect to the intensity with which the fundamental right is interfered with, as a common or routine means of preventing and detecting crime, since it may only be applied when there is no other, and in respect to the fundamental right, less restrictive procedure in order to achieve the pursued goal. Even the very possibility of becoming acquainted with the data on communication and movement of a certain individual without their consent means restricting their right to have the information on their privacy at their disposal, not taking into account whether the data are to be subsequently discarded or not depending on their relevance for criminal proceedings.

26. The Constitutional Court emphasises that the afore-mentioned risk of extensive use (and thus abuse) of this measure as a common or routine means is not only expressed at the abstract level but it is also supported with relevant statistical data. As already mentioned in the Judgment file reference Pl. ÚS 24/10 (paragraph 49), in accordance with the "Report on the Security Situation in the Czech Republic in 2008", the total number of criminal offences recorded in the territory of the Czech Republic in the given year amounted to 343,799, out of which 127,906 offences were detected. At the same time, the number of requests to provide the traffic and location data made by the competent public authorities reached 131,560 [cf. the Report from the Commission to the Council and the European Parliament, submitted on 18 April 2011 and entitled "Evaluation Report on the Data Retention Directive (Directive 2006/24/EC)", available on eur-lex.europa.eu, CELEX: 52011DC0225; the European Commission requested the relevant data from the Czech side]. According to a similar report prepared by the Ministry of the Interior for 2009, the number of criminal offences in that year amounted to 332,829, out of which 127,604 offences were detected. However, according to the afore-mentioned report of the European Commission, the number of requests for retained traffic data amounted to 280,271, i.e. more than double compared to the number for the previous year. The data imply that the tool in the form of requesting and using retained data (including data on the telephone calls that were not transmitted, which are completely ignored by the contested provision) is used by

the bodies active in criminal proceedings in an extensive manner, also for the purposes of investigating common, i.e. less serious crime.

27. In a democratic society, apart from expressing the requirement of necessity, the contested legal regulation should also contain the manner of handling the data on the side of the bodies active in criminal proceedings. It should include unambiguous and detailed rules containing the minimum requirements concerning the security of the retained data, which would guarantee that they will not be used for any other purposes than those stipulated by law. In particular, this involves restricting third-party access and defining the procedure of maintaining data integrity and credibility, or the removal procedure (the Judgment file reference Pl. ÚS 24/10, paragraph 50). Efficient protection against the unlawful interference with the fundamental rights and freedoms of the affected individuals should be guaranteed by means of a duty to subsequently inform the user of the electronic communication services, provided that the person's identity is known, and that the traffic and location data concerning this person have been disclosed to the bodies active in criminal proceedings. At the same time, the person should be provided with a legal means on the basis of which they could seek judicial review of the procedure of collecting and handling the relevant data. Any exemption to this duty would be admissible only for the reasons stipulated by law, where the interest in concealing the information prevails. Yet even in these cases, the legislature must guarantee that the assessment of the relevant authorities as to whether there are grounds for concealing the information was not arbitrary but was subject to obligatory judicial review (cf. also similar conclusions contained in the Judgment of the Federal Constitutional Court of Germany issued on 2 March 2010, file reference 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, especially paragraphs 281 and 282). In this respect, the Constitutional Court adds that there is no reason why the extent of the guarantees stipulated by law in relation to ordering the disclosure of the telecommunication traffic data should differ from the perspective of its content, unless such distinction is of essential character, from the guarantees stipulated in relation to ordering telecommunication traffic interception and records, without regard to the existing legal regulation, since in both cases the intensity of the interference with the right to privacy is comparable.

28. Last but not least, the legislature should take into consideration the purposefulness of stipulating more detailed rules concerning the content of the order to disclose the telecommunication traffic data, or possibly stipulating certain formal requirements concerning the request itself of the bodies active in criminal proceedings seeking such a measure to be taken. Due to the annual number of requests to order disclosure of the relevant data, which even exceeded a quarter of a million in 2009, it would be undoubtedly illusionary to assume that such requests are not limited, in practice, only to disclosing the essential data and a brief reasoning. For this reason, one may imagine that these essential content-based requirements should be stipulated directly on the level of the statute. They would be aimed at ensuring that the judge, in his/her decision-making activity, will have all the necessary information available, i.e. the information which is accessible, without much difficulty, to the bodies active in criminal proceedings, e.g. information on the user or owner of the user address or device, provided that such data may be obtained from the relevant operator of the electronic communications services without jeopardising the purpose of the criminal proceedings. In addition, it ought to be pointed out that currently, some of the content-based requirements of the order are subject to the generally recognised interpretation of the contested provision (cf. Šámal, P. a kol. Trestní řád. Komentář. I. díl. 6. vydání [Criminal Procedure Code. Commentary. Volume I. 6th edition]. Prague: C. H. Beck, 2008, p. 748), while failure to respect them may result in the violation of the fundamental right to informational self-determination of the affected individuals without regard to the absence of their statutory enactment. In this respect, the Constitutional Court emphasises the requirement of consistency and efficiency of the judicial review, particularly in respect to the character of the given proceedings which does not anticipate the participation of the other party before the decision issued by the court. The role of the court thus also lies in "weighing" the procedural situation, while it is inadmissible that the court end up in the position of a mere "assistant" to public prosecution, since it must always remain impartial (the Judgment file reference II. ÚS 789/06, paragraph 17).

29. The afore-mentioned facts themselves provide the grounds for the conclusion that the contested provision will not stand the second step of the proportionality test, since it does not condition

identifying the telecommunication traffic data, as performed by the bodies active in criminal proceedings, with the requirement of necessity and does not provide for means of efficient supervision related to its application, which would allow efficient protection of the fundamental right to informational self-determination of the affected individuals in the whole period when the relevant authorities have such data available. For the sake of completeness, however, it ought to be stated that it would not stand the third and final step of the test either, assessing proportionality in a narrower sense. As a matter of fact, the contested provision does not attribute any importance to the character and seriousness of the criminal offence for which the criminal proceedings are conducted despite the fact that such circumstances are, already at the general level, important for the result of balancing the collision between the fundamental right to informational self-determination and the public interest in preventing and prosecuting crime. In other words, even upon satisfying the afore-mentioned condition of necessity, this public interest may not be automatically assigned priority in the collision in question. On the other hand, it should always be considered whether, in respect to the importance of the subject of a particular criminal offence that was allegedly committed, the interest in prosecuting it outweighs the individual's right to decide whether and to whom they will make their personal data available. It is up to the legislature to determine in which cases of criminal offences this public interest prevails, while the decision must take into account their seriousness, similarly to determining penal rates, for instance. It remains to be added that the same principles are followed in the case of limiting the possibility to enact interception and records of telecommunications operation pursuant to Section 88, para. 1 of the Criminal Procedure Code only when the criminal proceedings are conducted in respect of a particularly serious criminal offence or in respect of an intentional criminal offence the prosecution of which is mandatory under a promulgated international treaty, although the legislature could also define the afore mentioned enumeration of criminal offences in a different manner. Similarly, the legal regulation of data retention pursuant to the Data Retention Directive stipulates that its aim is to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime. In addition to this, it needs to be emphasised that the afore-mentioned requirements in relation to the legislature do not at all prevent adequate transposition of this directive, while on the other hand being completely consistent with its thus stipulated purpose.

VIII.
Conclusion

30. It may be summarised that although Section 88a of the Criminal Procedure Code contains the complete legal regulation of the access of the bodies active in criminal proceedings to the telecommunication traffic data, this access is expressly conditioned only by stipulating that the relevant data may be identified exclusively for the purposes of clarification of the circumstances significant for the criminal proceedings. Although the assessment as to whether this condition has been met is granted to the presiding judge or the judge within the preliminary proceedings who decides on ordering such data, its very general and vague definition cannot be deemed sufficient, taking into account the absence of any further regulation concerning the subsequent disposal of the data, as well as in view of the fact that disclosing the data in question represents, in relation to the affected users of electronic communications services, an interference with their fundamental right to privacy in the form of the right to informational self-determination pursuant to Art. 10, para. 3 and Art. 13 of the Charter and Art. 8 of the Convention. Above all, the legislature failed to reflect at all in the contested provision the requirement of the proportionality of interference with fundamental rights with respect to the pursued goal, since the access to the data in question is provided for, in essence, as a common means of collecting evidence for the purposes of criminal proceedings, conducted even for any criminal offence. In view of the seriousness of the relevant interference with the private sphere of the individual, this limitation will only stand the test provided that it meets the conditions arising from the proportionality principle. This means that the access of the bodies active in criminal proceedings to the telecommunications traffic data may only come into question on condition that the purpose of the criminal proceedings cannot be achieved in any other way, that the legal regulation contains sufficient guarantees preventing the use of such data for any other purposes than those assumed by law, and that the restriction of the individual's right to informational self-determination does not amount to an

excessive interference with respect to the importance of specific societal relationships, interests or values that are subject to the criminal offence for which the corresponding criminal proceedings are conducted. The contested provision does not respect these limitations, while this deficiency may not be eliminated even by means of the stipulated judicial review. In their decision making on ordering disclosure of the relevant data, courts may grant protection to the right to informational self-determination with respect to the facts of a particular case, yet their case law cannot replace the absence of a sufficiently definite and legitimate legal regulation, which is, pursuant to Art. 4, para. 2 of the Charter, a condition for placing limitations upon fundamental rights and freedoms in general.

31. On the basis of the afore-mentioned arguments, the Constitutional Court states that the contested provision is inconsistent with the fundamental right to respect for private and family life in the form of the right to informational self-determination pursuant to Art. 10, para. 3 and Art. 13 of the Charter, as well as Art. 8, para. 2 of the Convention, since it allows the bodies active in criminal proceedings to interfere with it for the purposes of preventing and prosecuting criminal offences in a manner not corresponding to the requirement of the proportionality concerning its restrictions, as implied in the principle of the rule of law state pursuant to Art. 1, para. 1 of the Constitution. For the sake of completeness, it also adds that although the derogatory reason does not concern Section 88a, para. 2 of the Criminal Procedure Code in terms of content, the Constitutional Court proceeded to its annulment, since granting the petition only as far as paragraph 1 of the contested provision is concerned would render it obsolete in any case.

32. In conclusion, the Constitutional Court remarks that the afore-mentioned derogatory reasons may not be interpreted in such a way that the very application of the contested application would always result, in the case of the affected users of electronic communication services, in violating their fundamental right to privacy. Until now, the contested provision allowed to court to assess, in this particular case, the adequacy of ordering the disclosure of the telecommunication traffic data from the perspective of the fundamental right to informational self-determination, dismissing requests of the bodies active in criminal proceedings in groundless cases. It is thus impossible to conclude a priori that every decision issued on the basis of Section 88a of the Criminal Procedure Code before publishing this Judgment in the Collection of Laws resulted in interfering with the fundamental right or freedom of the affected user of electronic communications services. In addition, this Judgment does not provide any reason which would, in general, prevent using the so-far collected telecommunication traffic data for the purposes of producing evidence within criminal proceedings. The authority of ordinary courts to assess, within their decision-making activity, whether the procedure in question taken by the bodies active in criminal proceedings resulted in interfering with the fundamental rights and freedoms remains unaffected by these conclusions. At the same time, the Constitutional Court is convinced that the afore-mentioned deficiencies provide substantial room for an inadequate or arbitrary procedure taken by the bodies active in criminal proceedings while identifying and handling the data in question, which – owing to possible negative effects in the future – does not permit keeping the contested provision in force longer than a minimum necessary interim period. Being aware of the preparation of a new legal regulation, the Constitutional Court has thus delayed the entry into effect of the derogation verdict in relation to the contested provision only for the period until 30 September 2012, deemed necessary for completing the new legislative process.

33. In view of all the afore-mentioned reasons and pursuant to Section 70, para. 1 of the Act on the Constitutional Court, the Constitutional Court decided as is stated in the verdict of this Judgment.

A dissenting opinion to the Plenum's decision, under Section § 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, was submitted by Judge Ivana Janů.

Dissenting opinion of Judge Ivana Janů

Pursuant to Section 22 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, I am submitting a dissenting opinion to the verdict and reasoning behind the Judgment of the Constitutional Court in the matter of file reference Pl. ÚS 24/11. Through the afore mentioned Judgment, the Constitutional Court granted the petition of the District Court of Prague 6 and issued the verdict annulling the provision of Section 88a of Act No. 141/1961 Coll., on Criminal Judicial Proceedings (Criminal Procedure Code), as amended, upon the expiration of 30 September 2012. The basis of the reasoning consists of the conclusion that the contested provision does not stand the second step of the proportionality test, since it does not condition identifying the telecommunication traffic data, as performed by the bodies active in criminal proceedings, with the requirement of necessity and does not provide for means of efficient supervision related to its application, which would allow efficient protection of the fundamental right to informational self-determination of the affected individuals in the whole period when the relevant authorities have such data available (paragraph 29). Furthermore, the reasoning behind the Judgment is also summarised that Section 88a of the Criminal Procedure Code contains the complete enactment of the access of bodies active in criminal proceedings to the telecommunications traffic data and that such data may be identified exclusively for the purposes of clarification of the circumstances significant for the criminal proceedings (paragraph 30 and in more detail, paragraphs 24 and 25).

At first, I feel obliged to state that in several Judgments in the past, the Constitutional Court has already formulated the constitutional limits of the procedure taken by the bodies active in criminal proceedings when obtaining telecommunication traffic data. Before the legislature adopted the current wording of the provision of Section 88a of the Criminal Procedure Code, this happened in Judgments file reference II. ÚS 502/2000, issued on 22 January 2001 (N 11/21 SbNU 83), file reference IV. ÚS 536/2000, issued on 13 February 2001 (N 29/21 SbNU 251), or file reference IV. ÚS 78/01, issued on 27 August 2001 (N 123/23 SbNU 197). It stated that Article 13 of the Charter of Fundamental Rights and Freedoms constitutes the protection of not only the very content of the telephone messages, but also other data recorded when registering telecommunication traffic in relation to particular individuals. "In the case of obtaining or collecting evidence of the telecommunication traffic, the bodies active in criminal proceedings or a police agency, prior to initiating the criminal proceedings, are obliged to act accordingly pursuant to Section 88 of the Criminal Procedure Code, or pursuant to Section 36 of Act No. 283/1991 Coll., as amended, taking into account that the concept of "record" also applies to data collection by means of keeping a record of telecommunication traffic in relation to a particular individual or individuals. Through this constitutionally conforming interpretation of the quoted provisions, it is possible to arrive at efficient supervision against infringements of the fundamental right by public authorities, while at the same time not excluding the possibility for such bodies to collect the type of evidence which is undoubtedly frequently essential for the purposes of performing their functions, possibly until adopting a specific legal regulation concerning collecting such data."

In my view, these conclusions remained unchanged even upon adopting the provision of Section 88a of the Criminal Procedure Code by means of Act No. 265/2001 Coll.

Pursuant to Art. 8, para. 2 of the Constitution, enforceable decisions of the Constitutional Court are binding on all authorities and persons. In accordance with the interpretation of the Constitutional Court, not only the verdict of the judgment is binding, but also the reasoning, or those parts containing "principal" reasons. At the same time, it ought to be pointed out that the Constitutional Court has been following, in the long term, the principle of preference of the constitutionally conforming interpretation to derogation.

Until now, the Constitutional Court has proceeded from the constitutionally conforming interpretation of the contested provision. Particularly in the Judgment file reference II. ÚS 789/06, issued on 27 September 2007 (N 150/46 SbNU 489), the Constitutional Court explained in detail that the guarantees of the protection of Art. 13 of the Charter, when applied in the telecommunication area pursuant to Sections 88 and 88a of the Criminal Procedure Code, lies above all in the domain of

judicial review. It remarked that even in criminal proceedings, the role of the courts is to provide protection to the rights as stipulated by law [cf. the Judgment file reference II. ÚS 93/04, issued on 27 May 2004 (N 75/33 SbNU 239)], which also applies to rights and freedoms guaranteed by the constitutional order. In paragraph 19 and subsequent ones, it expresses the requirement of interference proportionality while examining a number of case elements (including the character of the criminal offence and the intensity of public interest). In paragraph 30, it expresses for interpretation and application an analogy to the guarantees contained in Section 88 of the Criminal Procedure Code, with the aim of ensuring a similar degree of protection of the rights under Art. 13 of the Charter. I refer to this Judgment in its details. The requirement (and thus an objective possibility) of a constitutionally conforming interpretation of the contested provision of Section 88a of the Criminal Procedure Code was also followed in another Judgement file reference IV. ÚS 1556/07, issued on 3 August 2010 (N 152/58 SbNU 289), which referred the bodies active in criminal proceedings again to the interpretation conclusions of the Judgment file reference IV. ÚS 78/01. Provided that the Constitutional Court implicitly insists on the requirement of the constitutionally conforming interpretation of the contested provision, then the objections directed against the application of the provision of Section 88a of the Criminal Procedure Code in the particular criminal proceedings failed to prevail in a number of proceedings on individual constitutional complaints (at random, the Resolution file reference III. ÚS 120/03, issued on 12 February 2004; the Resolution file reference I. ÚS 227/06, issued on 2 April 2007; the Resolution file reference III. ÚS 260/06, issued on 10 May 2007; the Resolution file reference II. ÚS 395/09, issued on 12 March 2009; or the Resolution file reference I. ÚS 694/08 issued on 23 June 2009, all unpublished in SbNU but available at http://nalus.usoud.cz).

In line with the quoted case law, the contested provision of Section 88a of the Criminal Procedure Code may be interpreted in the constitutionally conforming manner, i.e. no reasons for its annulment have been established. However, the majority of the Plenum abandoned the afore-mentioned conclusions for no reason in favour of the opinion that the contested provision represents "the complete legal regulation" (paragraph 30 of the Judgment), i.e. apparently isolated from other provisions of the Criminal Procedure Code.

The provision of Section 88a to be annulled is systematically classified in part one, chapter four, title seven of the Criminal Procedure Code, together with the provision of Section 88, under the heading "Interception and Recording of Telecommunication Activities". Both these provisions must therefore be interpreted in mutual conjunctions, yet the provision of Section 88a was not introduced into this passage until the amendment adopted by means of Act No. 265/2001 Coll., taking effect on 1 January 2002. At that time, Section 88 of the Criminal Procedure Code had already become effective, containing limitations of the interception and recording of telecommunication activities concerning certain criminal proceedings only. Complementing this title with another provision allowing identification of telecommunication traffic data must thus be perceived as a provision following the initial breach of the protection of information. For this reason, I have come to the conclusion that the limitations included in Section 88 of the Criminal Procedure Code may also be applied to Section 88a of the Criminal Procedure Code. Any potential restrictive interpretation, as implied in the commentary literature (e.g. Šámal, P. a kol. Trestní řád. Komentář. I. díl. 6. vydání [Criminal Procedure Code. Commentary. Volume I. 6th edition]. Prague: C. H. Beck, 2008, p. 748), maintaining that the guarantees of Section 88 of the Criminal Procedure Code do not apply to Section 88a of the Criminal Procedure Code, does not follow any constitutional line of arguments, being in collision with the case of the Constitutional Court (unquestionably with the Judgment file reference II. ÚS 789/06).

Any doubts raised in association with the reasoning behind the petition filed by the District Court of Prague 6 are also supported with the fact that the petition itself does not contain any constitutional arguments and in principle, the Petitioner refers only to the conclusions contained in the Judgment file reference Pl. ÚS 24/10, issued on 22 March 2011 (94/2011 Coll.) concerning Section 88a of the Criminal Procedure Code, which manifestly are not principal conclusions. In the Judgment file reference Pl. ÚS 24/10, the merits of the review concerned Act No. 127/2005 Coll., on Electronic Communications and on amendments to other related acts (Act on Electronic Communications), not the question of guarantees within criminal proceedings.

The assessment conducted by the Plenum is not performed in an abstract manner, i.e. on the level of an objective possibility or impossibility of a constitutionally conforming interpretation, but rather in view of specific (statistical) indications summarised in the Judgment file reference Pl. ÚS 24/10; however, these do not arise from the legal impossibility of a constitutionally conforming interpretation, but rather from the "unwillingness" of the bodies active in criminal proceedings, including ordinary courts, to respect the constitutionally conforming interpretation provided by the Constitutional Court. However, desirable sophistication of the practice of the bodies active in criminal proceedings may only be achieved through shifting their view of using the means contained in the Criminal Procedure Code in proportion to the individual's fundamental rights and freedoms, rather than through a (formal) amendment to the provision whose interpretation has not so far been respected. As a matter of fact, it is obvious that excessive use of the procedure pursuant to the provision of Section 88a of the Criminal Procedure Code is based on the routine practice of the bodies active in criminal proceedings, without regard of what the Constitutional Court deems as applicable law. For this reason, I am afraid that the new legal regulation will not change much in the afore-mentioned "inflation of petitions" concerning the procedure under Section 88a of the Criminal Procedure Code.

The question of intertemporary effects of the derogatory judgment is dealt with in paragraph 32, excluding those (retroactive) effects of the judgement that would prevent using the evidence collected so far pursuant to the provision of Section 88a of the Criminal Procedure Code. However, I have found out that the judgment has not provided sufficient explanation to the question of the effects in the period of the delayed derogation of the contested provision expiring on 30 September 2012 or possibly after 30 September 2012. With reference to the approach expressed in paragraph 54 of the Judgment file reference Pl. ÚS 15/09, issued on 8 July 2010 (N 139/58 SbNU 141; 244/2010 Coll.), in which the Constitutional Court expressed the necessity of application of the annulled provision in the future in view of the existing derogatory reasons expressed in the judgment, which I perceive as a general requirement, I believe that until the date in question, the bodies active in criminal proceedings are obliged to interpret and apply the provision to be annulled in a constitutionally conforming manner, i.e. pursuant to the afore-mentioned Judgment file reference II. ÚS 789/06, and in the event of ineffective expiry of the period provided to the legislature pursuant to the conclusions of the afore-mentioned Judgments file reference II. ÚS 502/2000, file reference IV. ÚS 536/2000, and file reference IV. ÚS 78/01. On condition that the bodies active in criminal proceedings are to comply with the requirements of protection of fundamental rights of affected individuals, while carrying on efficient detecting and prosecuting of crime, they will have to proceed exactly pursuant to the previous judgments. This is the fact that confirms my belief that granting priority to a constitutionally conforming interpretation to derogation would be an adequate response of the Constitutional Court.

Just *de lege ferenda*, I believe it is suitable to note towards the legislature that should the result of the new legal regulation consist in reducing the number of excessive requests to identify the telecommunication traffic data, it is impossible to neglect the key supervisory role and responsibility of the public prosecutor in criminal proceedings who may substantially contribute to the protection of the individual's information autonomy in the court's decision-making.

Due to the reasons mentioned above, I believe that the petition should have been dismissed, while the Constitutional Court offers a binding and constitutionally conforming interpretation of the contested provision in its Judgment.