Pl. ÚS 25/12 of 17 April, 2013
"Decree on Reimbursement for Costs of Proceedings"

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

In contrast to the Lawyers' Tariff (Decree No. 177/1996 Coll., as amended) under which the amount of fee and the amount of the costs of legal representation are derived from the number of acts of legal services carried out in the case, Decree No. 484/2000 Coll., that has been contested, has introduced the determination of the costs of legal representation based on the principle of flat-rate fees for the representation in proceedings. The Decree on Reimbursement for Costs of Proceedings provides for the flat rates of the amount of fee, which does not allow distinguishing the complexity of the case, time demands, the number of acts of legal services, as well as the way the judicial proceedings terminated (an electronic payment order, a judgment for recognition, and a default judgment). The flat-rate costs thus completely ignore the subject-matter and time demands for litigations or the effectiveness of the enforcement of rights or defending claims.

The costs of legal representation calculated based on the Decree on Reimbursement for Costs of Proceedings inadequately burden the losing party to the proceedings, especially in situations where the amount in dispute is low, especially at the small claims level. Reimbursement for costs awarded is clearly inadequate in relation to the nature and content of the dispute. Enforcing the civil obligations in such cases is a marginal issue in terms of general equity, with the interest of the creditor in obtaining profits from the litigation being at the forefront of the litigation.

The costs awarded regularly come into a clear disproportion to the sued value of the dispute. The losing party to the proceedings thus faces sanctions, while the amount of costs imposed is contrary to the principle of the proportionality of sanctions. *De facto*, this leads to imposing sanctions without law. The Decree on Reimbursement for Costs of Proceedings is thus in conflict with Article 4 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter"), which provides for that duties may be imposed only on the basis of and within the bounds of law and only while respecting the fundamental rights and freedoms. The costs awarded should not be inadequate in relation to the nature and value of the dispute.

The Constitutional Court is aware that the current legal situation allows courts to derogate from the Decree on Reimbursement for Costs of Proceedings. A judge has the option not to award reimbursement for the costs or to award only reimbursement for reasonably incurred costs (Section 142 (1) of the Civil Procedure Code). In a particular case, a judge may also take into account the reasons worthy of special consideration under Section 150 of the Civil Procedure Code. Also the case-law, including the case-law of the Constitutional Court, provides a relatively wide range of options for decision-making. However, the past experience shows that the application of these legal options by courts is inconsistent and unpredictable. This also weakens the principle of predictability of court decisions and the principle of legal certainty.

The Decree on Reimbursement for Costs of Proceedings is explicitly contrary to the Civil Procedure Code according to which the costs are to be awarded as necessary for the effective enforcement and protection of rights (Section 142 (1) of the Civil Procedure Code).

VERDICT

Under file No. Pl. ÚS 25/12, on 17 April 2013, the Plenum of the Constitutional Court, consisting of the President of the Constitutional Court Pavel Rychetský and its judges Stanislav Balík, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil (judge-rapporteur), Jiří Nykodým, Miloslav Výborný, and Michaela Židlická, decided on the petition from a group of senators, represented by Pavel Uhl, lawyer, based at Kořenského 15, 150 00 Prague 5, filed under Article 87 (1) (b) of the Constitution of the Czech Republic, for the annulment of Decree of the Ministry of Justice of 18 December 2000 No. 484/2000 Coll., laying down the flat rates of the amount of fees for the representation of parties to proceedings by lawyers or notaries in the decision-making on reimbursement for the costs of civil court proceedings and amending Decree of the Ministry of Justice No. 177/1996 Coll., on lawyers' fees and reimbursement to lawyers for legal services (Lawyers' Tariff), as amended, or on the petition for the annulment of Section 3 (1) and Section 12 of Decree No. 484/2000 Coll., as amended, with the participation of the Ministry of Justice as a party to the proceedings and Dora Drdová, represented by Pavel Uhl, lawyer, based at Prague 5, Kořenského 15, as an intervener, as follows:

The Decree of the Ministry of Justice of 18 December 2000, No. 484/2000 Coll., laying down the flat rates of the amount of fees for the representation of parties to proceedings by lawyers or notaries in the decision-making on reimbursement for the costs of civil court proceedings and amending Decree of the Ministry of Justice No. 177/1996 Coll., on lawyers' fees and reimbursement to lawyers for legal services (Lawyers' Tariff), as amended, is annulled on the date of publication of this judgment in the Collection of Laws.

REASONING

I.
Recapitulation of the petition

1. The Constitutional Court received a petition from a group of eleven senators (hereinafter referred to as the "Petitioner") under Article 87 (1) (b) of the Constitution of the Czech Republic (hereinafter referred to as the "Constitution") and under Section 64 (2) (b) of Act No. 182/1993 Coll., on the Constitutional Court, for the annulment of the Decree of the Ministry of Justice of 18 December 2000, No. 484/2000 Coll., laying down the flat rates of the amount of fees for the representation of parties to proceedings by lawyers or notaries in the decision-making on reimbursement for the costs of civil court proceedings and amending Decree of the Ministry of Justice No. 177/1996 Coll., on lawyers' fees and reimbursement to lawyers for legal services (Lawyers' Tariff), as amended (hereinafter referred to as "Decree No. 484/2000 Coll." or the "Decree on Reimbursement for Costs of Proceedings".

2. An alternative prayer for relief is filed to annul at least Section 3 (1) and Section 12 of Decree No. 484/2000 Coll.

3. In the case heard by the Constitutional Court under file No. ÚS 18/13, the resolution of 17 April 2013 rejected due to the plea of litispendence the accessory petition from the complainant Dora Drdová, attached to its constitutional complaint of 30 January 2013, file No. III. ÚS 420/13, seeking under Section 64 (2) (d) in connection with Section 74 of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter referred to as the "Act on the Constitutional Court"), the annulment of Section 3 (1) and Section 12 of Decree No. 484/2000 Coll. Within the meaning of Section 35 (2) of Act No. 182/1993 Coll. in the proceedings conducted under file No. Pl. ÚS 25/12, Dora Drdová, being the complainant, has the status of an intervener.

II.

Petitioner's arguments

4. The Petitioner seeks the annulment of the contested Decree for the following reasons:

(a) The contested Decree allows the awarding the costs of proceedings (reimbursement for the costs of proceedings) in an amount which constitutes an unfair and inadequate burden for the losing party to the dispute with respect to the subject of such dispute. This violates the principle of no penalty without law.

(b) By laying down the flat rates of the amount of the fee for representing a party to the proceedings by a lawyer, the contested Decree on Reimbursement for Costs of Proceedings does not take into account the formal procedural option of the termination of proceedings and ignores that the formally simplified proceedings constitute in fact reduced demands for litigations; the extent to which a fee is flat-rate thus exceeds the acceptable degree of injustice. This violates the principle of adequacy.

(c) The contested Decree on Reimbursement for Costs of Proceedings does not take into account the subject-matter professional and time demands for litigations and the extent to which a fee is flat-rate thus exceeds the acceptable degree of injustice, with respect to possible options of litigations. This violates the principle of adequacy.

(d) The extent to which the costs are flat-rate creates a situation where a certain litigation (typically recovery of lower claims) is advantageous for the reason of awarding the costs of proceedings, which in the market environment results in a greater number of such proceedings, without a valid reason for that in the light of the subsidiary nature of the judicial resolution of a dispute. This effect then disproportionately burdens the judiciary as a whole and creates inadequate impacts on the addressees of the legal regulations. The contested regulation then fails the test of its own rationality.

(e) The extent to which the costs are flat-rate as laid down by the Decree is based on incorrect presumptions (assumptions, fictions), which denies the reasonable function of a presumption in law.

(f) The contested Decree on Reimbursement for Costs of Proceedings creates an accessory inequality in relation to other types of proceedings and types of legal assistance. The contested regulation violates by this disproportion the general assumptions of the realisation of the right to a fair trial.

(g) The contested Decree on Reimbursement for Costs of Proceedings in the context of judicial practice is not able to generate the environment of legal certainty.

(h) The contested regulation grossly defies the principles of the rule of law and a reasonable set of rules of the conduct of disputes, as it is generally seen in other countries with comparable legal cultures.

5. The Petitioner states that the Decree on Reimbursement for Costs of Proceedings creates at lower ranges of the dispute value situations in which the awarded costs of proceedings are in general clearly inadequate in relation to the nature and content of the dispute. Law is generally dominated by the principle of adequacy.

6. The Petitioner points out that everyone is entitled to have his or her case heard by a court, even in case of a dispute of a negligible value. On the contrary, there is not a good reason to assume that everyone should be entitled to reimbursement for all the actual costs of litigation in case of winning the case, if the claimant brings an action constituting a marginal value. The content of the right to a fair trial does not include the full payment of all the costs a party to the proceedings had to bear in connection with the trial. There is no support for such consideration in the applicable law, which results, inter alia, from the fact that in many other proceedings there is absolutely no entitlement to reimbursement for costs in case of success. Criminal proceedings, administrative proceedings, and proceedings before the Constitutional Court may serve as an example.

7. According to the Petitioner, in terms of constitutional order, both awarding costs and awarding no costs is permissible, while if any law or decree assumes a standard situation, the judicial authority when departing from it must deal with such procedure, submitting its arguments for that. It is therefore theoretically possible to postulate an opposite situation where the costs are not awarded in principle, while in exceptional situations they are awarded upon justification. For example, this level concerns the awarding of the costs of proceedings concerning constitutional complaints conducted before the Constitutional Court.

8. The legislature has therefore at its disposal a relatively wide scope of considerations for determining a general rule, provided that it is possible to depart from it based on giving the reasons for that. A mere possibility of departure, however, does not provide a possibility to determine any general rule arbitrarily. If the legislature establishes general rules, such general rules cannot be in conflict with the general principles of adequacy and of no penalty without law.

9. According to the Petitioner, the legal regulation may not make the costs of proceedings so advantageous so that it is in principle advantageous to bring an action for the subjects of performance the non-performance of which is marginal in terms of general justice. The judiciary should have a subsidiary nature and should only be considered when other instruments fail to solve any violation of rights (an agreement, a composition, efforts to agree on payment in instalments, etc.). If in a certain segment of disputes, the judiciary is on the contrary deliberately used as the first instrument to resolve a dispute, which is the case for the vast majority of small claims disputes, then it indicates that an impermissible incentive mechanism of the litigation is applied - i.e. awarding inadequate costs.

10. The actual amount of awarded costs under the Decree is regarded by the Petitioner as inadequate, in relation to all small claims disputes and also in relation to disputes within the range from CZK 10,000 to approximately CZK 200,000 (hereinafter referred to as the "Small Claims") because only as for the amounts exceeding CZK 200,000 the costs amount to below 20% of the principal recovered and are reasonably adequate.

11. According to the Petitioner, the costs of proceedings awarded should not under any circumstances be inadequate in relation to the nature and value of the dispute. This means, among other things, that the awarded costs may not be grossly disproportionate to the required value of the dispute. Awarding inadequately high costs of proceedings is dominant among other things also as a penalty which is a condition that is impermissible within the rule of law. The prohibition of the punitive nature of the costs awarded results according to the Petitioner from two separate reasons.

12. A general principle of law, not limited to the criminal law, is applied, namely the principle that there must not be a penalty (punishment) without law; in the field of contractual relationships, penalties can be supported by the arrangements that are not contrary to law. The amount of costs imposed under the Decree on Reimbursement for Costs of Proceedings achieves a virtually punitive nature, which is impermissible. A decree, which is not any law, may not introduce a separate penalty system which would greatly exceed a civil law penalty imposed by law, which is penalty interest on late payments. The law - Civil Procedure Code - does not allow that the Decree on Reimbursement for Costs of Proceedings could establish a penalty imposing system.

13. According to the Petitioner, it is necessary to regard as problematic that the existing case-law tend to consider each claim past due as eligible for action (*actio nata*), regardless of whether the claimant has attempted to negotiate with the debtor or to resolve the dispute in any other manner. Pursuant to Section 2 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended (hereinafter the "Civil Procedure Code"), the courts have jurisdiction to resolve disputes, while a dispute means a dispute which has subject-matter and factual contents, not a mere existence of delay. The courts, however, decide on disputes regardless of whether their decision satisfies the requirement of subsidiarity, and often do not work as an entity resolving disputes, but as an entity serving claims. The role taken by the courts through the formalisation of judicial procedures should not in terms of the constitutional order

result in unnecessary, inadequate, and punitive consequences in the area of making decisions on the awarding of the costs of proceedings.

14. With regard to the above-mentioned, the Petitioner therefore considers a significant part of the prescriptive impact of the Decree as unconstitutional because it creates a generally inadequate effect burdening the entities in the manner inconsistent with the purpose of civil court proceedings and creates de facto an inadequate penalty. This is in itself contrary to the principle of proportionality, which is a general requirement for the rule of law under Article 1 of the Constitution, the principle of no penalty without law, and is also contrary to the purposes of civil proceedings as defined in Section 2 of the Civil Procedure Code.

15. Since the adoption of the contested Decree on Reimbursement for Costs of Proceedings, the structure of cases to be decided and the manner in which they are processed have changed according to the Petitioner. In the case of disputes concerning financial performance, a simplified manner of filing applications (electronic payment order) has been introduced, which allows automatic batch processing of a number of applications entered by the automatic system of processing actions as variables in the data sets of individual applications which are submitted to courts electronically after being marked by an electronic tag (or signature).

16. At the level of execution of such applications, the judiciary prefers the issue of (electronic) payment orders. If its issue fails, the court usually attempts to reach a decision without any hearing, while seeking the issue of a judgment for recognition. Only if this is not possible, the court usually orders a hearing at which it is possible to issue a default judgment, among other things. To prevent it effectively, the defendant must defend itself in a qualified manner, namely by lodging a protest, then by filing a defence against the action, not admitting the claim, and then by stating that it does not agree to waive the hearing. Moreover, the defendant must argue with the statement and arguments of the claimant. If the defendant is not able to perform these procedural steps, an enforcement order is issued against the defendant; when issuing the order, the court does not decide the dispute at issue and does not deal with the issues of law.

17. In many cases, the defendant pays the claim during the proceedings and the court then discontinues the proceedings, in which case the court also awards the costs of proceedings to the claimant.

18. In line with the increased complexity of legal and economic relations, a difficult traceability of all claims, and a decreasing cooperation between creditors and debtors, it is normal that the formally defined disputes do not comply with the parameters of the material dispute and only constitute the reminder service managed by the judiciary and actually charged in the form of awarded costs.

19. In the event that there is a hearing ordered, the party that has lost in a dispute faces decisions which according to the Petitioner "suffers often a somewhat simplified concept of justice" because in small claims disputes the court does not have to defend its position in appeal or other review proceedings.

20. From the global point of view, the judiciary has adapted, also due to the transformation of procedural law and the introduction of a number of new procedural tools, to the recovery of claims; when compared with the time when the Decree on Reimbursement for Costs of Proceedings was adopted in its first version, the vast majority of disputes are currently dealt with without any hearing and without the real production of evidence or resolution of disputes being necessary. If the Decree on Reimbursement for Costs of Proceedings has not adapted to this fact and defines the awarded costs identically for the case of issue of (electronic) payment orders and to the case when the hearing and the production of evidence are ordered, this situation is contrary to the principle of adequacy and the extent to which the costs are flat-rate reaches an impermissible simplification.

21. According to the Petitioner, the mentioned ways of terminating the proceedings constitute a totally different level of demands for legal services and the fact that the Decree on Reimbursement for Costs

of Proceedings ignores it creates inequality resulting in real obstacles to the access to justice. The attractiveness of undisputed claims which are easy to recover in bulk leads to the fact that the services focus on these claims and neglect disputes which in advance seem really questionable. The market in fact forces the advocacy to transform itself into the collection service, without being positively evaluated for thoroughly legal services.

22. According to the Petitioner, the extent of inadequacy of a fee in relation to the formal complexity of a dispute creates such extent of injustice which is not rationally justifiable. The state basically favours such behaviour of the parties exercising their rights, which allows them to use the state as a collection and recovery agency. Ultimately, this leads to a decline in law and its impermissible reduction to the collection relationship.

23. The specific form of the Decree on Reimbursement for Costs of Proceedings also violates the principle of adequacy, which is an integral part of the democratic rule of law within the meaning of Article 1 of the Constitution.

24. The Petitioner points out that although individual proceedings differ in their subject-matter and legal complexity of the dispute, the Decree in fact distinguishes neither these differences nor the number of acts to be carried out by a lawyer during the litigation, whether an action or a defence. Basically, such concept of law that seeks justice through a legal dialogue and legal arguments is disadvantaged, and on the other hand such legal activities which are factually and legally uncomplicated are favoured. In practice, the lawyers prefer disputes with the minimum number of acts and with simpler arguments, which however often neglect the need for the legal care for legally more complicated disputes, which leads to a general underestimation of legal arguments and focusing on the formalities of submissions which are important but not crucial.

25. The Petitioner considers as a very fitting expression of the impact of the Decree on Reimbursement for Costs of Proceedings the unifying opinion of the Supreme Court of 15 October 2008, file No. Cpjn 201/2008, according to which "when determining a fee for the representation by a lawyer or a notary the grounds for the procedure under the provisions of a special legal regulation on a non-contractual fee are not constituted by the circumstances that a lawyer made in the proceedings acts in the form of automated outputs and submissions, that the dispute concerns a low amount, that the case at issue is not legally complicated or demanding, that the proceedings were brief, that similar claims are exercised or that claims are exercised through a single action or other characteristics of the case, but only by specific (individual) circumstances of the case." Within this interpretation, the Petitioner completely rejects as impermissible the extent to which the costs are flat-rate, which is inherent and integrated in the whole prescriptive logic of the contested Decree.

26. As a specific and the most problematic form of abstraction from the formal demands of the dispute the Petitioner considers Section 12 of the contested Decree on Reimbursement for Costs of Proceedings that awards half the costs of the enforcement proceedings (compared to the trial proceedings). This rule is considered quite absurd: If in the case of disputes in trial proceedings it is not evident that the complexity of the dispute is not dependent on the height of the amount in dispute; in the case of enforcement proceedings this conclusion is quite evident. In enforcement proceedings, variables included in trial title are projected into a unified application that does not allow much of a creative contribution. The legal difficulty of filing an enforcement application is zero; such proceedings could be reduced to filling in a pre-printed form. The only matter which must be dealt with by the entitled person is the choice of an enforcement officer, which is not a matter of law according to the Petitioner, regardless of that the choice of an enforcement officer who *de facto* fulfils the role of court by one of the parties appears to be teetering on the edge of unconstitutionality.

27. If the formal and procedural reduction leads to a reduction of litigation to collection relationships, the material reduction according to the Petitioner reduces legal assistance to the mere administration of the dispute without an emphasis on the matter-of-fact manner of litigation. In this respect, the Decree is explicitly contrary to the Civil Procedure Code according to which the costs are to be awarded as

necessary for the effective enforcement and protection of rights (Section 142 (1) of the Civil Procedure Code). In the light of this legal rule, the contested Decree on Reimbursement for Costs of Proceedings cannot stand. Its concept negates any consideration of the effectiveness of legal representation, which is prescribed by law on the contrary. This ground of illegality thus builds on other grounds which lie in conflict with the constitutional order and law.

28. The Petitioner believes that the flat-rate costs themselves are not in conflict with the constitutional order (and law). On the other hand, if reasonably set, the flat-rate costs result in the rationalisation of processes regulated by them. Ideally, they can minimise the costs of simple litigations.

29. The original motive of the Decree on Reimbursement for Costs of Proceedings was according to the Petitioner the fact that a number of proceedings were unnecessarily extended for the reason of ineffective chaining of acts the number of which determined the amount of entitlement to the costs of proceedings. The introduction of flat-rate costs for the entire proceedings should remove the pressure on stretching the proceedings. However, the Petitioner regards the result of these efforts as questionable because the expected target has not been achieved in fact. In the course of time, the purpose of the acceleration of proceedings has been achieved through the joinder of proceedings and other procedural tools and the constant pressure on the judiciary and its efficiency. The basic legislative motive of the adoption of the regulation has therefore passed away according to the Petitioner.

30. In general, the Petitioner holds that if the extent of flat-rate costs had been set in order to ensure that the behaviour economically beneficial to the parties is also effective in terms of efficiency of the judiciary (including the material aspects of efficiency - i.e. maintaining and increasing the level of justice), the flat-rate costs could fulfil their purpose and, in the long term, reduce the overall financial demands for litigations. However, this was not achieved following the adoption of the contested Decree as the flat-rate costs include the elements which create a higher percentage rate of costs of small claims. Such element inevitably leads to the fragmentation of claims. If the author of the Decree intended to lighten the burden of the judiciary, it would have to motivate the parties to legal proceedings to join small claims by setting no or a purely operational (flat-rate expenditures) fee in the range of small claims, while only the joinder and achievement of a certain amount at issue would render the possibility of awarding the costs.

31. The Petitioner holds that the legislation that would be conforming both in terms of law and in terms of the constitutional order could be adopted. The Petitioner refers to foreign legislations which provide examples of flat-rate costs successfully set. In general, therefore, the Petitioner considers the regulation of similar phenomena through flat-rate costs as permissible, but in the form in which it appears in the contested regulation as impermissible in terms of considerations above.

32. The flat-rate costs being a prerequisite for awarding the costs for legal representation, regardless of the complexity of the dispute, result according to the Petitioner in filing a great number of applications for awarding the claims which are small and the administration of which entails minimum costs. If this disproportion in recoverability is long term, the market environment seeking profit adapts to these conditions and creates conditions for the creation of such claims, especially if the proceeds from such recovery are significantly disproportionate to the principal.

33. The market offers quite a lot of different services on the boundary between legal and illegal (usury) lending activities. Their parameters are now set not in order to burden the party to be affected with high interest but to burden the party with a high number of minor penalties, which in terms of substantive law gives the impression of adequacy and will not be classified as usury after being assessed by law enforcement authorities. When such penalties are recovered, each of them is then burdened with separately awarded costs of proceedings. A common phenomenon is also the sharing of claims which after being divided are assigned to different parties and can, therefore, be recovered separately with the multiplication of the awarded costs of proceedings.

34. The Petitioner regards as particularly alarming the recovery of excess fare in public transport, being set by law. Their upper level is set by law in order to ensure that the excess fare also covers the reasonable costs of its recovery. In the case of judicial enforcement, it is then a legally unidentifiable but an economically effective duplicity of the recovery of the same claim. Likewise, it seems doubtful if any claims are recovered by any public law bodies (municipality, district or regional authorities) hiring lawyers for this purpose. The Petitioner mentions that this controversial practice has been pointed out by the Constitutional Court also in its judgment, file No. II. ÚS 2396/09, of 13 August 2012 (available with other decisions quoted here at http://nalus.usoud.cz). Claims are frequently sold by the creditors at first for their nominal value, then in the next steps to private law entities for a higher value in order to recover especially the expected reimbursement for the costs of proceedings.

35. The above-described phenomena are largely unregulated within the society, are caused especially by the conditions set, and will not pass away until such conditions are changed. Although it appears that the number of small claims is restricted in advance, this is not the case and the market environment is capable of generating a substantially unlimited number of them.

36. One of the consequences of the thus set of rules is overloading the system of the civil judiciary with an extremely high number of applications, resulting in the recovery of small claims, with the only economic motive being the expected awarding of the entitlement to reimbursement for the costs of proceedings. A large number of disputes which are not factual disputes in the material sense but only a formal expression of an accounting event (often with a questionable substantive basis) then burden the judiciary to such an extent that the judiciary is no longer able to examine in detail the substantive requirements for the decisions issued (payment orders). Although many of the orders would not pass the test of hearing and possible counterarguments, if professional, but would stand the compulsory payment order procedure stage. That in itself in individual cases does not have to constitute a violation of the right to a fair trial, provided that the defendant does not exercise any remedy or lodge any appeal, but in terms of the function of the judiciary such situation is undesirable if it becomes a common phenomenon.

37. The Petitioner points out that a typical defendant must spend much more costs on his/her defence against the procedure under the standard-form actions than a claimant. With regard to the routine processing of applications, the probability of error is not excluded. In the proceedings based on standard-form actions, this results in a situation where the starting positions of the parties are significantly different, and this inequality is also increased by the inadequacy of the amount of reimbursed costs, which are actually smaller for the claimant (decision of the Constitutional Court, file No. II. ÚS 2396/09).

38. The Petitioner emphasises that the increasing number of enforcement proceedings in the Czech Republic is a serious social problem. There is not exact data available concerning the claims recovered, but some partial data maintained by the Chamber of Enforcement Officers of the Czech Republic can be used: In the period from 2001 to 2008, i.e. for 8 years, 1,933,650 enforcement proceedings were ordered; in single year 2009, 760,923 enforcement proceedings were ordered; in 2010, 701,900 enforcement proceedings were ordered; and in 2011, 936,219 enforcement proceedings were ordered. The numbers given above concern enforcement proceedings, but those had to be preceded by trial proceedings. From the above figures it is evident that although there is no doubt that the claimants are almost always legally represented, there is not a sufficient number of lawyers in the Czech Republic (as of October 2012, there were 9,526 lawyers in the in Czech Republic) to provide the same legal assistance to defendants so that they could be represented individually with respect to the number of cases. These figures alone demonstrate to what extent the actual provision of legal services in such an amount of cases is rather a virtual matter, which, however, establishes the actual obligations and responsibilities in the statements concerning the costs. Although it is impossible to provide actually individual legal services in the mentioned quantity (with the costs awarded however), it is equally impossible for those against whom the procedure is applied to defend themselves.

39. Although the enforcement proceedings appear to be separate from the trial enforcement, it should be emphasised that as far as the costs of enforcement are concerned half of the costs of the trial proceedings (pursuant to Section 12 of the contested Decree on Reimbursement for Costs of Proceedings) are incurred during the enforcement proceedings. The enforcement proceedings are also an indicator that the trial proceedings were previously conducted. The mentioned numbers of enforcement proceedings ordered must be compared with the number of enforcement proceedings which have been terminated (by discontinuance or recovery); in 2009, there were 178,233 enforcement proceedings, in 2010 there were 202,036 enforcement proceedings, and in 2011 there were 287,984 enforcement proceedings. The comparisons to the number of enforcement proceedings indicate that ten years after the formation of the system of enforcement officers no more than 30% of enforcement proceedings are finalised. According to the Petitioner, the claim recovery system where the trial proceedings should be the main indicator of reasonableness and permissibility includes a built-in system error that due to the high economic attractiveness of a particular type of proceedings constitutes not only a burden for the trial proceedings system but there is also a risk of an imbalance in the subsequent enforcement proceedings which would collapse due to the ever increasing number of enforcement proceedings pending and become difficult to predict for creditors and debtors.

40. In addition to that such manner of setting the rules constitutes a burden for the judiciary as a whole, in both the trial proceedings and the enforcement proceedings, it should be noted also that the claim recovery system which is extremely motivated by the costs as such results in far-reaching effects on the debt structure of the population.

41. A certain segment of the population is in fact disproportionately burdened by the cost debt the legitimacy of which is questionable. As a result, this leads to the fact that a certain part of the population, which is rather poor, is burdened with permanent enforcement proceedings. Low-income parts of the population are thus continuously maintained at the level of minimum income exempt from seizure, which systematically de-motivates them to make their own attempt to get out of their difficult economic situation because any partial success in getting a job or a higher salary is only followed by other enforcement. The economic concept of "debt trap" which expresses the point beyond which the indebtedness for an economic entity (family, individual) is already unsustainable acquires a new content in this respect only through the existence of the contested Decree that as a result of inadequately set of procedural rules can drastically multiply the amount of debt in a way that makes it one of the most important factors in reaching the point of a debt trap.

42. Therefore, the Petitioner considers the contested Decree a regulation that completely misses its original purpose and, therefore, does not meet the requirement for the rationality of a regulation in the light of the purpose intended by the legislature. The original purpose of the Decree was to simplify the judicial proceedings, to ensure the smooth administration of justice, and to set the rules that will be more or less fair without a difficult examination. The contested Decree on Reimbursement for Costs of Proceedings completely misses out on that purpose and now works as an instrument that motivates significantly to commence legal proceedings without previous attempts at conciliation, which denies the subsidiary function of the judiciary, produces a significant burden on the judiciary, which weakens its ability to individualise cases and identify substantive deficiencies in the phase of compulsory payment order procedure, further burdens significantly a significant segment of the population, and last but not least causes a condition where the recovery of debts is generally less predictable. The functions that were expected from the Decree have been achieved with other instruments (joinder of proceedings, etc.).

43. All these malfunctions and dysfunctions are very serious according to the Petitioner and goes totally against the original purpose of the Decree. Therefore, the Decree on Reimbursement for Costs of Proceedings should be annulled in its entirety. The Petitioner refers not only to the inadequate rates in a small amount, but also to the fact that the compulsory payment order procedure and other undisputed ways of settling a case are burdened by the same rate as other disputes. The simplification and flat-rate costs are integrated in the whole Decree and reach such an extent that, according to the

Petitioner, it is necessary to annul the whole Decree, if the cause of the unlawful state is to be removed.

44. It is true that under law it is possible to depart from the application of the Decree on Reimbursement for Costs of Proceedings (Section 150 of the Civil Procedure Code). The possibility of departure is then also given by the very fact that the court is not strictly bound by the Decree. The very principle of the possibility of departure is considered correct by the Petitioner, but this is only true if the need for departure actually concerns a minority of phenomena.

45. If the rule is that in small claims proceedings the enforcement of generic standard-form actions dominates, the amount of flat-rate costs thus determined is grossly beyond the statistically standard facts according to the Petitioner. The court can make use of flat-rate costs meaningfully only if it is certain that in most cases they correspond to the real conditions. If, on the other hand, the court had to justify, based on majority, any departure from the Decree and follow it only in exceptional cases, the unreasonable determination of the expected conditions would lack any sense in such cases.

46. The courts mostly give up on this derogation activities and apply without consideration the Decree the application of which does not need to be justified separately. Assumptions or beliefs, as set out under the law contrary to the usual facts, cannot logically fulfil their function because such procedure is also technically unsustainable.

47. Therefore, according to the Petitioner, it is not possible to argue that the court may depart from the Decree in an individual case. Formally speaking, it is possible, but it is not reasonable to require the courts to derogate from flat rates in most cases. In practice, this is not possible, among other reasons, because the vast majority of cases end in the compulsory payment order procedure where the court has neither a statement of the counterpart nor other document on which its consideration could be based. A specific equitable cost model can have many forms *de lege ferenda*. It should also reflect the method of settlement (a payment order, a judgment for recognition, a default judgment, a common judgment, etc.).

48. According to the Petitioner, it is then completely illogical that any proceedings that do not occupy an important position among various proceedings are stimulated by a compensation for the winning party to the dispute, which significantly exceeds the actual costs of that dispute. The Petitioner searches in vain for subject-matter or legal reasons that would justify the conclusion that the recovery of small claims is more important in terms of enhancing the legal awareness, maintaining the functionality of the state, and ensuring a fair trial than the defence of an accused in the criminal court proceedings, the defence against a bullying procedure of an administrative authority or the defence against a violation of the constitutionally guaranteed rights in the proceedings concerning a constitutional complaint. On the contrary, the Petitioner holds that this accessory inequality distorts the perception of law and the priorities of justice. In addition to inequality, in the Petitioner's point of view, it is to be noted that in terms of effects it is rather the poorer people who bear the consequences.

49. The Petitioner points out that in some cases the courts do not award the costs of proceedings to claimants at all and derogate from the Decree and justify such procedure properly by the reasons on the part of the claimant and consisting in the nature of the dispute. This procedure has generally stood the test of constitutionality, as it is evident from the resolution issued under file No. IV. ÚS 2777/11 of 27 December 2011. However, this procedure is not chosen by all the courts, although all the courts face the cases concerned. Also the judgment issued under file No. I. ÚS 3923/11 of 29 March 2012, greatly modifying the impact of the Decree on Reimbursement for Costs of Proceedings for the purpose of the so-called standard-form actions for small amounts, significantly affected the agenda of the Decree on Reimbursement for Costs of Proceedings. The Constitutional Court in fact created a cost limit for a particular type of disputes, constituted by the principal amount. However, even this principle is not accepted by the judicial practice unconditionally.

50. At present, some courts in some proceedings do not award the costs at all and such decisions stand the test of constitutionality. Other courts (a minority of them) follow the mentioned judgment, while others follow the Decree in its unchanged form. There is also a fourth decision-making model, namely a subsidiary application of the Lawyers' Tariff within the meaning of Section 151 (2) of the Civil Procedure Code. In addition, it is of course possible to combine all the methods and apply different criteria for the assessment of borderline cases. A common feature of the courts' decision-making practice is then non-uniformity and fragmentation.

51. The purpose of the Decree that legitimises the flat-rate costs should be predictability. If the Decree is so diversely modified by the judicial practice that results in entirely different decision outcomes in the cases otherwise comparable, it indicates a prescriptive invalidity of the Decree. The judiciary is not able to repeal, based on its practice, the Decree in its entirety, which could be possible (and perhaps even constitutionally conforming), but does so only in certain parts, inconsistently and diversely, which in turn creates a legal uncertainty.

52. The Petitioner expresses its belief that the contested Decree on Reimbursement for Costs of Proceedings is in conflict with law as well as with the constitutional order, that it violates all the principles of adequacy and the rational arrangement of relationships, and that it does not fulfil the purpose for which it has been adopted. Further, the Petitioner does not consider it to be technically or materially possible that the case-law would agree on the method of determining the costs which would be a uniform, flat-rate, predictable, and fair at the same time and would take into account all the circumstances that should be considered by the method. The judicial power cannot, by its nature, create, in a legal vacuum, complex prescriptive systems and substitute the role of legislature.

53. The Petitioner recommends that the contested Decree on Reimbursement for Costs of Proceedings should be annulled on the date of publication of the judgment in the Collection of Laws. Although the Petitioner is aware that at a general level it is more advisable to allow the legislature a certain period of time to prepare a new regulation, it is not necessary in this case, since after the annulment of the contested Decree on Reimbursement for Costs of Proceedings the Lawyers' Tariff will apply automatically due to the subsidiary application of Section 151 (2) of the Civil Procedure Code. Although the tariff has similar deficiencies, in many ways it is a less problematic regulation, among other reasons, because it takes into account the number of acts and, thus, also the complexity of proceedings, and in fact the standard-form or small claims or simple disputes are burdened by lower costs awarded under the tariff.

III.
Comment by the Ministry of Justice

54. The Ministry of Justice (hereinafter referred to as the "Ministry") in its comment for the Constitutional Court delivered on 25 February 2013 stated that Decree No. 484/2000 Coll. provides for the flat rates of fees for the representation of parties to proceedings by lawyers or notaries in civil court proceedings for the purpose of deciding on reimbursement for the costs of proceedings pursuant to Section 151 of the Civil Procedure Code. Before the adoption of Decree No. 484/2000 Coll., the awarded costs of legal representation in judicial proceedings were calculated based on Decree of Ministry of Justice No. 177/1996 Coll., on lawyers' fees and reimbursement to lawyers for legal services (Lawyers' Tariff), according to which the amount of the lawyers' fee depends on the number of acts of legal services carried out in the proceedings. The adoption of Decree No. 484/2000 Coll. responded to the experience with that the system of fees depending on the number of acts of legal services was the reason for delays in judicial proceedings (the more transactions, the higher the fee).

55. The Ministry admits that the flat-rate compensation provided for by Decree No. 484/2000 Coll. in fact does not reflect the expertise required by litigations and time demands for litigations. This is particularly the case in small claims proceedings (especially if they are filed on the basis of standard-form actions). Likewise, in the case of difficult long-standing disputes when several hearings are held and an extensive production of evidence is carried out, the complexity of the case, placing increased

demands on a lawyer, is not reflected in the amount of fee determined under Decree No. 484/2000 Coll. However, the Code of Civil Procedure provides for such situations by enabling the courts, if justified by the circumstances of the case, to proceed when determining reimbursement for the costs of legal representation under the Lawyers' Tariff in accordance with the part of the first sentence after the semicolon in Section 151 (2) of the Civil Procedure Code. The Constitutional Court itself has found this procedure correct in its judgment, file No. I. ÚS 3923/11, also noting therein that the awarded costs in the proceedings concerning the amount at a small claims level should not exceed the principal amount being recovered. According to the Ministry, the alleged violation of the principle of adequacy contested by the Petitioner cannot be seen in the unconstitutionality or unlawfulness of Decree No. 484/2000 Coll., but in that the courts often mechanically award reimbursement for the costs of legal representation pursuant to Decree No. 484/2000 Coll. and fail to take into account the specific circumstances of the case.

56. On the other hand, according to the Ministry it is not possible to ignore that if the court has a choice under the current legal situation whether to proceed when deciding on reimbursement for the costs of proceedings under Decree No. 484/2000 Coll. or in accordance with the part of the first sentence after the semicolon in Section 151 (2) of the Civil Procedure Code under the Lawyers' Tariff, or to use any of the corrective measures as provided for in Section 142 (1) or Section 150 of the Civil Procedure Code, it leads to different decisions of courts in similar cases. It is always necessary to insist on the requirement for the proper reasoning of the decision according to the facts of the case.

57. The Ministry mentions that it has recently taken a number of measures designed to eliminate the cases where reimbursement for the costs of proceedings awarded by the court exceed several times the amount of the recovered principal. These measures include an amendment to Section 3 (1) of Decree No. 484/2000 Coll. through Decree No. 64/2012 Coll., decreasing the rates of fees, especially if it is a small claim. The Ministry allegedly revised the amount of fee rates so that it allows for both the ratio to the amount of the claim itself and the costs incurred by individual parties to the proceedings.

58. The Ministry notes other newly-established institutions, such as a pre-trial demand under Section 142a of the Civil Procedure Code (as amended by Act No. 396/2012 Coll.), as a condition for awarding reimbursement for the costs of proceedings, aiming to give the debtor the last opportunity to pay the amount due and thus to avoid its judicial recovery, as well as covering the costs of proceedings. The amendment allows for the automatic joinder of enforcement proceedings conducted by the same enforcement officer against the same debtor in favour of the same creditor. Also enforcement proceedings conducted with more enforcement officers or enforcement proceedings in favour of more creditors will be possible to be joined and that will be made by the court based on the debtor's application, if individual amounts due do not exceed CZK 10,000 each.

59. The Ministry states that also Decree No. 484/2000 Coll. allows taking into account the demands of judicial proceedings. Pursuant to Section 18 (1) of the Decree, the court shall reduce the fee rate by 50% if the lawyer or notary has carried out only one act of legal services in the proceedings. Should the lawyer or notary not carry out any such act, he/she is not entitled to any fee. On the contrary, according to Section 18 (2), the court may increase the fee rate by 100% if the lawyer or notary represented a party to the proceedings in an extremely difficult or factually complicated case (unless it is a rate determined by percentage of the subject of the proceedings).

60. The Ministry rejects the Petitioner's claim that the amount of the costs of proceedings awarded pursuant to Decree No. 484/2000 Coll. has a virtually punitive nature. Allegedly, it is not a punitive mechanism but an instrument to protect those who were not able to exercise their right out of court and had to bear significant costs to exercise their right by bringing an action. The failure to provide reimbursement for the costs of proceedings could thus be used mainly as a punitive measure against creditors.

61. The Ministry states that the flat-rate costs are not uncommon in the context of European legal culture. On the contrary, there could even be traced a trend towards the use of flat-rate costs within the

European Union. For example, it can be referred to the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, which tries to make the costs of the recovery of claims flat-rate by providing for that the creditor is entitled to obtain from the debtor at least a fixed amount of EUR 40 which constitutes for the creditor reimbursement for its own costs connected with the recovery.

62. If Decree No. 484/2000 Coll. was annulled as the Petitioner requests, this would allegedly restore the condition existing before 2001; judicial proceedings would again be extended as a result of unnecessary acts of legal services carried out by lawyers, e.g. the submission of repeated statements of the same or a very similar content.

63. According to the Ministry, the courts should use the general corrective measure provided for in Section 142 (1) of the Civil Procedure Code and consisting in awarding only the costs necessary for the effective enforcement and protection of rights. Another provision giving the court the option not to award reimbursement for the costs of legal representation in the required amount even after the annulment of Decree No. 484/2000 Coll. would be Section 150 of the Civil Procedure Code according to which the court does not have to award reimbursement for the costs of proceedings, in whole or in part, if there are reasons worthy of special consideration.

64. The Ministry admits that the argumentation concerning the possibility of applying the corrective measures as formulated in Section 142 (1) and Section 150 of the Civil Procedure Code is not completely sound. This is caused by the fact that the construction of the meanings of the phrases "effectiveness of the enforcement and protection of rights" and "reasons worthy of special consideration" is upon the discretion of courts. It is therefore very likely that the practice of individual courts in this area varies.

65. Irregularities in awarding reimbursement for the costs can be met especially in the enforcement proceedings. Although an enforcement officer plays partially a role of a court of first instance in the enforcement proceedings, the real position of the enforcement officer is not independent. The enforcement officer is chosen for the purpose of the exercise of an enforcement order by the beneficiary or usually its legal representative. Proceedings are then allocated to the enforcement officer by the beneficiary's legal representative whose proceeds are then determined by the enforcement officer in the order to pay the enforcement costs within the meaning of Decree No. 484/2000 Coll. This fact, namely the dependence of the allocated cases to individual enforcement officers on the choice of the legal representatives of beneficiaries, could therefore lead to the fact that the enforcement officers would award reimbursement for the costs of proceedings in the entire amount as required also for the apparently unnecessary acts, such as inspecting the file without a relevant reason, for calls, applications, and motions not prescribed by procedural rules, etc.

66. In connection with the decision-making on reimbursement for the costs of proceedings in the matters of the enforcement of a decision, it is also necessary according to the Ministry to point to the fact that Section 12 (1) of Decree No. 484/2000 Coll. provides for that in such matters the rate of fee, in the case of recovered cash amounts, is 50% of the rate of fee determined under Section 3 (1) of Decree No. 484/2000 Coll., however at least CZK 500. Should the Decree be annulled, a sharp increase in the costs in the matters of the enforcement of a decision might allegedly be expected.

67. Finally, the Ministry states that due to the existence of the flat-rate amount of reimbursement for the costs of legal representation pursuant to Decree No. 484/2000 Coll. any party to judicial proceedings can estimate, in advance and with a high degree of accuracy, the amount of the costs of proceedings to be paid by that party to the other party should the former fail to succeed in the judicial proceedings. On the contrary, when applying the Lawyers' Tariff, i.e. when deriving the amount of reimbursement for the costs of legal representation from the number of acts of legal services, such party to the proceedings could not make such estimate at the beginning of the judicial proceedings, because it is never clear in advance how many hearings will be ordered in a particular case or how many submissions will be made by the counterparty on the merits. Even the decision on

reimbursement for the costs of proceedings should be predictable, which rather supports maintaining Decree No. 484/2000 Coll. in force.

68. The Ministry notes that the annulment of Decree No. 484/2000 Coll. will not attain the objectives pursued by the Petitioner. Although it will increase the predictability of judicial decisions in terms of the legal regulation governing awarding reimbursement for the costs, as the respective decision-making will only be regulated by Decree No. 177/1996 Coll., on lawyers' fees and reimbursement to lawyers for legal services (Lawyers' Tariff), as amended; however, based on the current correction by the decisions of the Constitutional Court, the fee itself will not be predictable as the cancellation of the fee limits and a lack of clarity in the number of acts in the proceedings may constitute the same legal uncertainty. On the contrary, it can apparently also be noted that if at the same time the Civil Procedure Code is not amended in terms of positive law, the fee will be increased in the phase of the proceedings where the legislature previously enacted only half the rate.

69. When assessing the petition in terms of necessity, the Ministry concludes that although the decision-making on the costs of proceedings was excessive in the past, especially in the cases of standard-form actions for small amounts, the Ministry of Justice responded to this in the past and has taken some steps to remedy the situation within the existing legal provisions. An amendment to the Civil Procedure Code by Act No. 396/2012 Coll. has introduced pre-trial demands and the limits of costs in the enforcement of a decision and an amendment to the Decree on Reimbursement for Costs of Proceedings by Decree No. 64/2012 Coll. has reduced the absolute amounts of the costs of proceedings concerning monetary disputes; the new legislation has brought a more detailed breakdown of fee rates with an absolute reduction in specific amounts, and thus the opportunity for a more responsive decision-making especially in small claims disputes.

70. As to the assessment of the petition in terms of adequacy, i.e. the assessment in terms of loss caused with respect to the purpose, it is possible to agree with the Petitioner that excessive reimbursement for the costs should not be a punitive mechanism for the defendant. Although the defendant must not incur inadequate losses as a result of increasing the costs excessively, this right of the defendant must be well balanced and compared to the right of the claimant to legal protection and the possibility to enforce competently its claim against the defendant. The fact that the defendant is in default of payment of its debt cannot be at the expense of the claimant who seeks to enforce its rights. The current regulation is said to be balanced and fulfilling the principle that negative consequences must not exceed positive ones, as it reflects both the right of creditor to claim compensation for the costs incurred and sufficiently protects the debtors against any disproportionate increase in reimbursement for the costs of proceedings as a result of the acts carried out by the legal representative of the counterparty.

71. The Ministry concludes that determining the amount of reimbursement for the costs of legal representation under Decree No. 484/2000 Coll. has both positive and negative aspects; the Decree is allegedly neither unconstitutional nor illegal.

IV.
Rejoinder of the Petitioner

72. The Petitioner commented on the comment from the Ministry in its notification to the Constitutional Court delivered on 11 March 2013, stating:

73. The Ministry in its comment emphasises that courts should in each case individualise their decisions and specifies the legal ways to do so. As to this, the Petitioner points out that in most cases this is not the case because the number of cases considered and routinely processed do not allow that, despite the fact that the individualisation would require in simple disputes the complementary evidence to prove cost issues, the parties' submissions on that issue, and proving the conditions on both sides of the dispute, which would significantly exceed the importance of the original trivial

dispute. According to the Petitioner, the flat-rate costs incorrectly set could be removed but not overcome by means of a number of individual decisions creating a different standard.

74. The Petitioner considers it questionable if the Ministry the objective of which is to ensure meaningful and fair flat-rate costs justifies maintaining them (if its rationality, fairness, and logic are challenged) by the fact that the deficiencies are not a problem because it is possible to depart from the regulation. Such attitude would in fact lead to the general conclusion that there are no unlawful decrees because the court can always depart from them as it is not bound by the decree. The arguments of the Ministry remain only at the level of not binding considerations as to how the courts could proceed alternatively; it would be more useful in the opinion of the Petitioner to incorporate in the text of the contested Decree a prescriptive rule on how to proceed if it does not happen in practice.

75. Regarding the recent changes in the contested Decree stated by the Ministry as a step mitigating the negative impacts and taking into account their minimalist nature, the Petitioner considers them extremely inadequate. Allegedly, it is clear enough from the graphs being part of the petition on the merits.

76. The Petitioner is of the opinion that if there is something problematic in the present Decree it is the fact that it does not distinguish disputes based on their typology. In fact, the Ministry defends a model that responds in the same way to a number of different situations. While the courts can individualise their decision-making policy, they do need different tariff rates for different types of proceedings, acts, or cases.

77. As for the other support measures which should eliminate the effects caused by the prescriptive impact of the Decree to which the Department refers, the Petitioner points out that a pre-trial demand is insufficient, especially considering the fact that its implementation has nothing to do with the basic constitutional problem consisting in a gross disproportion between the costs incurred and those awarded. A pre-trial demand may slightly reduce the number of people who will be affected by an incorrect regulation, but it does not change the nature of the impact. According to the Petitioner, a small reduction in the number of people who are affected by the unconstitutional legal regulation does not remedy in any case the unconstitutional nature of that regulation. In addition, it should be added that the time limit for a pre-trial demand appear to be short. Assuming that a pre-trial demand will contribute to reducing the negative consequences of the contested Decree appears to be a pure speculation according to the Petitioner.

78. Also the joinder of enforcement proceedings seems to the Petitioner as insufficient as they can be easily circumvented by assigning the claims with the identical creditor, debtor, and cause to various entities that recover them separately, which is now standard practice that prevents the joinder of applications. In addition, both support mechanisms (pre-trial demand, joinder of enforcement proceedings) remove the effects of the unjust system in a very imperfect nature. Such solutions may delay the problem, but will not remedy it.

79. The possibility of reducing the fee rate in accordance with Section 18 of the contested Decree, as mentioned by the Ministry as a prescriptive corrective measure enabling taking into account the complexity or simplicity of a dispute, is according to the Petitioner completely ignored in practice, among other things, because it is conceived as an exception to the rule and not the rule itself.

80. The Petitioner states that it does not renounce flat-rate costs as such but campaigns against their specific form. The Petitioner even refers to adequate forms of flat-rate costs abroad.

81. The Petitioner reiterates that its petition is, as far as the prayer for relief is concerned, directed against the current wording of the Decree, but it is not directed against flat-rate costs as such in general. The petition certainly does not imply that the annulment of the Decree would lead to a continued state without regulation, but it expects that the Ministry will adopt a new decree that will reflect the requirements of the Constitutional Court. The subject of proceedings before the

Constitutional Court is not, and logically cannot even be, the discussion concerning the ideal form of legislation. This is always a task of the legislature. The proceedings only examine whether the current legislation does not exceed the limit set by the superior law. If the Constitutional Court annuls a regulation, such regulation must usually be replaced by the legislature, with the reasons for the annulment being for the legislature an inspiration and a guide or *memento derogandi* constituting the limits for further legislative considerations. It is upon the discretion of the Ministry whether it will choose after the annulment of the Decree to adopt a completely new decree, to change it partially or, in cooperation with the legislature, to combine the tariff and a decree or to set limits concerning judicial proceedings for the tariff through a decree.

82. The Petitioner emphasises that the annulment of the Decree will not and cannot fulfil the objective of the elimination of an unconstitutional condition. This also applies to any return to the application of the Lawyers' Tariff, which would have no effect on the enforcement proceedings for which the current tariff presents the same or a greater burden as the current Decree. The application of the Lawyers' Tariff may only appear as a temporary emergency measure. Should the Constitutional Court find the Decree unconstitutional or unlawful, it will be necessary to create actively a new system, which will be a task of the Ministry.

83. The Petitioner in a certain way understands the sentiment of the legislature arising from the fact that the legislation created by the legislature does not fulfil its purpose and objective to the full extent, including the possibility of exceptions that are neglected in practice. If a certain regulation does not work, even though it complies with the formal prerequisites for that, it is necessary based on the logic of its sociological effect to look for the functional legality of the impacts of this regulation and to respond to those reasonably. The Petitioner insists on its petition.

V.
Comment by the Public Defender of Rights

84. At the request of the Constitutional Court, the Public Defender of Rights stated that it waived its right to intervene in the proceedings pursuant to Section 69 (3) of the Act on the Constitutional Court, but submitted its comment within the meaning of Section 48 (2) of Act No. 182/1993 Coll.

85. The Public Defender of Rights notes that with regard to the findings obtained in its activities it repeatedly criticised the practice of some lawyers and enforcement officers consisting in unauthorised claiming and awarding the beneficiary's costs in the enforcement proceedings in the form of fees pursuant to Section 12 (2) of the Decree on Reimbursement for Costs of Proceedings, although such lawyers did not carry out any acts in the realisation or discontinuance of the enforcement proceedings, but only took over the case and applied for the enforcement proceedings to be ordered. The Public Defender of Rights agrees with the arguments put forward by the Petitioner for the annulment of the Decree on Reimbursement for Costs of Proceedings.

VI.
Waiver of hearing

86. Pursuant to Section 44 of the Act on the Constitutional Court, the Constitutional Court shall order a hearing if such hearing is expected to clarify the matter of the case. The hearing shall always be ordered by the Constitutional Court if so provided by the mentioned Act or if the evidence is produced before the Constitutional Court. In the present case, the Constitutional Court holds that the hearing cannot be expected to clarify the matter and, therefore, waives the hearing.

VII.
Locus standi of the Petitioner

87. The Constitutional Court notes that the Petitioner complies with the requirements of Section 64 (2) (b) of the Act on the Constitutional Court and is entitled to file a petition to annul other legal regulation or an individual provision thereof under Article 87 (1) (b) of the Constitution.

VIII.
Constitutional conformity of the legislative process

88. In accordance with Section 68 (2) of Act No. 182/1993 Coll., on the Constitutional Court, as amended by Act No. 48/2002 Coll., the Constitutional Court in its decision-making shall assess the contents of an act or other legal regulation in terms of their compliance with the constitutional acts, as well as with other acts in the case of other legal regulations, and establish whether such acts or regulations have been passed and published within the limits of competence set by the Constitution and in a constitutionally prescribed manner. The Constitutional Court finds that the contested legal regulation has been passed in a constitutionally prescribed manner and published in accordance with the Constitution and in accordance with Act No. 309/1999 Coll., on the Collection of Laws and the Collection of International Treaties.

89. Article 79 (3) of the Constitution provides that if they are so empowered by statute, the ministries may issue regulations on the basis of and within the bounds of that statute. Contested Decree No. 484/2000 Coll. was issued by the Ministry of Justice pursuant to the statutory authority as set out in Section 374a (c) of Act No. 99/1963 Coll., the Civil Procedure Code, as amended.

90. The contested Decree was published in Chapter No. 140/2000 of the Collection of Laws on 29 December 2000 and came into effect on 1 January 2001. The Decree has been amended by Decree No. 49/2001 Coll., Decree No. 110/2004 Coll., Decree No. 617/2004 Coll., Decree No. 277/2006 Coll., and Decree No. 64/2012 Coll.

IX.
Assessment by the Constitutional Court

91. The Constitutional Court has concluded that contested Decree No. 484/2000 Coll. is contrary to the constitutional order and law.

92. According to the explanatory memorandum concerning Act No. 30/2000 Coll., amending Act No. 99/1963 Coll., the Civil Procedure Code, as amended, and other acts, the purpose of Decree No. 484/2000 Coll. should have been to simplify the calculation of a fee for the representation in civil court proceedings and to eliminate delays caused by the parties to the proceedings in order to achieve a higher fee for the legal representation as a result of carrying out more acts of legal services. However, the Decree on Reimbursement for Costs of Proceedings has resulted in serious negative consequences, violating the fundamental rights and causing dysfunctions of the justice system.

93. In contrast to the Lawyers' Tariff (Decree No. 177/1996 Coll., as amended) under which the amount of fee and the amount of the costs of legal representation are derived from the number of acts of legal services carried out in the case, Decree No. 484/2000 Coll., that has been contested, has introduced the determination of the costs of legal representation based on the principle of flat-rate fees for the representation in proceedings. The Decree on Reimbursement for Costs of Proceedings provides for the flat rates of the amount of fee, which does not allow distinguishing the complexity of the case, time demands, the number of acts of legal services, as well as the way the judicial proceedings terminated (an electronic payment order, a judgment for recognition, and a default judgment). The flat-rate costs thus completely ignore the subject-matter and time demands for litigations or the effectiveness of the enforcement of rights or defending claims.

94. The contested Decree motivates the parties to civil-law relationships - creditors to conduct litigations even in the cases where the subject of dispute is of a negligible value. This is done with a focus on the profit as the claimant expects that the amount of reimbursement for the costs of

proceedings will be awarded by the court pursuant to Decree No. 484/2000 Coll., while the amount of reimbursement for the costs of proceedings will be higher than the costs actually expended and the difference will bring the business profit for the winning party. The awarded costs are so high that in principle it is advantageous to sue also for a negligible value.

95. The number of such litigations conducted, and motivated by the prospect of easy profits, have increased enormously in recent years and form a considerable portion of civil cases at courts. This leads to the excessive capacity loading of the judicial system and the growth of expenses incurred from the state budget for the operation of the judiciary. The handling of this type of agenda can easily cause delays in proceedings in other cases the subjects of which are much more important issues. According to Article 90 of the Constitution of the Czech Republic, "courts are called upon above all to provide the protection of rights in the legally prescribed manner". The court litigations of this type, designed primarily not to seek the protection of the rights but as commercial and business activities producing profits, appear to be teetering on the very edge of the abuse of rights. The prohibition of abuse of rights is recognised as one of the basic principles of law and follows from the constitutionally established concept of the rule of law (cf. the Preamble of the Constitution).

96. In addition, it can be said that such relatively autonomous system of the recovery of claims working in the mentioned manner raises socially undesirable consequences - resulting in an impoverishment of a significant part of the population. A statistically significant part of the population with low incomes is unable to pay the costs imposed by the courts and finds itself in serious livelihood difficulties as a result of the subsequent enforcement connected with other costs.

97. The costs of legal representation calculated based on the Decree on Reimbursement for Costs of Proceedings inadequately burden the losing party to the proceedings, especially in situations where the amount in dispute is low, especially at the small claims level. Reimbursement for costs awarded is clearly inadequate in relation to the nature and content of the dispute. Enforcing the civil obligations in such cases is a marginal issue in terms of general justice, with the interest of the creditor in obtaining profits from the litigation being at the forefront of the litigation.

98. The described phenomenon occurs especially in the following types of civil disputes:

- Proceedings in which an appeal against a trial court's judgment is not permissible (proceedings in small claims disputes);
- Disputes initiated by means of a standard-form action (with individual actions differing, in principle, only in the details concerning the defendant and the claimed amount);
- Claims from contracts where one of the parties thereto is a consumer; and
- Contractual relationships in which a consumer is effectively excluded from the opportunity to negotiate a civil contract with a different content (typically, contracts for transportation, the supply of heat and other utilities, a consumer credit, a current account, information services, electronic communications, insurance, a regulatory fee under Act No. 48/1997 Coll., on public health insurance and on amendments to related acts, as amended; cf. the judgment of the Constitutional Court, file No. I. ÚS 3923/11).

99. In the real social environment, there has emerged a new kind of business consisting especially in trading in small claims. The claims are assigned and bought up by specialised companies engaged in the recovery of claims and claims are traded. A monetary claim is recovered by other than the original creditor; the claimant expects that the amount of reimbursement for the costs of proceedings will be awarded by the court in accordance with Decree No. 484/2000 Coll.

100. The profits of such businesses are given not only by differences in prices in trading in claims but are multiplied by flat-rate reimbursement for the costs of judicial proceedings, especially consisting in inadequate lawyers' fees for representing the winning claimant. The costs awarded in such cases significantly exceed the costs actually incurred, necessary for the effective enforcement and protection of rights. A unique system of claims recovery deliberately producing excessive costs of judicial

proceedings has been created. This system affects or liquidates the losing debtors and, on the other hand, provides significant benefits to persons who are involved in the enforcement and recovery of mainly small claims and recovery of the related costs of proceedings.

101. A particularly undesirable situation occurs in the area of public services financed from public budgets (health care, public transport, education, etc.). The claims are recovered by public-law entities (state, municipality, district, and region) that also hire lawyers for this purpose frequently. The consequences of losing are then far more burdensome for the debtors than if the claim is recovered by the state or a municipality directly through their employees because the costs of proceedings are increased by the lawyer's fees.

102. The flat-rate lawyers' fees completely ignore the subject-matter complexity of the dispute, the number of acts carried out in the case, and time demands for and the effectiveness of the enforcement of rights or defending claims. The contested Decree does not take into account the manner of the termination of the case either. There can also be mentioned an undesirable situation when the flat-rate fee awarded is on the contrary inadequately low because the nature of the specific dispute requires a significantly large number of demanding tasks.

103. The costs awarded regularly come into a clear disproportion to the sued value of the dispute. The losing party to the proceedings thus faces sanctions, while the amount of costs imposed is contrary to the principle of the proportionality of sanctions. *De facto*, this leads to imposing sanctions without law. The Decree on Reimbursement for Costs of Proceedings is thus in conflict with Article 4 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter"), which provides for that duties may be imposed only on the basis of and within the bounds of law and only while respecting the fundamental rights and freedoms. The costs awarded should not be inadequate in relation to the nature and value of the dispute.

104. The Constitutional Court is aware that the current legal situation allows courts to depart from the Decree on Reimbursement for Costs of Proceedings. A judge has the option not to award reimbursement for the costs or to award only reimbursement for reasonably incurred costs (Section 142 (1) of the Civil Procedure Code). In a particular case, a judge may also take into account the reasons worthy of special consideration under Section 150 of the Civil Procedure Code. Also the case-law, including the case-law of the Constitutional Court, provides a relatively wide range of options for decision-making. However, the past experience shows that the application of these legal options by courts is inconsistent and unpredictable. This also weakens the principle of predictability of court decisions and the principle of legal certainty.

105. The Decree on Reimbursement for Costs of Proceedings is explicitly contrary to the Civil Procedure Code according to which the costs are to be awarded as necessary for the effective enforcement and protection of rights (Section 142 (1) of the Civil Procedure Code).

106. Since any departure from the Decree must be justified in a court decision, this increases the amount of work involved and formal complexity of court decisions, thereby overloading the courts and increasing the length of judicial proceedings. The need to justify comprehensively any departure from the Decree also discourages judges to apply those alternative methods.

107. The existing case-law of the Constitutional Court suggests that the contested Decree does not provide the adequate legislation in this area and confirms the need for the adoption of a new legal regulation, taking into account the decision of the Constitutional Court.

X.
Obiter dictum

108. Without anticipating any future legislation, the Constitutional Court expects that it will better reflect the peculiarities of individual cases. The criteria for determining the amount of reimbursement

should be included in the Decree itself. The amount of fee should reflect the principle of proportionality and should also be adequate in relation to the amount of the sum being recovered. This is all the more important when it comes to disputes concerning small claims in which an appeal against a judgment of trial court is not permissible and the decision is therefore not subject to an instance review.

109. The Constitutional Court wishes to recall some principles formulated in its previous case-law, which should also be taken into account by the future legislation.

110. In its judgment file No. I. ÚS 3923/11, the Constitutional Court considered the issue of reimbursement for the costs of proceedings and lawyers' fees in the case of standard-form actions for small amounts. The Constitutional Court states that also in the proceedings for an amount of up to CZK 10,000 the decision-making of courts on reimbursement for the costs of proceedings must follow the principle of success in the case (Section 142 (1) of the Civil Procedure Code). The claimant winning a dispute entirely is usually entitled to reimbursement for the costs of proceedings. However, this does not mean that the court decides on reimbursement "mechanically". On the contrary, it must consider whether there exist other relevant circumstances having a substantial effect on the awarding or denial of reimbursement for the costs reasonably incurred and the manner of determining it applied by the court (see the sentence before the semicolon of Section 151 (2) of the Civil Procedure Code and the exception to that as mentioned in the sentence after the semicolon). In the mentioned judgment, the Constitutional Court further states that if the ordinary courts when deciding on reimbursement for the costs of proceedings choose an exceptional procedure in accordance with law, complying with the principle of success in the case, and sufficiently justify a statutory exemption, then there can be no objections in terms of the protection of the rights and freedoms guaranteed by the constitutional order.

111. In the mentioned judgment, the Constitutional Court pointed out that it had to unify the case-law of ordinary courts through its judgment, as in small claims cases there is no other authority which could make this in a binding manner in terms of statements on reimbursement for the costs of proceedings. In such proceedings initiated by a standard-form action, a claim arising from a contract or any other legal reason is applied against a consumer who is effectively excluded from the opportunity to negotiate different terms and conditions, then with regard to the need to observe the principle of proportionality between the amount recovered and the amount of reimbursement for costs it is fair if the amount of fee for the representation of the claimant by a lawyer is determined in the amount usually not exceeding one times the principal being recovered.

112. Similarly, in judgment file No. ÚS 988/12 of 25 July 2012 the Constitutional Court states that the rule according to which the winning party to the proceedings can be awarded reimbursement for only the costs reasonably incurred shall apply to any costs, including the costs of representation by a lawyer (a fee for representation, flat-rate reimbursement for cash expenses, and reimbursement for value added tax). Further, the Constitutional Court states that, within the meaning of Section 142 (1) of the Civil Procedure Code, only those costs which had to be necessarily expended by a party to the proceedings in order to defend properly its violated or endangered right in court may be considered as the costs reasonably incurred. The costs associated with the representation by a lawyer usually correspond to this definition. This rule, however, cannot be attributed an absolute and unconditional nature; there may even occur situations where the costs connected with the representation by a lawyer cannot be regarded as necessary for the effective enforcement and protection of rights in courts. That is especially the case when the right to be represented by a lawyer is abused."

113. In its judgment file No. I. ÚS 2929/07 of 9 October 2008 (N 167/51 SbNU 65), the Constitutional Court states that if the state has at its disposal in order to protect its legal interests corresponding organisational units, financially and personally secured from the state budget, there is no reason to transfer the exercise of its rights and obligations in this area to a private entity, namely a lawyer in that reviewed case. As it is clear from the reasoning of the judgment contested by the constitutional complaint, the court justified its statement on reimbursement for the costs of proceedings only by reference to Section 224 (1) and Section 142 (1) of the Civil Procedure Code. The ordinary court did

not address the issue whether these costs are actually necessary for the effective enforcement and protection of rights. Thus, its decision has been burdened by a defect having a constitutional aspect, consisting in a breach of Article 36 (1) of the Charter.

114. In its judgment file No. IV. ÚS 2513/09 of 2 February 2010 (N 17/56 SbNU 169), the Constitutional Court refers to the judgment of the Constitutional Court file No. I. ÚS 2929/07 and states that it is well known that in order to administer the respective legal acts the central public administration authorities have at their disposal the relevant legal (legislative) departments employing a sufficient number of professionals who are able to ensure the protection of interests of the Czech Republic before the courts. According to the opinion of the Constitutional Court expressed in the cited judgment, the defendant did not have to be represented by a lawyer under the given circumstances, albeit only in the appellate proceedings. If this happened, the complainant cannot be under this situation reasonably asked to reimburse the defendant for the costs of proceedings thus incurred, as these costs cannot be considered as the "costs necessary for the effective enforcement and protection of rights" within the meaning of Section 142 (1) of the Civil Procedure Code. According to the findings of the Constitutional Court, the ordinary court did not consider in its decision the above-mentioned issues and justified its statement on reimbursement for the costs of proceedings only by reference to Section 224 (1) and Section 142 (1) of the Civil Procedure Code. The ordinary court did not address the issue whether these costs are actually necessary for the effective enforcement and protection of rights. The Constitutional Court has found in this fact a defect having a constitutional aspect, consisting in a breach of Article 36 (1) of the Charter.

115. In its judgments file No. IV. ÚS 3243/09 of 2 March 2010 (N 38/56 SbNU 449) and file No. III. ÚS 1180/10 of 14 September 2010 (N 194/58 SbNU 715), the Constitutional Court notes that if the state has at its disposal, in order to protect its legal interests, corresponding organisational units, financially and personally secured from the state budget, there is no reason to transfer the exercise of its rights and obligations in this area to a private entity, namely a lawyer in that reviewed case; and if it still does so, then there is no reason to reimburse such lawyer for such costs as those reasonably incurred. If the court deciding on the appeal on point of law ruled on reimbursement for the costs of proceedings only with reference to the principle of success, while not addressing the issue whether the costs of representation by a lawyer incurred by a party to the proceedings - state were reasonably incurred, it has committed a violation of the right to a fair trial.

116. In its judgment file No. II. ÚS 2396/09, the Constitutional Court concludes that the statutory cities and their districts might be expected to have at their disposal sufficient human resources and material equipment to be able to defend competently their decisions, rights and interests, without having to use the legal aid of lawyers. If the contrary is not proved in the respective proceedings, the costs of representation by a lawyer are not reasonably incurred.

117. This is not to argue categorically that any representation of the state by a lawyer is always ineffective and reimbursement for the costs of legal representation cannot ever be awarded to the state. In exceptional circumstances, the representation of the state by a lawyer constitutes the effective enforcement and protection of rights. In its resolution file No. III. ÚS 2428/10 of 31 March 2011, the Constitutional Court points out that in each specific case where the state is represented in the specific proceedings by a ministry as the competent organisational unit and as one of the central authorities, it is necessary to consider according to the circumstances of such case whether the competent organisational unit of the state is able to defend itself in the given dispute (especially if it acts as a defendant) effectively using its own lawyers, or whether the dispute is so specific that it requires for the effective defence and the winning outcome of the dispute for the organisational unit of the state - and ultimately also for the Czech Republic - that the Czech Republic be represented by lawyers. With the generally promoted trend towards the overall effectiveness and efficiency of the activities of the state administration, the internal personnel cannot be oversized so as to cover all possible areas of law in which the state acts as a party to judicial proceedings. The state cannot be denied the right to be represented in court by a lawyer with regard to a specific nature of the subject of the proceedings; the costs thus incurred cannot automatically be regarded as unreasonable, but in each case it is necessary

to consider whether or not the costs are necessary and needed for the effective enforcement and protection of rights.

118. The issue of reimbursement for the costs of proceedings is significantly regulated by the judgment of the Constitutional Court, file No. I. ÚS 988/12, containing two legal phrases:

"I. The rule according to which the winning party to the proceedings can be awarded reimbursement for only the costs reasonably incurred shall apply to any costs, including the costs of representation by a lawyer (a fee for representation, flat-rate reimbursement for cash expenses, and reimbursement for value added tax).

II. Within the meaning of Section 142 (1) of the Civil Procedure Code, only those costs which had to be necessarily expended by a party to the proceedings in order to defend properly its violated or endangered right in court may be considered as the costs reasonably incurred. The costs associated with the representation by a lawyer usually correspond to this definition. This rule, however, cannot be attributed an absolute and unconditional nature; there may even occur situations where the costs connected with the representation by a lawyer cannot be regarded as necessary for the effective enforcement and protection of rights in courts. That is especially the case when the right to be represented by a lawyer is abused."

119. From the above it is clear that under the current situation, the Constitutional Court, the decisions of which are to fill the gaps in situations not regulated by Decree No. 484/2000 Coll., was forced to assume the task of the unification of the case-law of ordinary courts. However, it is not the role of the Constitutional Court in principle. A new legal regulation replacing the current Decree on Reimbursement for Costs of Proceedings should be considered as an adequate solution.

XI.
Facit

120. In view of the foregoing, the Constitutional Court has come to the conclusion that the contested Decree on Reimbursement for Costs of Proceedings is in conflict not only with Section 142 (1) of the Civil Procedure Code providing for the effectiveness of the costs incurred as a criterion of awarding reimbursement for the costs of proceedings, but also with Article 4 (1) of the Charter providing for that any duties may be imposed only on the basis of and within the bounds of law and only while respecting the fundamental rights and freedoms.

121. Although the above-mentioned objections of illegality and unconstitutionality relate mainly to Section 3 (1) and Section 12 of the contested Decree, the Constitutional Court has come to the conclusion that it is necessary to annul the Decree in its entirety because individual provisions of the Decree are interconnected.

122. In summarising the above, the Constitutional Court has found that the contested Decree is contrary not only to law but also to the constitutional order of the Czech Republic and, therefore, has annulled the contested Decree under Section 70 (1) of Act No. 182/1993 Coll., on the Constitutional Court, as amended by Act No. 48/2002 Coll., on the date of publication of this judgment in the Collection of Laws.

A dissenting opinion disagreeing with the plenary decision is written by Judge Vladimír Kůrka pursuant to Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended.

A dissenting opinion of Judge Vladimír Kůrka on the judgment with file No. Pl. ÚS 25/12

1. I must say that the majority of the plenum was originally united in the view that Decree No. 484/2000 Coll., as amended (hereinafter referred to as "Decree No. 484/2000 Coll.", or the "Decree"), contested by the petition from the Senate, is contrary to the constitutional order due to its conflict with Article 36 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") for making access to courts more difficult, as well as Article 4 (1) (duties may be imposed only on the basis of law and while respecting the fundamental rights and freedoms), and further due to its conflict with the law, namely to Section 142 (1) of the Civil Procedure Code. My dissent was originally against the above-mentioned, but the final text of the judgment does not contain a reference to Article 36 (1) of the Charter and the constitutional order remains henceforth represented only by Article 4 (1) of the Charter, while it is indicated that only a conflict with the law comes to the fore. Very well then.

2. I insist that the repealing judgment agreed by the majority of the plenum is not adequate. Through the judgment, the Constitutional Court entered the legally "indistinct" area which defies the application of abstract, unambiguous, and thus universally acceptable criteria. Instead of legal arguments, the majority came up with mainly social objections and the conclusion the majority has arrived at may hardly stand as an expression of genuine finding that the contested regulation presents an obvious constitutional or legal excess. There can be raised a number objections to Decree No. 484/2000 Coll. (as they were raised to Decree No. 177/1996 Coll., hereinafter referred to as the "Lawyers' Tariff"), but the unconstitutionality (or unlawfulness) of the regulation cannot be derived from them.

3. First of all, the Constitutional Court has completely abandoned the application of its own standards of review, namely the "three-step test" (effectiveness, adequacy, and proportionality), and although the purpose of the Decree (Item 92) is mentioned (in terms of contribution to the acceleration of civil proceedings), it is not dealt with further; the Constitutional Court only asserts that the Decree "in fact" has caused "serious negative consequences, violating the fundamental rights and causing dysfunctions of the justice system" and that the used "flat-rate" fees for legal services "completely ignore the subject-matter and time demands for litigations or effectiveness of the enforcement of rights or defending claims." By means of this simplification, the majority of the plenum has established the state where the serious methodological review has been suppressed from the very beginning, if not eliminated at all.

4. Which appears at least in two aspects: (a) in terms of the criterion of "necessity" - is there available any other "pure flat-rate" or "more fair flat-rate" model determining fees for legal services? And (b) is it not that the "socially undesirable consequences" ("an impoverishment of a significant part of the population" - see Item 96) are only associated with an extremely narrow (and not decisive for the whole) segment of legal services (which is in fact explicitly acknowledged by the majority in Items 97 and 98)?

5. As to (a) from the previous item: such "not flat-rate" model seems to be the Lawyers' Tariff favoured by the majority of the plenum; but it is opposed by a trivial finding that also the Lawyers' Tariff is based on flat-rate costs! And it could not be the other way, because it is historically proven experience that it is not possible otherwise (there is no need to go into details as the matter is obvious to insiders). If the majority has finally decided to repeal the regulation with immediate effect (without any deferral for the legislature), this suggests that the Lawyers' Tariff will be preferred by the majority also in the future; however, has the majority demonstrated that the tariff does not result in similar consequences, or consequences subject to analogic objections? Was it not the case that small claims were apparently a good "business" also during the effect of the tariff (in a greater amount, even though not bought up)? If the "flat-rate" costs are objectively inevitable, then they always - in the specific case and in one way or another - "ignore the subject-matter and time demands for litigations" (Item 102), and this consequence can only be "diminished" - not based on a mere categorical rejection but an informed analysis, with the result not satisfactory in all respects however. The objection based on "flat-rate" costs is mentioned by the majority of the plenum only generally, while not indicating in any manner any idea of a "correct" regulation, let alone if it is realistically achievable. And a dramatic

intervention, such as the repeal of the "flat-rate" legislation that is being considered, hardly complies with that.

6. As to (b) of Item 4: objections to the Decree are principally based on the opposition to some social phenomena as described in the judgment (e.g. "a new kind of business consisting especially in trading in small claims" - see Item 99). However, this focus (as acknowledged by the majority) does not apply the Decree, but only the determination of fees for legal services at low (the lowest) monetary amounts, subject to levels as defined by Section 3 (1) of the Decree (which, by definition, can build on that "trading in small claims"). However, not only that the "trading in claims" does not cover the entire agenda, but it does not even cover the agenda of small claims, which is why the intended decrease in the fees for the legal service logically represents for the majority of the plenum a threat that such service would be difficult to ensure for those "legally" justified based on small claims, as (from the perspective of the Constitutional Court) such service should be possible to be ensured (in this respect, more difficult access to courts might be an issue!). Any objections to fees under the Decree (apart from the accentuated impact on the situation of the clients of legal services) cannot lack a serious socio-economic analysis of the cost of labour of the person who provides such service (usually a lawyer), which, however, was not addressed by the majority of the plenum in any way.

7. If it is not possible to connect with the (limited) agenda exclusively pursued by the majority of the plenum a fee excess at all (without further consideration), then it is obvious that not the Decree but its application is the issue, or rather its adequate projection into court decisions on the costs of proceedings. And in this respect, it can be held that the case-law of ordinary courts (for example, see the case-law of the District Court in Ústí nad Labem or District Court in Ostrava) and of the Constitutional Court have already corrected interpretatively adequately and satisfactorily what is criticised and from what the reasons for repeal of the majority of the plenum result (see the resolution file No. I. ÚS 2777/11, or the judgment file No. I. ÚS 3923/11, and a number of related decisions); these and other application means can generally be found in an adequate application of Section 150 and Section 151 (2), the first sentence after the semicolon, of the Civil Procedure Code (also the opinion of the Supreme Court, file No. Cpjn 201/2008, referred to by the Petitioner, has been overcome by the Constitutional Court in its decision-making practice), as well as in the adequate assessment of "reasonably incurred" costs within the meaning of Section 142 (1) of the Civil Procedure Code (see again e.g. both mentioned decisions of the Constitutional Court). On what findings the opinion that "the past experience ... shows that the application of these legal options by the courts is inconsistent and unpredictable" (Item 104) is based has not been disclosed by the majority of the plenum.

8. Article 36 (1) of the Charter (that the Decree restricts access to courts) was omitted from the argumentation portfolio of the majority of the plenum (probably as inapplicable with which I must agree), but Article 4 (1) is still contained there; however, its application, as justified in Item 103, cannot also be accepted, in full evidence. Briefly speaking: the costs of proceedings are neither conceptually nor *de facto* sanctions (*de facto,* a court fee would have been a sanction then) and, therefore, the application of the Decree is not the imposition of sanctions "without law", as it is inferred by the majority of the plenum.

9. As the reason for the repeal coming to the fore is the "conflict with the law" (though not "only" with it - see Item 120) and it means the conflict with Section 142 (1) of the Civil Procedure Code, the Constitutional Court found itself on thin ice; by requiring the court to award to the winning party to the proceedings "reimbursement for the costs necessary for the effective enforcement and protection of rights against the party who has lost in the case", this provision has a different target ("outside the Decree"), as it sets primarily a criterion that determines who pays the costs of proceedings and to whom. It also says, however, that the obliged party shall pay only the costs reasonably incurred, which under the given circumstances means that only those costs are reasonably incurred (as to the lawyers' fees) which are supported by legislation (including the Decree) and no other or higher costs, even if the lawyer charges them in the proceedings. A fee for representation is classified by the law under the costs of proceedings under Section 137 (1) and (2) of the Civil Procedure Code, with reference to the

specific legislation (which is also the Decree), which means that Section 142 (1) of the Civil Procedure Code is only based on that, without it being capable of influencing the "special regulation" retrospectively. From which it follows logically that Section 142 (1) of the Civil Procedure Code cannot be applied in arguments against the Decree; the costs of proceedings determined under the Decree can only be corrected through it (using the criterion of "effectiveness") (again cf. the judgment file No. I. ÚS 3923/11).

10. It is worth expressing a surprise at Section X of the judgment (*Obiter dictum*); the judgments of the Constitutional Court listed here mostly do not relate to the topic and, especially, the considerations concerning the effectiveness of the legal representation by a lawyer clearly derogate from it. The purpose of this part of the reasoning is not obvious.

11. The petition of the group of senators was commented on by the Ministry of Justice (Section III) aptly and with a clear knowledge of the facts and, therefore, the comment should have been considered (it is possible to refer to it otherwise).

12. With reference to what is stated in Item 2 above, I conclude that the Constitutional Court in its judgment neglected (once again) the principle otherwise promoted by it, namely, self-restraint and self-discipline, as it has succumbed to the biased direction of some objections from the general public, or their simplifying identification with the contested regulation, and has underestimated the fact that those objections are only partial in relation to it. Clearly, the Decree is not beyond criticism; however, any correction of it should have been done by other entities than the Constitutional Court that has already done what reasonably could have been done by the Constitutional Court within its own case-law.

13. Therefore, the petition should have been dismissed.