

**Pl. ÚS 36/11 of 20 June 2013**  
**“Standard and above-standard health care”**

**CZECH REPUBLIC**  
**CONSTITUTIONAL COURT**  
**JUDGMENT**

**IN THE NAME OF THE REPUBLIC**

**HEADNOTES**

It is true that the general foundation for basic and more expensive alternatives is contained directly in the Act. However, from the Constitutional Court’s point of view it is important whether the framework in the Act, in and of itself, i.e. without an implementing regulation, is sufficiently understandable to persons governed by the Act and whether it would be capable of application. An implementing regulation is meant to only provide details. The contested framework for care alternatives at present works so that, apart from the general framework presented above that is in the Public Health Insurance Act, the decree that issues a list of health care services with point values also contains health care services identified by the Ministry of Health for which insured persons can be offered a choice between the basic and more expensive alternatives. Only from the decree is it clear to health care services providers, insurance companies, and insured persons what is a basic alternative and for what health care services, medical aids, resources and health care materials it is possible or necessary to pay beyond the level of public insurance coverage. It is not evident from the Act itself, and cannot be derived from it by even the loosest interpretation. Thus, the Public Health Insurance Act only took the first step toward defining standard and above-standard care (in the words of the Public Health Insurance Act, basic and more expensive alternatives). The second, though essential, part, without which the institution could not survive, i.e. the specific determination of what is, within the intent of Art. 31 of the Charter, free care, is regulated only in the implementing regulation. In the Constitutional Court’s opinion, here the legislature did not meet the requirements established by the constitutional order and repeatedly interpreted by current case law.

The fee for inpatient care is basically payment for “hotel services.” This is also supported by the arguments of the Ministry of Health regarding the concrete level of the fee, which is derived from per capita expenses for food, beverages, energy, water, etc. Thus, it is seen as the equivalent of expenses that the patient would necessarily have anyway (even outside the medical facility). The Constitutional Court’s first constitutional law criticism results from this. The obligation established does not in any way differentiate cases where the hospitalization is merely a routine component of treatment, only related to health care services, and in extreme cases can be replaced by a stay outside the health care facility, even if that were not a practical and optimal solution for the patient, and when the hospitalization is a necessary component of the medical service itself. We can hardly accept that during hospitalization in an intensive care unit the patient is being provided “hotel services.” In these cases the obligation to pay the fee conflicts with the text of Art. 31 of the Charter. Hospitalization that is health care in the narrow sense, covered by public health insurance, must be provided free, because for the patient there is no other alternative to it. Another factor that causes the constitutionality deficit is the lack of limits for this payment; in this regard the Constitutional Court had to fully agree with the petitioners. The Public Health Insurance Act imposes obligations in a blanket manner; they have to be paid by non-earning persons, including socially at-risk groups, children, persons with health disabilities, etc. Likewise, the obligation to pay the fee is not limited in time; the patient is to pay it in full regardless of the length of hospitalization. The combination of these factors can evoke a financially unbearable situation, not only for the abovementioned categories of patients.

**In any case, it denies the essence of solidarity in receiving health care. The exemption from fees for those insured persons who present a decision, announcement, or confirmation issued by a body providing assistance in material need about the benefits allocated is not a measure that effectively mitigates the effects of the obligation. This requires the activity involved in arranging an obtaining official documents, which can hardly be expected or required from precisely those persons who are most socially burdened by the fee.**

**The postulate of equality does not give rise to a general requirement that everyone must be equal with everyone else, but it does give rise to a requirement that the law not give an advantage or disadvantage to one group over another with justification. Thus, the Constitutional Court also accepts statutorily established inequality, if there are constitutionally acceptable reasons for it. However, that is not so in this case. The dominant position of the insurance companies, especially Všeobecná zdravotní pojišťovna, in combination with the authorization to impose penalties and regulations on health care services providers, specifically limitations of services, financial penalties for medicine prescriptions and requested care that exceed the set limits, is not balanced out by anything on the side of the health care services providers, such as an obligation to enter into contracts on the part of insurance companies in cases where conditions set forth by generally binding legal regulations have objectively been met. Thus, the insurance companies' authorization to impose penalties, which is based in the contested provisions of § 16a par. 10 and 11, as well as § 32 par. 5 and § 44 par. 5 and par. 6, in the words "imposed under paragraphs 1 to 5" of the Public Health Insurance Act, exceeds the bounds of constitutionally acceptable inequality, as the Constitutional Court defined it in the abovementioned judgments. This inequality is multiplied by the large range of most of the penalties, which is not unconstitutional in and of itself, as will be stated below, but emphasizes it, in combination with the abovementioned circumstances. Thus, the indicated designated statutory provisions are inconsistent with Art. 1 of the Charter, which guarantees equal rights.**

## **VERDICT**

The Plenum of the Constitutional Court, consisting of Chairman Pavel Rychetský and Judges Stanislav Balík, Jaroslav Fenyk, Jan Filip, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Vladimír Sládeček, Milada Tomková and Michaela Židlická, ruled on a petition from a group of 51 deputies from the Chamber of Deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Bohuslav Sobotka, seeking the annulment of § 11 par. 1 let. f), § 12 let. n), § 13 par. 3 to 8, § 16a par. 1 let. f), par. 9 to 11, in § 17 par. 4 the words "and identifying the health care alternatives under § 13," § 32 par. 5 and §44 par. 5 and in par. 6 the words "imposed under paragraphs 1 to 5" of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by Act no. 270/2008 Coll., Act no. 59/2009 Coll., Act no. 298/2011 Coll. and Act no. 369/2011 Coll., with an alternative proposal seeking the annulment of § 11 par. 1 let. f), § 12 par. 1 let. n), § 13 par. 3 to 8, § 16a par. 1 let. f), par. 9 to 11, in § 17 par. 4 the words "and identifying the health care alternatives under §13," §32 par. 5 and § 44 par. 2 and in par. 3 the words "imposed under paragraphs 1 and 2" of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by Act no. 270/2008 Coll., Act no. 59/2009 Coll., Act no. 298/2011 Coll., Act no. 369/2011 Coll. and Act no. 458/2011 Coll., with the participation of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic as parties to the proceedings, as follows:

**I. The provisions of § 11 par. 1 let. f), § 12 let. n), § 13 par. 3 to 7, in § 17 par. 4 the words "and identifying the health care alternatives under § 13" of Act no. 48/1997 Coll.,**

**on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, and § 12 par. 1 let. n) of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, in the wording as amended by Act no. 458/2011 Coll., are annulled as of the day this judgment is promulgated in the Collection of Laws.**

**II. As of the day this judgment is promulgated in the Collection of Laws, the following will cease to be valid: parts of the appendix to Ministry of Health decree no. 134/1998 Coll., which publishes the list of health care services with point values, as amended by later regulations, these being the parts of the appendix where the symbol "E" indicates that this is a more expensive [literally, “economically more demanding”] health care alternative under § 13 par. 5 of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations.**

**III. The provisions of § 16a par. 1 let. f) of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, is annulled as of the end of 31 December 2013.**

**IV. The provisions of § 13 par. 8 of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, is annulled as of the day this judgment is promulgated in the Collection of Laws, and the provisions of § 16a par. 9 to 11, insofar as they concern fees for inpatient care under § 16a par. 1 let. f) of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, § 32 par. 5 and § 44 par. 5 and in par. 6 the words “imposed under paragraphs 1 to 5” of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, and § 44 par. 2 and in par. 3 the words “imposed under paragraphs 1 and 2” of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, in the wording as amended by Act no. 458/2011 Coll., are annulled as of the end of 31 December 2013.**

## **REASONING**

### **I.**

Definition of the matter and recapitulation of the petition

1. On 14 December 2011 the Constitutional Court received a petition from a group of 51 deputies of the Parliament of the Czech Republic seeking the annulment of the above-cited (parts of) provisions of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by Act no. 270/2008 Coll., Act no. 59/2009 Coll., Act no. 298/2011 Coll. and Act no. 369/2011 Coll., due to their inconsistency with the constitutional order and the obligations of the Czech Republic arising from international treaties on human rights. When called upon by the Court, the petitioners subsequently amended the proposed judgment in the petition to take into account the amendment of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, (the "Public Health Insurance Act") implemented by act no. 458/2011 Coll., Amending Acts Related to the Establishment of a Place of Payment and Other Amendments to Tax and Insurance Acts, which will go into effect on 1 January 2015. The contested legal framework

- divides health care, or health care services, for purposes of coverage by public health insurance, into a basic, fully covered alternative, and a more expensive alternative, which is not covered by public health insurance funds above the coverage level set forth for basic care,
- raises the daily co-payment [literally, “regulatory fee”] for inpatient services from CZK 60 to CZK 100,
- authorizes health insurance companies to penalize health care services providers for the violation of certain obligations imposed on them by the Public Health Insurance Act.

2. According to the petitioners, the adopted legislative framework is inconsistent with Art. 6 par. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter"), which guarantees the right to life, Art. 31 of the Charter, which guarantees everyone the right to protection of health and guarantees citizens, on the basis of public insurance, under conditions provided for by law, the right to free medical care and medical aids, Art. 4 par. 4 of the Charter, which requires that the essence and significance of the rights and freedoms must be preserved when employing provisions concerning limitations on them, Art. 1 of the Charter, which declares equal dignity and equality of rights, Art. 3 par. 1 of the Charter, which guarantees the fundamental rights and freedoms to everyone regardless of property or other status, and Art. 11 par. 1 of the Charter, under which the property right of each owner shall have the same content and enjoy the same protection. The contested framework also conflicts with obligations arising from Art. 12 par. 1 and par. 2 let. c) and d) of the International Covenant on Economic, Social and Cultural Rights, Art. 11 par. 1 and 3 and Art. 13 of the European Social Charter, Art. 3 of the Convention on Human Rights and Biomedicine, Art. 24 par. 1 and par. 2 let. b) of the Convention on the Rights of the Child and Art. 25 let. a), b), d) and f) of the Convention on the Rights of Persons with Disabilities.

a) Division of health care services into basic and more expensive

3. According to the petitioners, the mere change in terminology, where the term “health care” was replaced in the Public Health Insurance Act by the term “health services,” captures the legislature’s overall intent to head toward a concept of client medicine, provided according to the criteria of the “client’s” financial possibilities. The legislative framework permits dividing health care according to its financial burden for the system, not its effectiveness from a medical perspective. The formulations used are very vague, and the law completely lacks defining elements for the single distinction between the two alternatives, which is "effective and economical dispensing of the sources of public health insurance." Likewise, there is no definition of the criteria according to which the financial burden of health care could be determined when distinguished the basic and more expensive alternatives. Thus, it is not evident whether the criterion is to be the price of medicines, the price of health care materials, health care equipment, the price of medical aids, the quality of care in a health care facility (food, the furnishing of the premises, additional services), the level of compensation of health care workers, personnel and technical equipment or the momentary level of payments for individual health care services on the basis of a contract for provision and payment of covered services under the Public Health Insurance Act. The condition for distinguishing the two alternatives, i.e. the possibility of providing health services in more than one manner, says nothing about what the legally guaranteed standard of health care is. In this regard the petitioners point to judgment file no. Pl. ÚS 35/95 of 10 July 1996 (N 64/5 SbNU 487; 206/1996 Coll.), in which the Constitutional Court stated that “the citizens’ entitlement to free health care and to medical aids is tied to the constitutional requirement and the framework of public insurance.” The Constitutional Court also repeated this constitutional safeguard in judgment file no. Pl. ÚS 14/02 of 4 June 2003 (N 82/30 SbNU 263; 207/2003 Coll.). Here the Constitutional Court also stated that “for constitutional and statutory principles this care

cannot be divided into a kind of basic, “cheaper” but less appropriate and less effective care, and an above-standard, “more expensive,” but more suitable and more effective one. The difference between standard and above-standard care may not consist of differences in the suitability and effectiveness of treatment. The law does not regulate what health care a doctor or health care facility may provide, but what kind it must provide in the general interest so that all insured persons have a right, in the same degree, to such treatment and medication, as meets their objectively determined needs and the requirements of the appropriate level and of medical ethics. Thus, the developmental orientation of health care, supported by laws, is based not on shifting “better” items of health care from the sphere of payment-free care into the sphere directly paid by insured persons, but, in contrast, toward improving the items provided payment-free from public health insurance.” The petitioners consider the contested framework to be discriminatory, because access to the more expensive alternative will depend on the willingness or ability to pay the price of health care, not on the need for it. Thus, in fact two health care systems are created – for those who have only the basic alternative, and for the more well-off, who can afford the more expensive alternative. The petitioners state their belief that health care services providers will give priority to insured persons who choose the more expensive alternative, because they will have an economic interest in doing so. In contrast, insured persons who choose the basic alternative will be identified in the health care records as those who bring nothing extra, and will therefore be penalized, for example, by a long waiting period to receive health care services. It will be difficult for insurance companies to monitor a statutory ban of such conduct. Implementing two alternatives of health care based on the criterion of whether the insured person has the funds to pay supplemental amounts for his care contradicts the principle of people’s equality in dignity and rights. The petitioners point out that individual legislators, in their statements in the plenary debates in the Chamber of Deputies and in the Senate, drew attention to the unconstitutionality of the adopted changes and the consequences resulting from application of them, and they quote representative samples in the petition.

4. Under the Charter, limitations may be placed on the fundamental rights and freedoms only by law, and the right to protection of health can be exercised only within the limits of implementing statutes. The Public Health Insurance Act presupposes that the level of coverage of health care services in the basic alternative, as well as definition of health care services that are the more expensive alternative, will be set by an implementing regulation, specifically, a decree by the Ministry of Health. It will also set forth a list of health care services with point values to indicate the health care alternatives. In this case as well, during the course of adopting the amendments, some legislators drew attention to violation of the constitutional principle that conditions for provision of health care and the conditions for entitlement to free health care can only be set forth by statute. Until 31 March 1997, such a framework was contained in Act no. 20/1966 Coll., on Public Health Care, as amended by later regulations, under which health care for full or partial payment, and the level, as appropriate, was to be specified in detail by the Ministry of Health, in agreement with the Ministry of Finance, by decree. The related provision of Act no. 550/1991 Coll., on General Health Insurance, as amended by later regulations, entrusted the definition of areas of care that were fully and partly paid to the Health Care Regulations, which the government was authorized to issue by order. The Constitutional Court annulled this legislative framework by its judgment file no. Pl. ÚS 35/95 (no. 206/1996 Coll.), stating that “it is unacceptable that the definition of the scope of the health care provided for full or partial coverage would be left to regulations other than statutory ones.” According to the petitioners, the presently contested framework shows features of unconstitutional limitation of fundamental rights completely identical to the framework that the Constitutional Court annulled in that judgment.

b) Increase of co-payment [“regulatory fee”]

5. The petitioners indicate that they consider unconstitutional all co-payments introduced by Act no. 261/2007 Coll., on Stabilization of Public Budgets, and in this regard they agree with the reasoning contained in the dissenting opinions of seven Constitutional Court judges filed to judgment file no. Pl. ÚS 1/08 of 20 May 2008 (N 91/49 SbNU 273; 251/2008 Coll.). However, they point out that they do not seek a repeat review of the same matter, i.e. the entire system of co-payments, but of a completely new legislative framework that increases the co-payment for each day that inpatient care is provided from CZK 60 to CZK 100. The reasons for this full 2/3 increase, i.e. by a significant amount, were justified only as a proclamation, without documenting the need and rationality of the measure; incidentally, even the Ministry of Finance raised doubts in the comment process. Since the introduction of the fee in 2008 there has not been such a significant growth in expenses either in the segment of inpatient health care facilities or in health care as a whole. The increase does not correspond to the level of inflation or to the growth of nominal and real wages. The amount of the increase is not negligible; for certain social groups it will be a barrier to access to health care, especially as no protective limits have been set. The increase has a markedly negative effect on persons with health disabilities. In the petitioners’ opinion, increasing the fee has a “suffocating effect,” especially in relation to groups of insured persons such as children, seniors, persons with health disabilities, and socially weak persons.

c) Authorization of health insurance companies to penalize health care services providers

6. Insurance companies have been given this authorization, although they are not public authorities and are not fundamentally, vis-à-vis health care services providers either in a superior position or in the position of a body authorized to exercise state power over them. The relationships between health insurance companies and health care services providers stand on a private law basis, and the principle of private autonomy applies between them. This approach of the legislature was criticized by some Constitutional Court judges in their dissenting opinions to the abovementioned judgment file no. Pl. ÚS 1/08. Health insurance companies have very wide discretion when giving fines, both as regards the amount of fines and as regards repeated fines. The maximum amount of fines is considerable, and it can threaten the very economic existence of a health care services provider. The petitioners express a concern that a health insurance company can, through this authorization to penalize, directly or indirectly influence a health care services provider in relation to entering into, performing, or terminating an agreement on the provision and payment of covered services, especially if they have or have had a mutual conflict. In cases where the imposition of a fine is grounds for terminating an agreement on the provision and payment of covered services without a termination notice period (§ 17 par. 2 of the Public Health Insurance Act), a health insurance company may act as a “judge in its own case.” In contrast, a health care services provider does not have at its disposal any similar public law authorization to penalize a health insurance company.

II. A)

Statements from the parties to the proceeding

7. The Constitutional Court, in accordance with § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") sent the petition to open proceedings to the parties to the proceeding – the Chamber of Deputies and the Senate of the Parliament of the Czech Republic.

8. The Chamber of Deputies responded with a brief statement. It recapitulated the legislative process and said that it considers the statutes in question, amending the Public Health Insurance Act, to have been duly adopted and promulgated. It leaves evaluation of the contested provisions fully to the Constitutional Court's review.

9. Likewise, the Senate, in its statement, did not clearly state support either for the petition or for the contested legislative framework. It stated that the matter had been given great attention in the Senate bodies, where, as in the subsequent debate in the full Senate, reservations on the part of senators who considered the bill to be unconstitutional outweighed the minority opinion that agreed with the bill. This was also reflected in the vote. The statement then describes the discussion of the amendment as regards individual provisions now proposed to be annulled. Overall, the Senate too leaves it fully up to the Constitutional Court's deliberation to review individual parts and make a final decision.

10. The ability of the government and the public ombudsman to join proceedings with the status of a secondary party, established as of 1 January 2013 in § 69 par. 2 and 3 of the Act on the Constitutional Court, as amended by Act no. 404/2012 Coll., applies only to proceedings opened after 1 January 2013 (see Constitutional Court Notification no. 469/2012 Coll. on the Effects of Act no. 404/2012 Coll., which amends Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, and certain other Acts, on uncompleted proceedings before the Constitutional Court opened before 1 January 2013).

## II. B)

Statements from other affected subjects

11. The Constitutional Court considered it desirable to obtain a more comprehensive view of the issue presented, and therefore addressed other subjects representing individual interest groups, whom it expected to have a contrary position on the present reform. In an effort to maintain a balance of opinions it also provided the opportunity to submit statements to the Ministry of Health, as the preparer of the health care reform, and to the Association of Health Insurance Companies of the Czech Republic, Všeobecná zdravotní pojišťovna [the General Health Insurance Company], the Czech Medical Chamber, and the Czech Association of Patients.

12. The Ministry of Health submitted a detailed brief on the petition, structured according to the areas defined in the petition. The Ministry of Health believes that the framework of basic and more expensive care will meet the test of constitutional conformity, which it supports with an overview of the framework's fundamental points: a) the guarantee of a certain, comprehensively understood health care paid out of health insurance, defined by qualitative elements; b) health care must be actually effective; c) both alternatives of health care must be actually effective; d) the insured person has the right to a choice of the basic, fully paid alternative and to information about the more expensive alternative, including the difference in price; e) if he chooses the more expensive alternative, the insured person pays only the difference in price compared to the basic alternative; f) the price list of the more expensive alternatives is publicly available; g) it is forbidden to give priority to patients who choose the more expensive alternative; h) the more expensive alternative can only be one that is identified as such in an implementing regulation; i) free health care does not become paid health care; the scope of fully-covered care is maintained. The Ministry of Health fundamentally disagrees that definitions of basic and more expensive care are lacking. The provision of § 13 par. 1 of the Public Health Insurance Act guarantees an insured person an entitlement to health care paid out of public health insurance, which is here defined by general

characteristics (its aim is to improve or preserve one's state of health or reduce suffering, it must correspond to the insured person's state of health and the aim that is to be achieved, it is in accordance with available current medical science and there is proof of its effectiveness). The highest possible standard of health care corresponding to the patient's state of health and needs in the sense of the same therapeutic effect is always insured with both alternatives, i.e. including the basic alternative. Only in the event that it is possible to provide health care that meets the criteria in § 13 par. 1 of the Public Health Insurance Act in several ways, which have the same therapeutic effect, is the criterion of coverage of the possible alternatives the effective and economical expenditure of public health insurance funds. When comparing the costs of the individual alternatives, everything must be included that is related to the provision of that care (the service itself, the length of hospitalization, medicines, medical aids, etc.). No health care that can be provided in only one manner can be identified as a more expensive alternative. The procedure followed by the health care provider will always be that a doctor will evaluate the patient's state of health and the related purpose of providing health care services, will determine the optimal alternative of care that will be the basic alternative for that case, and only then will investigate whether more expensive alternatives with the identical therapeutic effect exist for the treatment in question. Determining the conditions based on which the care alternative will be identified is not left to the minister's discretion; the legislation merely uses an implementing regulation to implement the relevant provisions of the Act to make application of the general statutory terms as simple as possible and as user-friendly as possible for the participants. The authorization reflects the legislature's attempt to optimally set the system so that it will not exhaust itself, but at the same time permit the right guaranteed by the Charter to be realized. It works with the concepts of effectiveness and efficiency of the covered care, where the effectiveness is a medical point of view reflecting the interest of the patient and efficiency reflects the limited amount of funds in public health insurance. The Ministry of Health already applied this method and the new statutory limits in decree no. 411/2011 Coll., which amends Ministry of Health decree no. 134/1998 Coll., which issues a list of health care services with point values, as amended by later regulations; a more expensive alternative of health care is only one that does not provide the patient with improvement from a medical viewpoint, but provides increased comfort or meets his subjective preferences (certain vaccination, casts, etc.). The Ministry of Health also disagrees with the manner of aligning the contested legislative framework with the one that was annulled by the Constitutional Court in judgment file no. Pl. ÚS 35/95 (no. 206/1996 Coll.), that is, with the claim that they show the same features. Now the definition of both alternatives, both the common elements (the same therapeutic effect) and the different ones (accordance with the effective and economical expenditure of public health insurance funds), set forth directly by the Act. In the previous case it was only a sub-statutory regulation – the expected Health Care Regulations. As regards the increase in the co-payment, it certainly does not create a barrier to access to health care. Payment of the fee is not established as a condition for the provision of covered health care; that must be provided by the health care provider regardless of whether the fee was paid or not. By analyzing statistical data the Ministry of Health determined that the system of co-payments, as it was set beginning 1 January 2008, did not in any way limit the availability of health care, even for the poorest citizens. Yet, it fulfilled the intended aim of having a regulatory effect on the consumption of health care. The amount of increase comes from the economic calculations of the amount of daily consumption expenses of the 10% of households with the lowest income in the Czech Republic calculated per capita (not including housing expenses, but including food and drink, alcohol, water and sewerage, electricity, gas and fuel, outpatient health care, transportation fuel and oil, cultural services, recreational and sport services, games and lotteries, restaurants and cafes and cafeterias), which were CZK 99.74 in 2010. Therefore, the proposed provision



cannot have the claimed suffocating effect. Finally, the Ministry of Health also disagrees with the petitioners that the authorization of health insurance companies to impose fines on health care providers is inconsistent with the constitutional order. It points to other cases where the law entrusts the exercise of public administration to a private law entity; in any case, in the case of the state and public law corporations it is usual that, apart from public law relationships, they also act as private law subjects. The Constitutional Court repeatedly addressed the blending of private and public law and resulting mixed nature of the activities of institutions and the limits of public and private law [the Ministry of Health refers to decisions file no. II. ÚS 75/93 of 25 Nov 1993 (U 3/2 SbNU 201) and file no. I. ÚS 41/98 of 1 December 1998 (N 147/12 SbNU 363)]. In the adjudicated case state administration is expressly delegated by statute, cases, conditions, and penalties are precisely defined, the procedures of health insurance companies are subject to the Administrative Procedure Code and their decisions are subject to review by a court. According to the Ministry of Health, the framework is analogous to cases where the state, through administrative offices, imposes penalties for violation of the law to persons with whom it enters into or can enter into contracts with various subject matters. The existing legislative framework allows insurance companies to also impose penalties on insured parties and employers, against which the petitioners curiously raise no objections. The legislative framework is not only justified, but also suitable, because insurance companies have at their disposal the necessary data from health care services providers and from insured parties. This generally means personal data, the protection of which would be threatened by further communication of them. We can also point to existing practice, where a fine was imposed in a mere 93 cases and collected in only 41 cases, with a total amount of CZK 587,500.

13. The Association of Health Insurance Companies of the Czech Republic, through its president, also rejects the petitioners' arguments. Division of health care cannot be discriminatory, in view of the same therapeutic effect. The Association of Health Insurance Companies has called for the division of care into standard and above-standard for a long time, and welcomes the introduction of a legal opportunity to pay for additional care. The legislative framework, on the contrary, eased the availability of even the more expensive health care alternative for those who could not afford to pay the full price of health care treatments or services, because now they will only pay the difference. The increase in the co-payment must be seen in the full context of the framework, where, on the other hand, the fee per item in a prescription was cancelled. The consequence was a lower cost burden for a larger group of patients. Moreover, there is a possibility of not paying the co-payment at all, in the case of an insured person drawing benefits when in material need. As regards the authorization for health insurance companies to penalize health care facilities, according to the Association of Health Insurance Companies it is necessary to distinguish two different, independent relationships that can arise between an insurance company and a health care facility; on the one hand a purely commercial law relationship, and on the other hand a public law relationship, where the insurance company acts as a party exercising public authority. The Constitutional Court itself, in judgment file no. Pl. ÚS 1/08, concluded that it is up to the legislature, to what subject it gives the authority to impose public law penalties.

14. Všeobecná zdravotní pojišťovna [the General Health Insurance Company] also disagrees with the petitioners. Introducing above-standard care is a modern method of achieving the public interest and a step forward. The contested framework cannot be considered discriminatory or as preventing access to care. Covered care must correspond to the patient's state of health and the purpose that is to be achieved. It follows that if a more expensive alternative is the only possible health care for a particular insured person, it will be the basic

alternative for that person. Differences in the alternatives do not lie in the suitability and effectiveness of treatment; the Act clearly requires the same therapeutic effect. Všeobecná zdravotní pojišťovna points to the fact that the co-payment for medicines is set by the State Institute for Drug Control by a mere decision; a system of alternatives has been used for a long time for glasses. Conditions are clearly set forth by the Act (out of several equally effective treatments, only the least expensive is covered), the list of health care services does not decide anything, but only identifies those services that the Act classified, based on price, among those that are covered only to the level of the least expensive alternative. As regards the co-payment for inpatient care, it was shown to be successful in regulation overuse of health care. An increase was necessary in order for it to really have a demotivating effect. Certainly it can be a burden for certain groups of insured persons, but the state has instruments to address these situations in the area of social security. It cannot be overlooked that for children and seniors the limit for (other) co-payments was reduced, which reduced the overall burden. Finally, the possibility of imposing public law penalties is the best method to force health care service providers to fulfill their obligations. Health care insurance companies are public institutions; imposing fines in an administrative proceeding, with the subsequent possibility of judicial review, ensures that misuse of authority on their part is minimized.

15. The Czech Medical Chamber distinguishes two aspects in dividing health care. First it is the actual division of health care services with the same therapeutic effect into services provided in the basic alternative and the more expensive alternative with an additional payment by the insured person, which it does not consider to be unconstitutional in and of itself. Under the existing legislative framework, an insured person is guaranteed, under § 13 of the Public Health Insurance Act, that all health care services necessary for protection of his health are covered, although if the manner in which they are performed is different in some cases, he can himself choose, and voluntarily pay extra for the more comfortable alternative. In a situation where the Czech health care system repeatedly struggles with serious economic problems, and when in the neighboring democratic countries citizens also have the ability to get regular insurance, and the general health insurance covers only the most necessary care, the ability to pay extra for certain above-standard services is desirable, and health care services providers themselves called for it. Moreover, the system newly includes only the difference between a more comfortable and less comfortable health care service or medical aid, which, according to the Czech Medical Chamber, is positive for the insured persons, because until now they had to pay the full price of such services or aids by themselves. As regards the second aspect, the manner of choosing individual services for which the alternatives of care and aids can be offered, that is left to a purely administrative official procedure – a ministerial decree (the current practice is that the Ministry of Health decides in a decree, which sets forth a list of health care services with point values, which services can be offered in the basic and more expensive alternative). The Czech Medical Chamber has only a terminological objection to the fee for inpatient services, because it is really a fee for hotel services. These are more or less services that a hospitalized patient would have to pay at home as well (food, lighting, heating, changing of bed linens). It has no objections to an increase as such; in its opinion it evidently corresponds to the increase in costs that has occurred over four years. Finally, according to the Czech Medical Chamber, the authorization to penalize providers is unprecedented in a situation involving contractual partners, and is out of the question in democratic countries. In a wider context it points out the repeatedly criticized unequal status of health insurance companies and health care facilities and points to an even weightier problem than the one in the petition, the warped and non-transparent rules for entering into agreements on the provision of care between insurance companies and health care facilities; the existence or non-existence of a private physician or health care facility is de

facto decided by the good will, or lack thereof, of an official of a monopoly health insurance companies, not by the preference of patients.

16. In contrast, the Czech Association of Patients agrees with the petitioners' position regarding the division of care into alternatives. Only the treating physician can decide what needs to be done for a patient in a particular case, and that is precisely what should be covered by public insurance. According to the Association, it is even necessary to completely prohibit the parallel provision of individually paid care in facilities that work, on a contractual basis, for a public insurance company. They reject all limitations on the coverage of health care, whether set by statute or a sub-statutory regulation, because they are in principle inconsistent with Art. 31 of the Charter. Likewise, they reject co-payments, including the fee for inpatient care, because there is nothing to regulate. After they were introduced, the number of persons treated decreased only by the poorest, who are, however, truly ill. In contrast, there was an increase in the phenomenon of people being called for a check-up, which certain health care providers turned into a considerable business. The amount of the fee for hospitalization is inconsiderate; therefore they support the arguments in the petition to annul it. The penalties that insurance companies can impose on providers are senselessly high; the real motive for introducing them must have been to provide the insurance companies with a tool for liquidating certain [health care] providers. The brief from the Czech Association of Patients included a statement from the Czech National Disability Council. The Council considers the most significant theme under discussion to be the issue of fees in health care. It fundamentally disagrees with such fees. They play no regulatory role with handicapped patients; for them hospitalization always involves a number of unpleasant obstacles, described in the statement, and therefore they try to avoid it. Moreover, these patients have health problems more often, the necessary hospital stay is longer, and generally their treatment is more difficult. These persons also have limited earning opportunities; realistically, the work opportunities available to them are minimal. Disability pensions, which are usually their only income, are very low, and make the level of inpatient care fees unacceptable for them. Using a model case, the Czech National Disability Council calculates that the payment of co-payments, especially fees for hospitalization, can be financially ruinous for handicapped persons.

## II. C)

### Overview of Foreign Systems

17. The Constitutional Court obtained information on the issue of standard and above-standard health care and co-payments by patients, as it is handled by legal regulations in neighboring countries that are relevant for us in view of historical contexts.

18. In Slovakia, Act no. 576/2004 Coll., on Health Care, Services Related to the Provision of Health Care, and Amending and Supplementing Certain Acts, defines health care as "the set of work activities performed by health care workers, including the provision of medicines, health care aids and dietetic foods with the aim of prolonging the life of a natural person (a 'person'), improving the quality of a person's life and the healthy development of future generations; health care includes prevention, dispensation [of medicines], diagnosis, treatment, biomedical research, nursing care and assistance in childbirth." It also sets forth the principle of equal treatment, which states that "The right to the provision of health care is guaranteed equally to everyone, in accordance with equal treatment in health care set forth by a special regulation. In accordance with the principle of equal treatment, discrimination based on sex, religious affiliation or faith, marital and family status, skin color, language, political or other beliefs, trade union activity, national or social origin, physical disability, age, property, race or other status is forbidden." In terms of coverage by public health insurance, care is

divided; conditions are provided by Act no. 577/2004 Coll., on the Scope of Health Care Covered by Public Health Insurance and on Coverage of Services Related to the Provision of Health Care, supplemented by government order no. 722/2004 Coll., on the Level of Payment by an Insured Person for Services Related to the Provision of Health Care, and government order no. 777/2004 Coll., which Issues the List of Illnesses for which health care services are partly covered or are not covered by public health insurance.

19. The Constitutional Court of the Slovak Republic addressed direct payment by patients in judgment file no. Pl. ÚS 38/03 of 17 May 2004 (no. 396/2004 Coll.), issued in a proceeding on a petition concerning “the introduction of fees for a certain segment of health care provided on the basis of health insurance, as well as services and activities that are closely connected to health care provided on the basis of health insurance but are not a direct element of it.” With Art. 40 of the Slovak Constitution having a wording analogous to Art. 31 of the Czech Charter, the Court formulated the statement of law that “Free care under Art. 40 has its ‘scope,’ i.e. not everything is provided free.”

20. Austria – with, of course, a different structure of public insurance (about 80% of the Austrian population is insured under the Act on General Social Insurance and the remaining groups, e.g. state officials, are insured under special regulations; there are no “state” insured persons, as the costs for care of persons who are not earning are included in the health insurance premiums paid by other persons; it is also possible to obtain non-mandatory, private supplemental insurance) and a different structure of expenditures (approximately half of the expenditures for health care is financed by health insurance premiums, one-fifth by taxes, and over a quarter is financed directly by citizens) – divides care from the viewpoint of coverage so that every public hospital must have a “general category” (a fee/accommodation category). All persons who do not request placement in a special category are placed in this category. In addition to the general fee category a public hospital may establish a “special category” that is intended for persons or their family members who request it, and based on their income or property are able to pay fees per day of treatment and other fees in the special category for themselves or their family members [see, e.g., § 32 of the Act on Hospitals for Vienna (Wiener Krankenanstaltengesetz 1987 - Wr. KAG)]. In the general category, payments for care (fees/premiums for care, "Pflegegebühren") cover (with certain exceptions) all hospital services (since 1997 in Austria coverage of hospital care depends considerably on physician and nursing services performed). Covered care does not include, e.g. the costs of transporting patients to and from a hospital, preparation of dentures – if they are not connected with treatment provided in a hospital – preparation of orthopedic aids (prosthetics) – if they are not therapeutic support – funeral expenses of an individual who died in a hospital [see § 44 par. 4 of the Act on Hospitals for Vienna (Wiener Krankenanstaltengesetz 1987 - Wr. KAG)]. The same applies to supplemental services that are not connected to medical services (not related to treatments) and are provided at the express request of patients. In addition to care payments (payments from insurance premiums) special fees ("Sondergebühren") and premiums can be required. These can be, for example, a fee for accommodation in a special accommodation category, an “out-patient” fee (the “Ambulatoriumsbeitrag,” which was allegedly cancelled in 2003 because many citizens were exempt from it), expenses for transportation of patients, dentures, if they are not related to treatment in hospital, orthopedic aids, etc. Patients in the special class can also be required to pay a contractual (physician’s) fee [cf. § 45a of the Act on Hospitals for Vienna (Wiener Krankenanstaltengesetz 1987 - Wr. KAG)]. The same applies to a fee for laboratory or consultant examination, X-rays or other physical services and for the activities of specialized doctors, for example for anesthesiology and intensive-care medicine. Thus, this means services under a private contract. The treating physician then

receives part of the contractual fee (not less than 40%). The hospital also collects “contributions for expenses.” Here too there are some exceptions, i.e. certain persons do not pay these or pay at a reduced rate (in view of their income level – e.g. if a patient’s income does not exceed ca. EUR 900). Payments for care and any special fees are published in the Land Collection of Laws (in the bulletin) by the Land government, in the form of an order. A hospital charges a patient the fees on the last day before discharge, and statutory late payment interest can be charged only six weeks after the payment due date – it is expected that the patient will be weakened after discharge from the hospital and he is thus given time to pay later; only after that are statutorily regulated interest charges applied. A person may file objections – in writing or orally – against the fees charge within two weeks after the bill is issued. Objections are ruled on by the city hall, as the regional administrative office. There are exceptions to co-payments for certain groups of people. Co-payments are routinely required for dentists, non-contractual doctors, therapists, psychologists, and so on. Patients must pay for certain services or aids (e.g. dental bridges) in full themselves.

21. In Poland (see Boulhol, H., et al. (2012), "Improving the Health-Care System in Poland", *OECD Economics Department Working Papers*, No. 957, OECD Publishing. doi: [10.1787/5k9b7bn5qzvd-en](https://doi.org/10.1787/5k9b7bn5qzvd-en) of 10 May 2012) access to basic care is ensured without limitation on the basis of general health-care insurance. Health care is not divided into standard and above-standard. Most basic care, regardless of the provider’s ownership status, is still paid by public health-care insurance. Poland devotes 7.4% of GDP to the health care system. The share of privately owned out-patient facilities grew from 42% in 2000 to 82% in 2009 and the overall use of out-patient care is increasing. Poland is among those OECD countries that have a high proportion of direct payments (medicines, payment for care by specialist physicians in private facilities, dentist payments, pre-paid health care packages paid by an employer for employees). All these services are formally paid independently, because private insurance does not exist, although discussions about the need to introduce private health insurance have been going on in Poland for at least ten years. The National Health Fund (the “NHF”) is a non-profit organization whose primary aim is to provide access to public insurance services in the health care field. Services providers are guaranteed equal treatment. The NHF is fully responsible for evaluating needs and for the inspection of agreed-upon medical services. In addition to contractual services, the NHF also finances selected programs for public health, medicine prescriptions in out-patient care, experimental programs, rehabilitation and health spa treatments and long-term care. Since 2008 the list has expanded to include highly specialized treatments. In 2009 the legislative framework first mentioned a “guaranteed” package of health care, an extensive list of medical services covered by health insurance, with the exception of such services as plastic surgery, flu immunizations, sex-change operations and in-vitro procedures. Basic care providers receive a contribution per patient, while the payment scheme for specialist care is payment for service. There are no supplemental payments for hospital stays for care that is covered by public health insurance.

22. In Germany, as regards the issue of dividing health care, in terms of payment, into standard and above-standard, or whether the division concerns only “supplemental” or “related” care, materials and aids used, or also physician services as such, the Federal Ministry of Health (Bundesministerium für Gesundheit) was asked about this particular question by letter. The reply indicates that coverage for hospital care is determined primarily on the basis of flat fees per the DRG system and supplemental payments. The coverage is provided for the overall volume of services that are necessary in individual cases in order to ensure effective and sufficient health care for the patient. This involves “general” hospital services, which include care for the ill, necessary operations, hospital stays, and other services

provided by the hospital facility. If the diagnosis requires, it also includes treatment by the senior doctor. Hospitals can charge for elective – above-standard – services, which are different from the services of general hospital care, if it was agreed that they would be charged separately. A patient can also request that treatment be provided by a particular physician in the facility (Chefarztbehandlung), even if this is not necessary based on the diagnosis; the agreement on physician selection applies to all physicians in a hospital who are authorized to charge and take part in the treatment of the patient. The patient will receive separate invoices from all the physicians who took part in the treatment, which he must pay as part of the payment of a hospital stay in the system of general hospital services. The amounts charged are reduced by 25%, corresponding to the calculation of the proportion of compensation for physician treatment in rates per treatment day. A hospital stay in a private or semi-private room can be provided as an above-standard service. The Constitutional Court also learned that § 2 of the fifth volume of the Social Code, which regulates statutory health care insurance (Sozialgesetzbuch V - Gesetzliche Krankenversicherung, “SGB V”) indicates that health insurance companies pay insured persons health care with a view to the principle of efficiency (§ 12 SGB V), while at the same time the quality and effectiveness of health care must meet the generally recognized state of medical knowledge and must take account of progress in medicine (§ 2 SGB V in fine). The degree of a patient’s co-payments for services other than general hospital services depends considerably on what kind of private health insurance, of which there is a wide choice, he has. As regards the regulatory fee (supplement – Zuzahlung) for hospitalization, it is set at EUR 10 per day, but can be charged for a maximum of 28 days of hospitalization in a calendar year – see § 61 SGB V. Other regulatory fees are a supplemental fee per prescription, a fee for rehabilitation, fee for ambulance transportation, etc. Similarly to the Czech legislation, there are maximum limits for fees and various exemptions (e.g. for the long-term unemployed in the Hartz IV category, etc.). The regulatory fee for visits to a general practitioner, dentist, outpatient specialist, or psychologist (Praxisgebühr), which was set at EUR 10 per calendar quarter and was the income of the insurance company, was annulled by the federal legislature as of 31 December 2012. As a matter of interest, we also note that in 2009 the Federal Social Court (Bundessozialgericht, BSG) concluded that this regulatory fee does not violate patients’ constitutionally guaranteed rights (See decision of 25 June 2009 file no. B 3 KR 3/08 R).

23. The materials obtained (in particular the article of 6 Nov 2012, by Petr Gola, available at <http://finexpert.e15.cz/za-den-v-nemocnici-platime-100-kc-jak-je-to-v-ostatnich-zemich>) also indicate that hospital stay fees in Europe range as follows:

Belgium – The basic co-payment for state hospitals for patients with health insurance is EUR 14.71 per day. They must also pay an initial fee of EUR 42 EUR.

Bulgaria – Citizens with health insurance pay 2% of the minimum wage for each day of hospitalization. At present the minimum monthly wage is BGN 270 (EUR 138). Thus, the co-payment is EUR 2.76 per day.

Estonia – The co-payment for hospitalization is different for individual health care facilities. However, the highest is EUR 1.60 per day.

France – The basic hospitalization co-payment is EUR 18 per day (EUR 13.50 in psychiatric facilities).

Latvia – the amount of a patient’s co-payment differs according to the type of hospital and treatment. It starts at LVL 9 (EUR 14).

Luxembourg – The hospitalization co-payment is EUR 19.62 per day.

Germany – The basic co-payment for patients with health insurance is EUR 10 EUR per day of hospitalization.

Austria – The amount of a patient’s co-payment differs according to the type of hospital and the land. It is around EUR 10 per day of hospitalization.

Sweden – The amount of hospitalization co-payment differs in individual health care facilities. However, the highest is SEK 80 (EUR 8.94) per day.

Switzerland – Patients in state hospitals pay a contribution for costs and accommodation of CHF 15 (EUR 12) per day.

## II. D)

### Response to statements and positions

24. The petitioners submitted a response to the statements and positions that had been passed on to them, in which they dispute in particular the individual arguments by the Ministry of Health. They repeat the critique of the background report, which, in their opinion, is wholly unsatisfactory. In its statement, the Ministry also did not refute the fact that the Act is lacking delimitation of the basic and more expensive alternatives of care; the formulation of the contested provisions makes the scope of care covered by public health insurance dependent on a Ministry decree. Even the Act’s requirement of the same therapeutic effect cannot establish the authority of the Ministry to arbitrarily determine which care has that effect and which does not. The Ministry’s idea of the practical application of the contested framework has no basis in the Act. Under the conditions set forth in the Act, the optimum care alternative will not be covered by public health insurance depending on the patient’s state of health, but purely based on whether it is or is not identified as the more expensive alternative in a sub-statutory regulation. Likewise, the wording of the Public Health Insurance Act does not indicate that the more expensive alternative, identified by a decree, could, ad hoc, in the case of a particular insured person, be the basic alternative, based on the current medical view; this rather a misinterpretation by the Ministry. The reference to existing practice is also not apt, because health care that an insured person pays himself is, in contrast to the contested framework, determined directly by the Act. If, in the case of increasing the fee, the only indicator is the amount of daily consumption expenses of the poorest 10% of households in 2010, that speaks more against increasing the fee, because it is unacceptable in a civilized country for the fee for one day of hospital stay to exceed all expenses included in calculating the daily expenses of the poorest households. Regarding penalties imposed on health care services providers, the petitioners point out that they did not in any way question the possibility of entrusting a subject of private law with the exercise of public administration, but criticized the lack of statutory limits on the discretion of an insurance company on the amount and possible repeated imposition of fines, the inappropriate upper limit, and disproportionate increase in the upper limit on the fine for not collecting co-payments. In response to the statement from the Association of Health Insurance Companies, the petitioners state that the adored possibility for the patient to pay extra for health care has nothing to do with the concept of the right to free health care and to covered medical aids established by the Charter. They express a concern that the contested framework will be implemented in the spirit of the recent trend, where the more insured people pay extra, the narrower the scope of covered care becomes. The reference to annulment of the fee for prescription items then cannot be relevant to objections against the increase of the co-payment, which has no practical significance for an insured person receiving inpatient health care. The essential thing here is that the fee is not limited in any way and also applies to children under the age of 18. The petitioners certainly do not agree with the position of the General Health Insurance Company, which rejects the part of the petition concerning care alternatives as being self-serving and incorrect, and points out that the list of health care services only identifies services that the Act already identified as being covered to the level of the least expensive alternative. The petitioners maintain that the Act itself does not identify any services; that is only done by the sub-statutory regulation,

which they consider to be a violation of constitutionality. They also reject the insurance company's claim that the increase in the inpatient fee was required as a practical matter, because the present level of CZK 60 did not have a sufficiently demotivating effect and did not lead to the desired aim, to reduce the overuse of inpatient care. The petitioners disagree with the starting premise that insured persons intentionally and arbitrarily extend their inpatient stay; in their opinion, in contrast, the fee has no regulatory function. In this regard they criticize the insurance company for not supplying any empirical data (which it undoubtedly has at its disposal) with its claims. The petitioners point out that they submitted a draft Act (Chamber of Deputies publication no. 979) that would cancel the inpatient fee for children under the age of 18. Although the government disagrees with this, citing legislative inadequacies, it nevertheless stated that it generally agrees with this aim. The petitioners agree with the position of the Czech Medical Chamber where it criticizes the contested legislative framework for being unconstitutional. In contrast, they disagree with the opinion that it is all right for the Act to permit offering a patient a more comfortable version of certain services or more comfortable aids for a supplemental fee if the therapeutic effect is the same. Within the intent of Art. 31 of the Charter care covered by public health insurance cannot be free of a more comfortable version or more comfortable aids. The opinion presented goes against a desirable trend, as more comfortable performance of services and more comfortable medical aids are only for those who can afford to pay more for them, not for all insured persons. The requirement of the same therapeutic effect is also problematic, as it is left to the Minister's discretion, which care has such an effect and which does not. The petitioners also reject the opinion of the Czech Medical Chamber that increasing the fee for inpatient care corresponds to the increase in costs that has occurred in recent years. Finally, the petitioners fully agree with the arguments of the Association of Patients of the Czech Republic and the Czech National Disability Council and emphasize their seriousness.

### III.

#### Text of the contested provisions

A) Legislative framework for defining health care that is provided in a basic and a more expensive alternative

25. Provisions:

§ 11 par. 1 let. f): An insured person has the right to choose an alternative of health services under § 13,

§ 12 let. n): An insured person is required to pay the provider, or another entity as the case may be, that provided the insured person health care, the difference between the price of the health care services provided and the level of coverage from health insurance under § 13.

§ 13 par. 3 to 7:

(3) If the health care services set forth in paragraph 1 can be provided in more than one manner, and all of them meet the conditions set forth in paragraph 1 and have the same therapeutic effect, the manner of provision of health care services that is in accordance with effective and economical expenditure of public health insurance funds (the "basic alternative") is covered. The other manners of provision of health care services in the first sentence that do not meet the condition of effective and economical expenditure of public health insurance funds (the "more expensive alternative"), are covered by health insurance at the level provided for coverage of the basic alternative for such health care services.

(4) A more expensive alternative of health care services means only health care services that are thus identified in implementing legal regulations issued under § 17. Health care that can only be provided in one manner cannot be identified as a more expensive alternative.



(5) Before providing health care services that can be provided in both a basic alternative and a more expensive alternative, the provider is required to offer the insured person the provision of health care services in the basic alternative and also inform him about the more expensive alternative, including the difference between the price of the more expensive alternative set in accordance with a price regulation and set for the in the provider's price list, and the level of coverage of health care services in the basic alternative set by an implementing legal regulation issued under § 17 and the price regulation. The procedure in the first sentence is not used if it is not possible, in view of the patient's state of health, to request his consent, and immediate actions are necessary to save his life or health. The price list of more expensive alternatives of health care services must be made public by the provider on the premises of the health care facility in a spot accessible to the public, as well as in a manner permitting remote access.

(6) In cases set forth in paragraph 5, the provider is required to note in the insured person's health care documentation that he was offered the provision of the basic alternative of health care services and that he was informed about the possibility of providing the more expensive alternative of health care services. The record in the health care documentation includes the insured person's expression of consent with the provision of the basic alternative of health care services or the provision of the more economically demanding alternative of health care services, if the insured person chose that alternative; in that case the record in the health care documentation also includes the insured person's expression of consent to pay the amount of the difference between the price of the more expensive alternative and the level of coverage of the basic alternative of health care services. This consent is signed by the insured person and the treating physician; if the insured person cannot sign the record because of his state of health, his clear expression of will is confirmed by the signature of the treating physician and another witness. The record states the manner in which the insured person expressed his will and the health reasons preventing the insured person from signing.

(7) Providers may not, when providing health care services, give priority to an insured person who chooses the more expensive alternative.

§ 17 par. 4: The Ministry of Health will provide by decree a List of health care services with point values and identifying the health care alternatives under § 13.

B) Increase of co-payment for inpatient care from CZK 60 to CZK 100 /day

26. Provisions

§ 16a par. 1 let. f): (1) The insured person, or his legal representative on his behalf, is required, in connection with the provision of covered services, to pay the provider who provided the covered services, a co-payment in the amount of

f) CZK 100 for each day in which inpatient services are provided, included inpatient spa rehabilitation care; the day when the insured person is admitted for the provision of such care and the day when the provision of the care is terminated count as one day; this also applies for the stay of a child's companion, if that is covered by health insurance under § 25. Obligations arising from other statutes are not affected thereby.

C) Authorization of health care insurance companies to penalize a health care services provider for violation of certain provisions of the Act on Public Health Insurance

27. Provisions

§ 32 par. 5: If repeated violation of obligations under paragraph 4 is found, the insurance company is entitled to impose a fine on the provider of up to CZK 1,000,000. A fine can be imposed repeatedly. When imposing a fine, the insurance company takes into account the gravity of the violation, the degree of causation, and the circumstances under which the

violation of obligations occurred. A fine can be imposed up to 1 year from the day when the insurance company determined that there was violation or failure to fulfill obligations, but no later than 3 years from the day when the violation or failure to fulfill obligations occurred. The fine is the income of the health insurance company that imposed it.

§ 44 par. 5: For repeated violation of the obligations imposed on providers in § 11 par. 1 let. d) the relevant health insurance company will impose on the provider a fine of up to CZK 1,000,000; when setting the amount of the fine, it shall take into account the gravity of the violation of obligations, in particular to the manner in which it was committed and its consequences and the circumstances in which it was committed; a fine can be imposed up to 1 year from the day when the relevant health insurance company learned of the violation of obligations, but no later than 3 years from the day when the violation of obligations occurred; repeated imposition of a fine is grounds for terminating the agreement on the provision and payment of covered services without a termination notice period under § 17 par. 2.

§ 44 par. 6: A fine imposed under paragraphs 1 to 5 is the income of the health insurance company that imposed it.

§ 13 par. 8: For repeated violation of obligations under paragraphs 6, 7 the relevant health insurance company will impose on the provider a fine of up to CZK 1,000,000. When setting the amount of the fine, it shall take into account the gravity of the violation of obligations, in particular to the manner in which it was committed and its consequences and the circumstances in which it was committed. A fine can be imposed up to 1 year from the day when the relevant health insurance company learned of the violation of obligations, but no later than 3 years from the day when the violation of obligations occurred. The fine is the income of the health insurance company that imposed it. Repeated imposition of a fine is grounds for termination of an agreement on the provision and coverage of health care services without a notice period under § 17 par. 2. The provider is not liable for violation of obligations if it proves that it expended all efforts that could be asked of it to prevent the violation of obligations.

§ 16a par. 9 to 11:

(9) A provider is required to collect the co-payment set forth in paragraph 1 from the insured person or his statutory representative, unless there is an exception to payment of the co-payment under paragraphs 2 to 4. If it finds repeated and consistent violation of this obligation, the health insurance company is authorized to impose on the provider a fine of up to CZK 1,000,000. A fine can be imposed repeatedly. When imposing a fine the health insurance company takes into account the gravity of the violation, the degree of causation, and the circumstances under which the violation of obligations occurred. A fine can be imposed up to 1 year from the day when the insurance company learned of the violation or failure to fulfill obligations, but no later than 3 years from the day when the violation or failure to fulfill obligations occurred. The fine is the income of the health insurance company that imposed it.

(10) A provider may not collect co-payments in connection with the provision of covered services that are not subject to co-payments under this Act. If it finds repeated violation of this obligation, a health insurance company is authorized to impose on that provider a fine of up to CZK 50,000.

(11) Repeated imposition of a fine on a provider under paragraphs 9 and 10 is grounds for terminating the agreement on the provision and payment of covered services without a termination notice period under § 17 par. 2.

#### IV.

Conditions for the petitioner's active standing

28. The petition seeking annulment of the cited provisions of the Act on Public Health Insurance was submitted by a group of fifty-one deputies of the Parliament of the Czech Republic, and was thus in accordance with the conditions contained in § 64 par. 1 let. b) of Act no. 182/1993 Coll., on the Constitutional Court. Thus, in this matter we can state that the conditions for the petitioner's active standing have been met.

## V.

Constitutional conformity of the legislative process

29. In a proceeding on review of statutes or other legislative regulations, the Constitutional Court is required, in accordance with § 68 par. 1 of the Act on the Constitutional Court, to review whether the contested legislative regulation was adopted and issued in a constitutionally prescribed manner.

30. The text of the contested legislative framework was added to the Act on Public Health Insurance by Act no. 298/2011 Coll., which amends Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, and other related statutes which made changes in content, and by Act no. 369/2011 Coll., which amends Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by later regulations, and certain other Acts; that, however, only changes the terminology in the text of the contested framework. The government of the Czech Republic submitted the draft of the amendment (later published as no. 298/2011 Coll.) to the Act on Public Health Insurance to the Chamber of Deputies on 13 April 2011 (Chamber of Deputies publication 325). The lower chamber approved the draft on 21 June 2011 by resolution no. 592 with a majority of 105 deputies out of 180 deputies present, and 73 deputies voted against the bill.

31. The Senate discussed the bill that had been passed to it (on 30 June 2011) on 21 July 2011, and in resolution no. 281 a majority, of 48 out of 75 senators present voted to reject it. The Chamber of Deputies discussed the bill rejected by the Senate on 6 September 2011 (resolution no. 668) and approved the bill with a majority of 103 deputies out of 177 present. Sixty eight deputies voted against. The Act was delivered to the President of the Republic on 15 September 2011, and he signed it on 29 September 2011.

32. The Constitutional Court states that the adoption and issuance of the legal regulations that are the subject matter of review took place in a prescribed manner.

## VI.

The review

33. After determining that the contested legislative framework withstood the test in terms of the constitutionality of the procedure by which it was adopted, the Court could consider the content of the contested provisions. The reasoning is conceived in the same spirit as the petition, that is, it considers in turn the constitutionality of, first, the division of health care, or health care services, into a basic and more expensive alternative, then the increase in the fee for inpatient care, and finally, the authorization of health insurance companies to impose penalties for defined actions by the providers of health care services.

A) Alternatives of health care services in terms of their coverage by health insurance

34. As described above, the petitioners find the legislative framework to be unconstitutional both in the manner in which it is defined, that is the formulation (or lack) of conditions and criteria for health care alternatives in terms of coverage by health insurance funds and in the

form in which it was done. The first group of objections thus casts doubt on the very possibility for the legislature to divide health care according to whether the patient is to make supplemental payments or not. Therefore, in further deliberations it is desirable to begin with answering this basic question, i.e. whether the constitutional order does or does not permit the very division of health care (which has the same therapeutic effect in the context of the reviewed legislation) according to the criteria of it being covered by public health insurance funds.

35. The controlling provision for this is Art. 31 of the Charter. It guarantees everyone the right to protection of health. Citizens have the right, on the basis of public health insurance, to free medical care and to medical aids under conditions provided for by law. The issue is whether this provision of the Charter, providing the right to free health care and to medical aids on the basis of public insurance includes, without anything further, all available health care and aids that come into consideration and whether it simultaneously rules out the possibility of separating out a certain segment of care as being above standard and removing it from the regime of coverage from public insurance, more precisely, full coverage.

36. Under Art. 89 par. 2 of the Constitution of the Czech Republic (the “Constitution”) enforceable decisions of the Constitutional Court are binding on all authorities and persons. In the past the Constitutional Court has considered the right to free health care repeatedly. Three of its decisions are significant in this regard: judgment file no. Pl. ÚS 35/95 (no. 206/1996 Coll.; N 64/5 SbNU 487), judgment file no. Pl. ÚS 14/02 (no. 207/2003 Coll.; N 82/30 SbNU 263) and judgment file no. Pl. ÚS 1/08 (no. 251/2008 Coll.; N 91/49 SbNU 273). In them, the Constitutional Court, in addition to reviewing the merits, addressed the wider context of the financing of health care. In view of the binding nature of the essential parts of the reasoning of those decisions, the Constitutional Court had to take these decisions as a starting point now.

37. The Constitutional Court admitted the possibility of dividing health care into standard, i.e. covered by public insurance, and above-standard, i.e. partly or fully paid by the patient, in judgment file no. Pl. ÚS 35/95, where it considered the constitutionality of the framework of legal provisions defining the scope of health care covered by general health insurance and sub-statutory regulations setting forth the specific scope of that care. In the reasoning of the judgment – using the terminology of the now-contested Act – it immanently expects the care alternatives, although it concentrated on the substance of the case, that being the form of the legislative framework: “Citizens have a right to free health care and medical aids on the basis of public insurance and under conditions specified in more detail by law. Thus, if these conditions can be governed only by statute, it is quite essential that the scope and manner in which they are provided be defined by the same legislative regime. Anything other than a statutory framework would be a violation of the Charter, and therefore unconstitutional. It is unacceptable for the definition of the scope of the amount of health care provided for full or partial payment be left to be regulated by anything other than statutory legal regulations. That would put the sphere of protection of fundamental rights and freedoms under the authority of the executive branch, which is not authorized to have such powers.” The Court spoke even more strongly in judgment file no. Pl. ÚS 14/02, where it addressed the issue of the compliance of the prohibition on a particular health care facility and health care workers to receive from insured persons any payment for care that was only connected with provided care covered by public insurance, where it stated: “However, the text of the Act also indicates that nothing prevents collecting direct payment from insured persons for health care provided beyond the framework of conditions for payment-free care”; the group of seven dissenting judges also expressly agreed with this interpretation. The same sentence was also quoted in

the majority opinion of the Plenum in judgment file no. Pl. ÚS 1/08 (point 125), which also stated that "... a formalistic insistence on an expanded understanding of free medical care for an individual could lead to lowering the level of free health care covered by public insurance in the true sense of the word for all members of society." Judge Jiří Nykodým stated in his dissenting opinion: "I do not wish to claim that all health care must be provided for free. ... The law may provide which items of medical care are fully covered by public health insurance, which are partly covered, and which are not covered at all; the same applies for coverage of medications and foods for special purposes. However, at the same time, an opportunity must be created for voluntary insurance, which could cover costs for treatment that is not covered by public health insurance funds. The fact that the state was not able, at least since 1995, to prepare a statute that would define health care fully or partly covered by health insurance, and thereby also define care not covered by these funds at all, in such a way that the public health insurance budget would be budget, although it has been evident for a number of years that expenses are higher than income, cannot be a reason to violate the constitutional order. In judgment file no. Pl. ÚS 35/93 the Court defined the possibilities of such a legislative framework to the effect that making this right subject to statute does not mean that free care can be fully ruled out by statute. A statute may define what is free and what is not free." Judge Vojen Güttler also joined this dissent. Judge Pavel Holländer also recognized direct payment for services, though in a more careful formulation, in his dissenting opinion: "One can also, in relation to Art. 31 of the Charter, imagine direct payment for services (again, with the possibility of contractual insurance), that are not a direct component of health care."

38. The Charter contains provisions on the fundamental rights that are different as regards their normative content. First there are fundamental human rights that arise directly from human existence, and that fact alone is the basis for defining their constitutional content and scope. These are values that contain the fundamental rights for preserving a person's integrity and ensuring his dignity, such as the right to life, inviolability of the person, and personal freedom. These rights are inherent, inalienable, non-prescriptible, and not subject to repeal (Art. 1 of the Charter). Limitations may be placed upon them only under the conditions prescribed in the Charter and only by law (Art. 4 par. 2 of the Charter).

39. In contrast, the rights and freedoms contained in Chapter Four as "Economic, Social, and Cultural Rights" need the presence of other factors in order to be implemented; they do not function directly like the abovementioned rights. In Art. 31 of the Charter this fact is expressly stated in the second sentence. The right to free health care and medical aids is narrowed to the scope of public insurance, and is thus condition on payment of insurance premiums and the volume of funds thus gathered and prepared for redistribution. All the rights contained in Chapter Four are dependent on the economic and social level attained by the state and the related standard of living. This right falls under the regime of Art. 4 par. 1 of the Charter, where obligations can be imposed only on the basis of the law and within its bounds, and only so that the fundamental human rights are preserved.

40. Realistic fulfillment of the right to health care and medical aids that will be truly effective and will correspond to modern trends in medicine is subject, first of all, to an appropriate financial foundation. It is a generally known fact that – and this is not meant in the negative sense – the financial needs of the health care system are constantly growing. The rate of economic growth and the related volume of funds for public health insurance are not keeping up with progress, research and the technological abilities in the health care field. Therefore, the Ministry of Health, as the authority responsible for stability in the sector, logical looks for

ways to obtain additional funds for financing health care (ore health care services). Increasing the proportion of direct payments by patients is one of them.

41. This possibility is not ruled out by the fact that the constitutional framers expressly included “free” in Art. 31 of the Charter. The Constitutional Court has already interpreted the concept of “free” medical care, from the point of view of Chapter Four of the Charter, governing economic, social and cultural rights. IN judgment file no. Pl. ÚS 35/93 (no. 49/1994 Coll.; N 7/1 SbNU 51) it considered a petition seeking the annulment of Article I of Act no. 190/1993 Coll., which amended § 4 par. 1 of Act no. 29/1984 Coll., on the System of Elementary and Secondary Schools (the Schools Act), as amended by later regulations. That article replaced in § 4 par. 1 of Act no. 29/1984 Coll., the sentence “Education is free” with the sentence “In schools that are part of the system of elementary and secondary schools, citizens have the right to free education, unless the law provides otherwise.” The Constitutional Court annulled in this provision the phrase “unless the law provides otherwise,” citing as its main reason the principle that, even though under Art. 41 par. 1 of the Charter the right provided in Art. 33 par. 2 of the Charter, i.e. the right to free education in elementary and secondary school can be exercised only within the bounds of statutes that implement these provisions, one can hardly assume that the absolute nature of the right to free elementary and secondary education, undermined by the statutory exception, would be compatible with the preservation of the limits of the fundamental rights and freedoms. In the related judgment, file no. Pl. ÚS 25/94 (no. 165/1995 Coll.; N 31/3 SbNU 233) the Constitutional Court considered a petition seeking the annulment of government order no. 15/1994 Coll., on the free provision of textbooks, instructional texts and basic school supplies. In this order the government set the scope in which students are provided free textbooks, instructional texts and basic school supplies. The Court denied the petition and stated in the reasoning that the “free” nature of education cannot consist of the state bearing all expenses that citizens incur in connection with the exercise of the right to education. Thus, the state may require payment of part of the expenses connected with exercise of the right to education, and the government is undoubtedly authorized to do so. This does not, under any circumstances, undermine the principles of free education in primary and secondary schools. In these two judgments the Constitutional Court defined the concept of “free” status on a general level to the effect that the free status of a right contained in the Charter being subject to statute does not mean that a statute can be used to completely eliminate the free status. The statute may specify what is free and what is not.

42. From the Constitutional Court’s point of view, it is important that the content of Art. 31 of the Charter not be de facto emptied out by statute. In the spirit of that Article, the funds of public health insurance must fully cover quality, full-value, and effective health care as elementary, standard care. As was said in judgment file no. Pl. ÚS 14/02, “for constitutional and statutory principles this care cannot be divided into a kind of basic, “cheaper” but less appropriate and less effective care, and an above-standard, “more expensive,” but more suitable and more effective one. The difference between standard and above-standard care may not consist of differences in the suitability and effectiveness of treatment. The law does not regulate what health care a doctor or health care facility may provide, but what kind it must provide in the general interest so that all insured persons have a right, in the same degree, to such treatment and medication, as meets their objectively determined needs and the requirements of the appropriate level and of medical ethics. Thus, the developmental orientation of health care, supported by laws, is based not on shifting “better” items of health care from the sphere of payment-free care into the sphere directly paid by insured persons, but, in contrast, toward improving the items provided payment-free from public health

insurance.” We must state that although the existing legislative framework fundamentally does not raise such concerns, because § 13 par. 1 of the Public Health Insurance Act defines the qualitative conditions of health care covered by public insurance identically for both alternatives of care so that a) they correspond to the insured person’s state of health and the purpose that is to be achieved by providing them and they are appropriately safe for the insured person, b) they are in accordance with the present available medical science, c) there is proof of their effectiveness for the purpose for which they are provided. On the other hand, it cannot be ruled out that, with several treatment alternatives, each of which meets the abovementioned parameters, a more expensive procedure may be more suitable than a less expensive one in view of a particular patient’s individual conditions. In such a case the treating physician must be given the opportunity to decide, in the interest of protecting the patient’s life and health, that it is suitable to use the more expensive alternative which, if it meets the conditions provided, will also be fully covered by public health insurance. A patient cannot get into a situation which the existing system tempts one to: he will be informed about the basic and more expensive treatment procedures, and the treating physician will inform him that only the basic alternative of treatment will be fully covered by health insurance, but at the same time, given his specific conditions, the more expensive alternative is recommended as more suitable for him. Thus, it is necessary to set by statute the limits between informing a patient about the basic alternative and the more expensive alternative(s) and recommending one of the available treatment alternatives to be used. If the treating physician decides to recommend a more expensive alternative for a particular diagnosis, he can do so only on the condition that it will be fully covered by public health insurance. It cannot be overlooked that the patient is the weaker party when negotiating the conditions of treatment procedures, and insofar as the legal framework provides protection to the consumer in the area of contractual legal relationships with a material basis, all the more so must the legal framework provide protection to the patient, where more significant values are involved. An example of such a situation is patients with associated diseases, where the basic treatment alternative would mean an increased risk of complications, possibly a threat to life, and therefore it is necessary to consider the more expensive treatment to be basic treatment in the interests of protection the health of the particular patient. In such a case it is out of the question for this treatment, more suitable to the patient’s individual conditions, not to be fully covered by public health insurance.

43. The foregoing arguments thus lead the Constitutional Court to part of its conclusion, that the division of health care services covered by public health insurance funds into a basic alternative, fully covered by public insurance, and a more expensive alternative, is consistent with our constitutional order. It is also important that European Union countries handle this issue similarly. Inspiration also comes from the abovementioned conclusion of the Constitutional Court of the Slovak Republic in judgment file no. Pl. ÚS 38/03 (no. 396/2004 Coll.), according to which free care under Art. 40 of the Constitution of the Slovak Republic (the wording of Art. 40 of the Slovak Constitution is analogous to Art. 31 of the Czech Charter) has its particular scope, and this does not mean that all care is provided for free.

44. It has already been said that economic, social and cultural rights, which include the right to free health care under Art. 31 of the Charter, are made concrete by the relevant law, and only on the basis of that law (and within its limits) can these rights and freedoms be exercised (Art. 41 par. 1 of the Charter). On the other hand, this must be a statute; a sub-statutory legal regulation is not sufficient. The Constitutional Court formulated this absolutely clearly in judgment file no. Pl. ÚS 35/95: “Citizens have a right to free health care and medical aids on the basis of public insurance and under conditions specified in more detail by law. Thus, if

these conditions can be governed only by statute, it is quite essential that the scope and manner in which they are provided be defined by the same legislative regime. Anything other than a statutory framework would be a violation of the Charter, and therefore unconstitutional. It is unacceptable that the definition of the scope of the health care provided for full or partial coverage would be left to regulations other than statutory ones. This would put the sphere of protection of fundamental rights and freedoms under the authority of the executive branch, which is not authorized to have such powers.” As regards substance, the Court said the same thing in judgment file no. Pl. ÚS 14/02: “If public health insurance is to approach the European standard, it would evidently be necessary for the Act to clearly and understandably define the possibilities for private payment by insured persons, evidently similarly as in developed European states, Germany, Switzerland, etc.” This interpretation is determinative for further review, and we will examine whether the legislature, apart from the division of health care and medical aids into alternatives, actually defined by statute the scope and manner of their provision within individual alternatives or whether this de facto remained to be done in an implementing ministry decree.

45. In a modern (regulatory) state, the executive branch is given its own norm-creating activity. In order for it to be considered a constitutional and non-arbitrary exercise of power, it must always have limits on its norm creation that are set by law. Under Art. 79 par. 3 of the Constitution, ministries and other administrative offices may issue legal regulations on the basis of a statute, within its bounds, and only if they are so empowered by the statute. In judgment file no. Pl. ÚS 45/2000 (no. 96/2001 Coll.; N 30/21 SbNU 261) the Constitutional Court state: “To summarize, the constitutional definition of derived norm creation by the executive branch rests on the following principles: (a) an order must be issued by an authorized entity, (b) an order may not interfere in matters reserved to statutes (i.e. it cannot establish primary rights and obligations) and (c) legislative intent for regulation beyond the statutory standard must be evident (i.e. discretion must be provided for the sphere in which the order functions).” The Court considered an implementing decree, as another instance of derived norm-creation, in judgment file no. Pl. ÚS 23/02 (no. 476/2004 Coll.; N 89/33 SbNU 353), where it stated that “in order to ensure effective exercise of public administration, it is suitable to leave regulation of details to a sub-statutory legal regulation, which can be amended more ad hoc. Therefore, the constitutional order of the Czech Republic permits the legislature, under certain conditions, to authorize executive bodies to issue sub-statutory legal regulations. Of course, the authorization must be express and the content of the sub-statutory regulation must be in accordance with the statute that it implements, i.e. it must be issued on its basis and within its bounds. However, if Parliament fails to establish the appropriate framework and gives the executive branch blanket authorization to determine what a right is, what the rights and obligations of persons are, or what the powers and obligations of administrative offices are, then it violates the principle of limited delegation of norm-creation and thus also violates the principle of the separation of powers, set forth, among other things, in Art. 2 par. 1 of the Constitution. Limitation of the delegation of norm-creation is one of the traditional and key aspects of the separation of powers and the system of checks and balances on which the constitutional order of the Czech Republic rests. In the system of separation of powers the legislature fundamentally cannot transfer its authority to another subject, entrust it to different hands (...). Under the case law of the Constitutional Court, not every obligation has to be provided by statute, because a requirement that every obligation be provided directly and exclusively by statute would ‘obviously lead to absurd results, the denial of the purpose of secondary norm-creation, because a conceptual element of every legal norm is the definition of certain rights and obligations for the persons addressed by the norm’ (cf. judgment no. 410/2001 Coll.). However, a sub-statutory regulation must always stay within



the bounds of the statute, which are either expressly defined or arise from the meaning and purpose of the statute. On the basis of the statutory authorization, the implementing regulation is to provide more concrete detail on the issue whose general features are regulated by the statute, but it may never go beyond the statute.” In judgment file no. Pl. ÚS 3/2000 (no. 231/2000 Coll.; N 93/18 SbNU 287) the Constitutional Court then stated that Art. 79 par. 3 of the Constitution must be interpreted narrowly, which means that the authorization to issue sub-statutory legal regulations must be specific, unambiguous, and clear.

46. The Constitutional Court has already repeatedly addressed the authority of the executive branch in the implementation (or regulation and the related possible limitations) of fundamental rights contained in Chapter IV of the Charter. In the abovementioned judgment file no. Pl. ÚS 45/2000 it considered the fundamental right to do business (Art. 26 par. 1 of the Charter), which “does not apply directly and can be exercised only within the bounds of statutes; however, any limits for such conduct of business or activities are subject to statutory reservation.” The government order then under review contained a number of provisions that interfered in the sphere of freedom to do business. Although the Constitutional Court respected the principle of a looser relationship between a statute and an order, as it considered the main element of an order’s constitutionality to be its consistency with the meaning and purpose of the statute as a whole, it was forced to state that neither a grammatical, systematic, or logic interpretation, even with the broadest possible approach, did not indicate that it would be possible to draw from the statutory provision in question regulation of production related to agriculture, or to limit the availability of produced goods on a particular market. If the legislature cannot delegate to the executive branch an area of relationships that is intended to be regulated by statute, and thus basically abdicate its legislative obligation, then all the more so the executive branch cannot assume the right to such regulation itself, on the basis of a statute that obviously has a different purpose and meaning. The contested order violated the statutory reservation and limited the freedom to do business in a manner that the statute did not anticipate and did not generally regulate. Insofar as the Constitutional Court annulled the sub-statutory regulations on the grounds that the limits created by the legislature for legislative activity by the executive branch are uncertain, it must do so all the more in an area where the statute does not anticipate a legislative initiative from the government at all. In judgment file no. Pl. ÚS 5/01 (no. 410/2001 Coll.; N 149/24 SbNU 79) the Constitutional Court stated that it is not true that any limitation on a fundamental right enshrined in Art. 26 par. 1 of the Charter can be implemented only by statute (and not by a government order). It considered government order no. 445/2000 Coll., on setting production quotas for milk for the years 2001 to 2005 (except for one provision) to be constitutional, because it provided concrete details on an issue whose basic features had already been regulated by statute. “The contrary conclusion, which would require all obligations to be set directly and exclusively by statute, would obviously lead to absurd results, denying the purpose of secondary (and in some cases even primary) norm creation, as part of the concept of each legal norm is the definition of certain rights and obligations of those to whom it is addressed.” If the government respected the relevant principles for issuing the contested order – on the basis of an express statutory authorization – and the order’s content only sets forth details to make the cited statutory provision more concrete, i.e. only concerns the issue whose general features are regulated by the statute itself, the order cannot be unconstitutional; in this case the limits of the fundamental rights and freedoms were set directly by statute (Art. 4 par. 2 of the Charter) and the obligations arising from the order are therefore imposed “on the basis of and within the bounds of law” (Art. 4 par. 1 of the Charter). In judgment file no. Pl. ÚS 23/02 the Constitutional Court annulled provision of Act no. 109/2002 Coll., on Institutional Care or Protective Care in School Facilities and on preventive Education Care in School Facilities and

amending other Acts. The provisions of the Act that proposed to be annulled introduced into the Czech legal order the term “contractual family,” which, however, it did not define in detail, and its provisions in this regard were unclear. The rights and obligations of persons and bodies involved in this institution and their powers would have had to be set by ministerial decree, in order for the institution to even become functional. Therefore the contested provisions were inconsistent with Art. 79 par. 3 of the Constitution, because they were an impermissible delegation of norm-creation to a body in the executive branch and permitted a sub-statutory legal norm to regulate the bounds of the fundamental rights and freedoms. The contested provisions of the Act were inconsistent with this article of the Constitution, because the ministry was authorized to regulate something for which the Act itself did not set any limits, which it did not regulate itself at all. Thus, this was not a case of implementing the Act but supplementing it, because the implementing regulation would have had to precisely define the institution of a contractual family. Thus, the relevant statutory framework for the ministry decree to implement was lacking. The brevity and indefiniteness of the Act did not create the necessary basic framework for the cited sub-statutory regulation. The relevant provisions of the contested Act did not observe the constitutional principles of sub-statutory norm-creation. The definition of the term “contractual family” was unclear. Equally unclear were the conditions under which a child can be placed in a contractual family (“in specially justified cases, if the interests of the child require it”). The intensity of this lack of clarity was so high that it ruled out the possibility of setting the normative content of these provisions using standard interpretation procedures.

47. The source of the regulation of health services alternatives lies in § 13 of the Public Health Insurance Act. Paragraph 1 of that provision (which is not proposed to be annulled) contains the definition of a health care service covered by health insurance; health care services provided to an insured person with the aim of improving or maintaining his state of health or lessening his suffering are covered if a) they correspond to the insured person’s state of health and the aim that is to be achieved by providing them and they are appropriately safe for the insured person, b) they are in accordance with the presently available medical knowledge, c) there is proof that they are effective for the purpose for which they are provided. Paragraph 2 (also not contested) defines the areas of services (e.g., preventive care, diagnostic care, provision of medications, transportation of insured persons, etc.) that are covered by public insurance in the specified scope and under the specified conditions. The difference between the health care alternatives is defined in the contested paragraphs 3 and 4 so that if the health care services set forth in paragraph 1 can be provided in more than one manner, then, if all of them meet the conditions set forth in paragraph 1 and have the same therapeutic effect, insurance covers the alternative which is, consistently with effective and economical expenditure of public health insurance funds, identified as the “basic alternative.” Other alternatives of health care services that meet the same conditions, except for effective and economical expenditure of funds, as “more expensive alternatives,” are covered by public health insurance only up to the amount specified for coverage of the basic alternative of such health care services. An more expensive alternative of health care services must be identified as such in implementing legal regulations; under § 17 par. 4 of the Public Health Insurance Act the Ministry of Health shall issue by decree a list of health care services with point values and indicating the health care alternatives. Health care that can only be provided in one manner cannot be identified as an more expensive alternative.

48. Thus, it is a question whether, by using this formulation, the legislature complied with the wording Art. 31 of the Charter. According to the Ministry of Health, as the presenter of the bill, the first paragraph of § 13 of the Public Health Insurance Act guarantees that both

alternatives will meet the highest possible standard of health care corresponding to the patient's state of health and needs. That is, even the basic alternative, which meets all the criteria for covered health care, including the same therapeutic effect. The Ministry explains the alternatives to the effect that the first step will always be to thoroughly evaluate the patient's state of health and determine the optimal health care alternative, which will become the basic alternative for the particular case. Only then will it be reviewed whether there is in fact and formally a more expensive alternative with the same therapeutic effect for the particular treatment. This will be case that does not bring the patient any further improvement from a medical perspective (has the same therapeutic effect), but only increased comfort, or the patient subjectively prefers it. Thus, in the opinion of the Ministry of Health, the elements common to both alternatives, and their limits, are established directly in the Act; the decree only implements its provisions in a user-friendly way.

49. We can only partly agree with this. It is true that the general foundation for basic and more expensive alternatives is contained directly in the Act. However, from the Constitutional Court's point of view it is important whether the framework in the Act, in and of itself, i.e. without an implementing regulation, is sufficiently understandable to persons governed by the Act and whether it would be capable of application. An implementing regulation is meant to only provide details. The contested framework for care alternatives at present works so that, apart from the general framework presented above that is in the Public Health Insurance Act, the decree that issues a list of health care services with point values also contains health care services identified by the Ministry of Health for which insured persons can be offered a choice between the basic and more expensive alternatives. Only from the decree is it clear to health care services providers, insurance companies, and insured persons what is a basic alternative and for what health care services, medical aids, resources and health care materials it is possible or necessary to pay beyond the level of public insurance coverage. It is not evident from the Act itself, and cannot be derived from it by even the loosest interpretation. Thus, the Public Health Insurance Act only took the first step toward defining standard and above-standard care (in the words of the Public Health Insurance Act, basic and more expensive alternatives). The second, though essential, part, without which the institution could not survive, i.e. the specific determination of what is, within the intent of Art. 31 of the Charter, free care, is regulated only in the implementing regulation. In the Constitutional Court's opinion, here the legislature did not meet the requirements established by the constitutional order and repeatedly interpreted by current case law.

50. Art. 4 par. 2 of the Charter indicates that "the requirement of a statutory basis for possible limitations on fundamental rights is derived from the democratic principle, as well as from the principle of a material, law-based state. The reason for it is to prevent the executive branch from exercising its own ideas about how and how much the fundamental rights can be limited. Giving this authorization to a democratically legitimated parliament is meant to ensure that limitations on fundamental rights will take place only after democratic, parliamentary discourse; moreover, limitations on fundamental rights also receive subsequent democratic feedback" (see Wagnerová, Eliška, Šimíček, Vojtěch, Langášek, Tomáš, Pospíšil, Ivo and collective of authors, *Listina základních práv a svobod. Komentář*. [The Charter of Fundamental Rights and Freedoms. Commentary. Praha: Wolters Kluwer, 2012, p. 128). The legislature cannot delegate to the executive branch the imposition of primary obligations; a sub-statutory regulation must always respect the purpose and meaning defined by statute. The sub-statutory regulation by itself, without support in the statute, defined a defining element to which an obligation is tied. Therefore, this is a regulation which, among other things, also conflicts with the requirement of Art. 4 par. 1 of the Charter. As regards the reviewed

material, we can conclude that certain substantive defining elements, to which the obligation of payment for health care (even after choosing the more expensive alternative) is tied, as is the obligation of health care providers concerning offering alternatives or documentation of the patient's consent, are (or should be) primarily defined only in the sub-statutory regulation.

51. As was stated, sub-statutory norm-creation is unconstitutional if the limits of the fundamental rights and freedoms cannot be set otherwise than directly by statute. That is the situation in this present case involving the limits of the right to free health care. The basic features of the issue are regulated in the Public Health Insurance Act, but only partly. The basic framework for a sub-statutory legal regulation is therefore too brief and uncertain. In addition, we cannot overlook the gap in the statutory definition, which is pointed out in point 42 of the reasoning.

52. For the reasons stated, there is no choice but to annul the contested provisions, § 13 par. 3, 4 and part of § 17 par. 4 of the Public Health Insurance Act, due to inconsistency with Art. 4 par. 2 a Art. 31 of the Charter. Because the related provisions, § 11 par. 1 let. f), § 12 let. n), and § 13 par. 5 to 7 cease to make sense thereby, the judgment annulled these provisions as well.

#### B) Increase of the co-payment for inpatient care

53. The petitioners contest the provision that establishes the fee obligation [§ 16a par. 1 let. f) of the Public Health Insurance Act], that is, not the fee as such, but its increase to the present CZK 100 per day of hospitalization.

54. The Constitutional Court already considered a petition seeking the annulment of the fee for inpatient care in judgment file no. Pl. ÚS 1/08 (no. 251/2008 Coll.; N 91/49 SbNU 273), as part of evaluating the constitutionality of the system of co-payments in the health care system as a whole. It denied the petition for the annulment of the fee – at the time, CZK 60 per day of hospitalization. In relation to all fees, it found grounds for maintaining a maximum degree of restraint in exercising its authority to make derogatory decisions, with the provision that submitting the most suitable ways to fulfill social rights under Chapter Four of the Charter is a task for political parties, based on the mandate received from the voters. At the same time, as a supporting step, it applied a test of reasonableness, with the conclusion that the contested framework stood up to all its steps. As regards the now contested fee for hospitalization, the Constitutional Court took into account that the petitioners themselves admitted that it was a matter of paying for “hotel services,” that is setting a fee for accommodation and food in a hospital, which need not exceed the bounds of constitutionality. Thus, the case of a fee for hospitalization obviously cannot be a question of free health care or medical aids under Art. 31 of the Charter, but of concurrently provided other related services. Otherwise – taken ad absurdum – Art. 31 of the Charter would also establish an entitlement to free accommodation or catering services outside medical facilities, and regardless of whether they are or are not provided in connection with health care or not. The Constitutional Court concluded that, as the petition wasn't being contested for reasons of nonconformity of the legislative process, it would consider the relevant part of the petition (seeking annulment § 16 par. 1 let. f) of the Public Health Insurance Act), to be obviously unsubstantiated.

55. In the present matter, the Plenum refers to the substance of the abovementioned conclusions. Of course, a change of circumstances, specifically the change of the legislative framework that took place after the decision in the matter file no. Pl. ÚS 1/08 and that increased the fee from the original CZK 60 to the present CZK 100 per day of hospitalization,

leads the Constitutional Court to the belief that the question of this provision's constitutionality must be re-opened. Increasing the fee by 2/3 is so marked, that this is in fact an essentially different provision. In any case, it was precisely in judgment file no. Pl. ÚS 1/08 that the Constitutional Court stated that it "...does not approach evaluation of questions related to social rights in a static manner, but with exceptional emphasis on what the situation is at the time of its decision." At the same time, it pointed out, as regards social rights, that within the intent of judgment file no. Pl. ÚS 11/02 (no. 198/2003 Coll.; N 87/30 SbNU 309) a reason for which "the Constitutional Court may depart from its own jurisprudence is a change of the social and economic relations in the country, a change in their structure, or a change in the society's cultural expectations. A further circumstance is a change or shift in the legal environment formed by sub-statutory legal norms, which in their entirety influence the examination of constitutional principles, without, of course, deviating from them, but, above all, not restricting the principle of the democratic state governed by the rule of law (Art. 1 par. 1 of the Constitution). A further circumstance allowing for changes in the Constitutional Court's jurisprudence is a change in, or an addition to, those legal norms and principles which form for the Constitutional Court its binding frame of reference, that is, those which are contained in the Czech Republic's constitutional order, assuming, of course, that it is not such a change as would conflict with the limits laid down by Art. 9 par. 2 of the Constitution, that is, they are not changes to the essential attributes of a democratic state governed by the rule of law."

56. Therefore, the Constitutional Court again subjected the provision, in its present form, to the test of rationality, a method which it routinely uses in analogous situations [for example, apart from judgment file no. Pl. ÚS 1/08 and the cited judgment file no. Pl. ÚS 83/06 (no. 116/2008; N 55/48 SbNU 629) also judgment file no. Pl. ÚS 54/10 (no. 186/2012 Coll.)]. The test reflects, on one hand, the need to respect the relatively wide discretion of the legislature, and at the same time, on the other hand, the need to prevent possible excesses. It consists of four steps: 1) defining the significance and essence of the social right, i.e. its essential content, 2) evaluating whether the statute does not affect the very existence of the social right or the actual implementation of its essential content, 3) evaluating whether the statutory framework pursues a legitimate aim, i.e. whether it is not an arbitrary fundamental lowering of the overall standard of fundamental rights, 4) weighing the question whether the statutory means used to achieve it is rational, even if not necessarily the best, most suitable, most effective, or wisest. As regards the first three steps of the test, we can refer to conclusions contained in the reasoning of judgment file no. Pl. ÚS 1/08; we only add to the third round of the test, for precision and concreteness, that the aim pursued, i.e. to take out of the regime of public health insurance coverage those services that have nothing to do with the actual provision of health care, is legitimate. However, the Constitutional Court reached different conclusions regarding the reasonableness of the contested legislative framework, for the reasons given below.

57. As was stated, the fee for inpatient care is basically payment for "hotel services." This is also supported by the arguments of the Ministry of Health regarding the concrete level of the fee, which is derived from per capita expenses for food, beverages, energy, water, etc. Thus, it is seen as the equivalent of expenses that the patient would necessarily have anyway (even outside the medical facility). The Constitutional Court's first constitutional law criticism results from this. The obligation established does not in any way differentiate cases where the hospitalization is merely a routine component of treatment, only related to health care services, and in extreme cases can be replaced by a stay outside the health care facility, even if that were not a practical and optimal solution for the patient, and when the hospitalization is a necessary component of the medical service itself. We can hardly accept that during

hospitalization in an intensive care unit the patient is being provided “hotel services.” In these cases the obligation to pay the fee conflicts with the text of Art. 31 of the Charter. Hospitalization that is health care in the narrow sense, covered by public health insurance, must be provided free, because for the patient there is no other alternative to it.

58. Another factor that causes the constitutionality deficit is the lack of limits for this payment; in this regard the Constitutional Court had to fully agree with the petitioners. The Public Health Insurance Act imposes obligations in a blanket manner; they have to be paid by non-earning persons, including socially at-risk groups, children, persons with health disabilities, etc. Likewise, the obligation to pay the fee is not limited in time; the patient is to pay it in full regardless of the length of hospitalization. The combination of these factors can evoke a financially unbearable situation, not only for the abovementioned categories of patients. In any case, it denies the essence of solidarity in receiving health care. The exemption from fees for those insured persons who present a decision, announcement, or confirmation issued by a body providing assistance in material need about the benefits allocated is not a measure that effectively mitigates the effects of the obligation. This requires the activity involved in arranging an obtaining official documents, which can hardly be expected or required from precisely those persons who are most socially burdened by the fee.

59. The legislative framework, in the form that is criticized above, also deviates in the context of the hospitalization fee paid in neighboring countries, as described in the narrative part. In Germany a hospitalization supplement (Zuzahlung) of EUR 10 per calendar day is charged, but it is collected for a maximum of 28 days of hospitalization in a calendar year [§ 61 of Volume Five of the Social Code (Sozialgesetzbuch V - Gesetzliche Krankenversicherung)]. For completeness, it is appropriate to note, since several statements submitted in this matter touched on it, that this fee, or more precisely supplemental payment, was not annulled. The German legislature annulled, as of 31 December 2012 the co-payment for visits to a general practitioner, dentist, outpatient specialist, or psychologist (the Praxisgebühr), which was set at EUR 10 per calendar quarter and was the income of the health insurance company. In 2009 the German Social Court (Bundessozialgericht, BSG) concluded that this co-payment does not interfere in patients’ constitutionally guaranteed rights (see decision of 25 June 2009 file no. B 3 KR 3/08 R). In Slovakia, under § 1 par. 1 let. a) of government order no. 722/2004 Coll., on the Level of Payment by an Insured Person for Services Related to the Provision of Health Care, issued to implement Act no. 577/2004 Coll., on the Scope of Health Care Covered by Public Health Insurance and on Coverage of Services Related to the Provision of Health Care, the payment for inpatient care does not apply. Likewise for hospital care in Austria, the insured person pays a co-payment of ca. EUR 10 for each day of hospitalization (the hospitalization fee) – the amount varies in individual lands, but it is paid for a maximum of 28 calendar days per year. These funds then generally serve for extrajudicial damage payments to patients for shortcomings in the provision of care. Even if a patient is not exempt from the fee, he can ask a hospital for extraordinary waiver of the payment on the grounds of a temporary difficult situation. In the case of an insured person’s family members who are not provided for, a co-payment in the amount of 10% of the daily rate is expected during the first four weeks. Beginning with the fifth week, hospital treatment is free for the insured person and family members who are not provided for. In some cases a health insurance company may pay part or the full amount of travel expenses incurred for purposes of access to health care (MISSOC: Your social security rights in Austria. Brussels, 2011, p. 11).

60. As was stated, the constitutional deficiency of the increase in the fee is found precisely in its insufficient differentiation and blanket application, in combination with the lack of any

limits. It thus places § 16a par. 1 let. f) of the Public Health Insurance Act into conflict with Art. 31 of the Charter, as well as Art. 3 par. 1 of the Charter, guaranteeing the fundamental rights to everyone without difference in property. Therefore, the Constitutional Court decided to annul it. At the same time, an interim legislative period was set until the end of 2013, because the co-payment for inpatient care is currently a not insignificant income to the providers of health care services, and its immediate disappearance would cause an economic burden on them without reason and economically. The legislature is thus given time to establish the parameters of payment within the intent of this judgment.

61. As obiter dictum the Constitutional Court presents to the legislature to consider whether to make more precise its chosen, truly confusing terminology. The payment in question is called a “fee,” although in legal terminology a “fee” means a payment obligation on an individual or legal entity in connection with the activities of a body of the state power (the state or a municipality) made in the course of the exercise of state power in its interest. This is a payment, the purpose of which is to function as motivation in relation to the subject seeking a particular act by the public authorities (i.e., pursuing as its aim the seriousness of an action, non-misuse of public power, e.g. the judiciary, with court fees); a fee also fulfills the role of a partial economic equivalent for the activities of the public authorities. Article 11 of the Charter provides that taxes and fees can be imposed only on the basis of law, and it must be emphasized that the determining feature of taxes and fees is the fact that they flow into the public budget. It is obvious that this situation does not involve that kind of payment. In essence this is a payment for “hotel services,” which are the income of health services providers and do not flow into public funds. No authority exercised by the state when fulfilling its functions or securing funds, or in connection with the collection of co-payments was transferred to providers. They are private law subjects. Therefore, in this connection it would be more suitable not to use the term “fee.”

C) Authorization of health insurance companies to penalize health services providers

62. The subject for review is the list of actions contained in the Public Health Insurance Act for which health insurance companies can impose penalties on providers. The Constitutional Court peripherally considered the question of financial penalties in judgment file no. Pl. ÚS 1/08, where it stated: “it is up to the legislature to choose which subject it will give the power to impose a public law penalty, if the penalty is imposed as the result of a proper administrative proceeding and the imposition of a penalty is subject to judicial review, which the contested legal regulation meets.” This is how it addressed financial penalties for failure to collect fees on the part of a health care facility (in the new terminology a “health care services provider”). The law as then valid and in effect involved a penalty of CZK 50,000. Now § 16a par. 9 of the Public Health Insurance Act is contested, with a wording that permits imposing for the same infraction a fine of up to CZK 1,000,000, and together with it also paragraphs 10 and 11, all in relation to the proposal to annul the provision increasing the co-payment for hospital stays. In addition, the present petition is aimed against financial penalties regulated in other provisions of the Act, specifically in § 13 par. 8, § 32 par. 5 and § 44 par. 5.

63. However, until now – not even in judgment file no. Pl. ÚS 1/08, where it wasn’t even raised – the Constitutional Court has not considered the question of whether this authority to penalize does not rule out an equal relationship between health services providers and health insurance companies, which is primarily a private law relationship. The intensity of deformation of the relationship, arising from the unique status of health insurance companies, caused by the fact that they administer public, not private funds, should correspond to this. The Constitutional Court does not doubt that it is generally acceptable for a particular subject

to act in private law relationships and simultaneously be endowed with sovereign authority, but in the relationship between a health care (services) provider and a health insurance company it is necessary to take into account the particular circumstances of the Czech environment. A prerequisite for the survival of a health care services provider is the conclusion of an agreement on their provision and coverage with a health insurance company, especially with the dominant Všeobecná zdravotní pojišťovna. Despite this objective existential dependence on the cooperativeness of the health insurance company, there are no formal, reviewable, and especially transparent rules for the conclusion of these agreements, in the sense of the provider being entitled to conclude one if it meets certain requirements. This de facto unequal position is further increased by the insurance companies' broad authority to impose penalties.

64. The Constitutional Court has already considered the question of equal rights in a number of its decisions. It has spoken primarily to the effect that the constitutional principle of equality expressed in Art. 1 of the Charter does not mean absolute equality. In judgment file no. Pl. ÚS 6/96 (published as no. 295/1996 Coll., N 113/6 SbNU 313), which was followed by further case law, the Court expressed this concretely as follows: "The constitutional principle of equality, enshrined among the rights in Art. 1 of the Charter, cannot be understood absolutely, and equality taken as an abstract category. The Constitutional Court of the Czech and Slovak Federal Republic expressed its understanding of equality, enshrined in that article, as relative equality, as intended in all democratic constitutions, which requires only the removal of unjustified differences (judgment of the Constitutional Court of the CSFR published as no. 11 in the Collection of Decisions of the Constitutional Court of the CSFR). Therefore, the principle of equal rights must also be understood to mean that legal differentiation between legal subjects in access to certain rights may not be an expression of arbitrariness; however, it does not mean that everyone must be granted any right."

65. The Constitutional Court generally interprets the principle of equality from two points of view [see, e.g., judgments file no. Pl. ÚS 16/93 of 24 May 1994 (N 25/1 SbNU 189; 131/1994 Coll.), file no. Pl. ÚS 36/93 of 17 May 1994 (N 24/1 SbNU 175; 132/1994 Coll.), file no. Pl. ÚS 5/95 of 8 Nov 1995 (N 74/4 SbNU 205; 6/1996 Coll.), file no. Pl. ÚS 9/95 of 28 February 1996 (N 16/5 SbNU 107; 107/1996 Coll.), file no. Pl. ÚS 33/96 of 4 June 1997 (N 67/8 SbNU 163; 185/1997 Coll.), file no. Pl. ÚS 9/99 of 6 October 1999 (N 135/16 SbNU 9; 289/1999 Coll.) etc.]. The first comes from the requirement of ruling out arbitrariness in the actions of the legislature when differentiating groups of subjects and their rights; the second comes from the requirement that grounds for differentiation be constitutionally acceptable, i.e. the impermissibility of the legislature interfering in one of the fundamental rights and freedoms by differentiating subjects and rights. The postulate of equality does not give rise to a general requirement that everyone must be equal with everyone else, but it does give rise to a requirement that the law not give an advantage or disadvantage to one group over another with justification. Thus, the Constitutional Court also accepts statutorily established inequality, if there are constitutionally acceptable reasons for it.

66. However, that is not so in this case. The dominant position of the insurance companies, especially Všeobecná zdravotní pojišťovna, in combination with the authorization to impose penalties and regulations on health care services providers, specifically limitations of services, financial penalties for medicine prescriptions and requested care that exceed the set limits, is not balanced out by anything on the side of the health care services providers, such as an obligation to enter into contracts on the part of insurance companies in cases where conditions set forth by generally binding legal regulations have objectively been met. Thus, the insurance



companies' authorization to impose penalties, which is based in the contested provisions of § 16a par. 10 and 11, as well as § 32 par. 5 and § 44 par. 5 and par. 6, in the words "imposed under paragraphs 1 to 5" of the Public Health Insurance Act, exceeds the bounds of constitutionally acceptable inequality, as the Constitutional Court defined it in the abovementioned judgments. This inequality is multiplied by the large range of most of the penalties, which is not unconstitutional in and of itself, as will be stated below, but emphasizes it, in combination with the abovementioned circumstances. Thus, the indicated designated statutory provisions are inconsistent with Art. 1 of the Charter, which guarantees equal rights.

67. As regards § 13 par. 8 of the Public Health Insurance Act, it is tied to the obligations of health care services providers, that arose from the newly created division of care into alternatives according to public insurance coverage. Specifically, it permits imposing penalties for violation of the provider's obligation to record in a patient's health care documentation both the offer of the basic alternative of health care services and instruction on the possibility of receiving the more expensive alternative, and the patient's consent, as well as violation of the prohibition on giving priority to a patient who chooses the more expensive alternative. In view of the annulment of the provisions that permit providing alternatives of covered care, it logically follows that there is another reason for annulling this provision, that the penalties enforcing its fulfillment in the annulled provision are annulled. For this reason, the Constitutional Court annuls this provision as of the day this judgment is promulgated in the Collection of Laws. It annuls the other provisions at the end of 2013, which is a sufficient period of time for the legislature to amend the contested provisions within the spirit of this judgment. The legislature should also consider whether to reflect amendments in the spirit of this judgment into penalties for failure to collect fees for other health care, which were not affected by the petition.

68. The Constitutional Court did not agree with the petitioners that the health insurance company's broad discretion is not acceptable, both in setting the level of penalties and in the possibility of imposing fines repeatedly, as well as that the upper limit of the penalties is not appropriate. The Constitutional Court recently – in judgment file no. Pl. ÚS 1/12 of 27 Nov 2012 (no. 437/2012 Coll.) – addressed the question of the constitutionality of part of Act no. 372/2011 Coll., on Health Care Services and Conditions for Providing Them (the Act on Health Care Services), defining the elements of misdemeanors and other administrative infractions, as well as the level of penalties for them. The Court denied this part of the petition from the group of senators [specifically in relation to § 114 par. 1 let. g) and § 117 par. 1 let. e), f), g), n) and r) and par. 3 let. d), e), f), g), h), i) and m) of the Act on Health Care Services], under which the upper limits of penalties are disproportionately high in view of their seriousness, because it did not find the form of the penalties inconsistent with Art. 11 par. 1 in conjunction with Art. 4 par. 1 and 4 of the Charter. At the same time, it stated that the possibility for review in a proceeding on constitutional complaints of a particular application of the provisions in questions remains unaffected. It provided justification for its conclusion in points 329-337 of that judgment, and now makes reference to that justification.

69. As obiter dictum the Constitutional Court states that the scope of authorization to impose penalties cannot be balanced even by the legitimate aim that is pursued by imposing them, i.e. thrifty management of public insurance funds. This measure appears disproportionate in a situation when these public funds are managed by, in addition to Všeobecná zdravotní pojišťovna, other employee health insurance companies that are purely private law subjects. The legislature should also consider a method of handling public health insurance funds that

is more economical, including from the point of view of administrative organization. As regards the horizontal relationship between health insurance companies and health care services providers, in order to prevent its continuing distortion, caused, among other things, by entrusting the authority to impose penalties to health insurance companies, under the present conditions the subject given this authority should be either the Ministry of Health itself, or, alternatively, in the case of state and regional providers of health care services, their founders, and in the case of private health care services providers, subjects competent thereto, such as, e.g. professional physicians' associations.

70. Regarding the annulled parts of § 12 and 44 of the Public Health Insurance Act, we must add that while the petition was being reviewed these provisions were amended by Act no. 458/2011 Coll., on Amendment of Acts Related to Establishment of a Single Collection Point and Other Amendments to Tax and Insurance Acts, (the amendment affects only the structure of the provision, so the present text of § 12 becomes paragraph 1 and paragraphs 2 and 3 are added, and in § 44 paragraph 5 becomes paragraph 2, and the present paragraph 6 becomes paragraph 3). The amendment goes into effect on 1 January 2015; therefore the verdict of this judgment corresponds both to the legislative framework that is valid and effective at the time of decision-making, and to the amendment that will get into effect in future. We add that in the case of § 12 the petitioners did not take into account the change made by Act no. 458/2011 Coll., even in the revised alternative of the proposed judgment in the petition, but the Constitutional Court, based on the content of the petition, did so. The Act on the Constitutional Court does not tie evaluation of whether a legal regulation is constitutional to its being in effect, but to its being valid, as a result of which petitions seeking the annulment of legal regulations must be considered admissible even when they are not in effect, as a result of the two indicated possibilities (see Filip, J., Holländer, P., Šimíček, V. *Zákon o Ústavním soudu. Komentář. 2., přepracované a rozšířené vydání.* [The Act on the Constitutional Court. Commentary. 2<sup>nd</sup> Revised and Expanded Edition] Praha: C. H. Beck. 2007, p. 387).

## VII.

71. In view of the foregoing arguments, the Constitutional Court, under § 70 par. 1 of the Act on the Constitutional Court, annulled § 11 par. 1 let. f), § 12 let. n), § 13 par. 3 to 8, § 16a par. 1 let. f) and par. 9 to 11 (where they concern the fee for inpatient care under § 16a par. 1 let. f) of the Public Health Insurance Act), in § 17 par. 4 the words “and indicating health care alternatives under § 13,” § 32 par. 5, § 44 par. 5 and in par. 6, the words “imposed under paragraphs 1 to 5” of the Public Health Insurance Act and § 12 par. 1 let. n) and § 44 par. 2 and in par. 3 the words “imposed under paragraphs 1 and 2” of Act no. 48/1997 Coll., on Public Health Insurance and amending and supplementing certain related Acts, as amended by Act no. 458/2011 Coll. Due to the reasons explained above, the enforceability of the annulling verdict no. III and part of the verdict no. IV of the judgment is postponed to 31 December 2013.

72. At the same time, in accordance with § 70 par. 3 of the Act on the Constitutional Court, the relevant parts of the appendix to Ministry of Health decree no. 134/1998 Coll., which issues a list of health care service items with point values, as amended by later regulations, were also annulled, where they identify services as more expensive alternatives. To be more precise, the Constitutional Court interprets verdict II to mean that in the decree, in addition to the symbol “E” it also annuls the relevant description of the more expensive alternative.

Instruction: Judgments of the Constitutional Court cannot be appealed.

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## Dissenting Opinion of Judge Vladimír Kůrka

### I. Re: “health care services alternatives”

Based on Art. 31 of the Charter of Fundamental Rights and Freedoms (the “Charter”), citizens have a right, on the basis of public insurance, to free health care and medical aids under conditions provided for by law. This of course does not mean that all medical care must be provided free; what is provided for free is only that which is provided on the basis of general health insurance, “under conditions provided for by law.” This was already explained in judgment file no. Pl. ÚS 1/08, as well as other cited judgments, and the majority of the Plenum does not question this conclusion.

A debate is regularly conducted just about whether the key provision, § 13 of the Public Health Insurance Act, meets the condition of a statute that sets forth what health care is provided for free.

Health services covered by health insurance are defined by § 13 in paragraph 1; they are provided to an insured person with the aim of improving or preserving his state of health or mitigating his suffering, if they correspond to the insured person’s state of health and the purpose that is to be achieved, and are appropriately safe for the insured person, are consistent with currently available medical science, and there is evidence that they are effective in view of the purpose for providing them (and similarly for the defined areas of services and the scope of coverage under § 13 par. 2 of the Act). It is then a trivial conclusion that the requirement of statutory definition of the conditions for free care under Art. 31 of the Charter is respected – it is done by statute. Everyone is entitled to the (thus) defined health care, and it must be provided for free.

If a health care service can be provided in only one manner, no further consideration is necessary.

However, even if the care can be provided in more than one manner with the same therapeutic effect (see § 13 par. 3), that changes nothing about the fact that a health care service is available to the insured person that must be provided as an “entitlement” and for free (under §13 par. 1 and 2), so here too this is provided by statute, as Art. 31 of the Charter requires. Logically, for this statutory designation of free care it is not at all important that the service is provided in the “basic” alternative (“in accordance with effective and economical expenditure of public health insurance funds”), nor that there may be other methods for providing health care services, and their designation will be only “sub-statutory” (§ 13 par. 4). On the contrary, what is important – for exercising this “more expensive alternative” – is not only the fact that it comes into consideration only with treatments that are expressly identified in the implementing regulations (§ 17), but above all that, even in that case, the more expensive alternative is ruled out in the event of health care that – in the particular case, with the particular insured person (see the wording “if ... it corresponds to the insured person’s state of health” in § 13 par. 1 of the Act) – is the only alternative that can be provided (§ 13 par. 4).

The condition in Art. 31 of the Charter, that it must be set forth by law what health care is provided for free, is thus fulfilled, despite the reference in §13 par. 4 of the Act to a sub-

statutory regulation, which, for the majority of the Plenum, has become the key element for the contrary conclusion. The sub-statutory regulation regulates only what is not (completely) covered by public health insurance, which is obviously not in conflict with Art. 31 of the Charter.

The principle stated in § 13 par. 4 of the Act, that “health care that can only be provided in one manner cannot be identified as a more expensive alternative” logically prevents the concerns indicated by the majority of the Plenum, that sub-statutory norm-creation could gradually “empty out” the content of free care defined by the Act (§ 13 par. 1, 2 of the Act).

Beyond this decision framework, it is noted that the majority of the Plenum did not explain why the requirement for the “law” under Art. 31 of the Charter – in relation to § 13 par. 4 of the Act – must necessarily be given the same categorical emphasis as in the case of Art. 11 par. 5 of the Charter (imposition of taxes and fees), if, in relation to other legal limits established by the Charter, under Art. 4 par. 1 (imposition of obligations) or Art. 4 par. 2 (regulation of the bounds of the fundamental rights and freedoms), the Constitutional Court already admitted certain possibilities for applying sub-statutory norm-creation (see, e.g., judgment file no. Pl. ÚS 5/01).

## II.

Re: “increasing the co-payment”

The Constitutional Court presented a constitutional law review of co-payments (including the fee contested here) in judgment file no. Pl. ÚS 1/08, and concluded that they do not exceed constitutional bounds (including Art. 31 of the Charter). In its evaluation (in the reasonableness test) it could not overlook the previously existing aspects, namely in the form of “insufficient differentiation and blanket application, in combination [with the lack of any limits” (point 60.), which the majority considers to be the deciding reason for derogation (exemption from the fee for persons in material need should not be significant for the “activity” anticipated by the Act, as that can “hardly be expected or required” – point 58.).

The majority of the Plenum – to justify the existence of conditions for deviating from its earlier conclusions – reached the judgment that because the fee was previously CZK 60, whereas now it is CZK 100, this involves a different matter, in which these arguments “regarding reasonableness” cannot be applied.

This presumption is not, in its absolute form, acceptable.

Seen from a procedural viewpoint, the only different thing is the part of the fee, CZK 40, that goes over the original CZK 60; however, because it comes from the same factual basis (“fees for hotel services”), the “differentness” – for purposes of escaping from the previous connection – is obviously relativized; there will be a “relevant difference” if that CZK 40 can be tied to such deviation from the existing (even if essentially identical) basis as also permits other support for those key reasons that the majority adopted (see above – blanket nature, non-differentiation, lack of limits).

However, the majority does not convincingly establish that this is such a fundamental change; and undoubtedly it is not; forty crowns did not change anything about the “blanket, non-differentiation or non-limits,” and the judgment expressly points only to circumstances that already existed previously, at the time of the previous decisions (points 57. and 58.).

Therefore this is not a reason to abandon the conclusions in judgment Pl. ÚS 1/08, nor is such a reason established by the quote from the otherwise determinative judgment file no. Pl. ÚS 11/02.

Incidentally, even the Czech Medical Chamber, in its statement, does not consider increasing the fee to CZK 100 to be unreasonable.

Of course, this is not to say that the reviewed framework is ideal, or that it could not be “better” or “more correct,” or socially more sensitive (in the aspects emphasized by the majority; that, however, is a requirement for the legislature, but it cannot be sufficient as a criterion for constitutional law review.

### III.

Re: “authorization of health insurance companies to impose penalties”

The majority’s judgment inappropriately emphasizes the private law aspects of the relationship between the Všeobecná zdravotní pojišťovna and health care services providers, overlooking obvious public law elements. It is obvious that the symbiosis of private law and public law is accepted in public life (and in the relevant administrative law doctrine), without being criticized as unconstitutional. If the public law position of the Všeobecná zdravotní pojišťovna is recognized, then it logically also has certain regulatory powers which are – again, logically and necessarily – also powers to penalize; this indicates that they cannot themselves establish any “inequality,” even as an “added value” to the inequality derived by the majority of the Plenum from other sources, as happens in the judgment (point 66.).

The level of the contested penalties, just like the “possibility of discretion,” does not bother even the majority (with correct citations of the Constitutional Court’s previous case law) (point 66.).

In any case, the Constitutional Court also stated that the authority to impose penalties was basically acceptable in judgment file no. Pl. ÚS 1/08, and even here – though now with the requisite quorum of nine votes – today’s majority gives no convincing reasons for changing the then-applicable opinion; the reasons which it presents, in the form of derived “inequality, are obviously not so, if the only circumstances that can be relevant are those that the Constitutional Court stated as reasons for changes in case law in judgment file no. Pl. ÚS 11/02.

### IV.

Conclusion

For the foregoing reasons the petition should have been denied.

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## **Dissenting Opinion of Judge Stanislav Balík**

I voted to deny the petition in extenso.

As regards the grounds, Vladimír Kůrka took the wind out of my sails somewhat, and I join his excellent dissenting opinion.

Wasn't everything already said in Pl. ÚS 1/08 ?

x x x

Are we afraid of the grim reaper and are we succumbing to the mistaken idea that we can buy our way out?

My image of a humanitarian doctor, “who moved not only in high society, but could also find his way to the most common people” (cf. J. Káňa, *Lékař nebo spisovatel?* [Doctor or Writer?] in: Axel Munthe, *Kniha o životě a smrti.* [Book about Life and Death] Praha: Melantrich, 1969, p. 392) is Axel Munthe. As a high school student I was captivated by the Book about Life and Death; it is an unsurpassed collection of examples of how, in any health care system, any particular case always depends on the doctor's professional ethics and the patient's trust.

My starting point is not skepticism, suspicion of doctors and health care facilities, the idea that health care is an unfair business. Personally, and from my family and friends, I have only the best experiences with the Czech health care system.

Will a change in the form of a legal regulation help to remove the eternal lack of trust?

Will 281 legislators carefully read specialized medical journals so that they can vote on alternatives of health care services?

Ad absurdum – would it not be most persuasive to decide about the alternatives in a referendum?

In fact, it always starts and ends with the true experts. There is no choice but to agree with their recommendation, because laypeople's lack of knowledge will have to be supplemented with trust.

Wouldn't the legislature – if the reviewed legislative framework had not been annulled – still have had the ability to “overcome” by statute any obvious arbitrariness or excess manifested in a legal regulation of lesser force?

x x x

It's unfortunate that the principle of minimizing interference was abandoned.

Is it really necessary to nibble bits from a whole that appears to be a systematic effort to resolve what is difficult to solve or, in the sense of absolute perfection, unsolvable?

“We know that we must die, and that is really the only thing we know about our future. Everything else is mere guessing, and in most cases we guess wrong. Like lost children in a dark forest we grope forward on our way through life, we barely see a hand's width ahead of ourselves, we don't know what awaits us from day to day, what danger and what obstacles will appear in our path, what more or less suspenseful adventures we will have in expectation of the Great Adventure, the most suspenseful of all: death. Occasionally in our confusion we dare to ask fate a shy question, but we will get no answer, for the stars are too far. The sooner we realize that our fate is decided inside ourselves and not up above among the stars, the better for us. We can find happiness only in ourselves, seeking it among others is lost time,

and we have no time to waste.” (cf. A. Munthe, *Knihá o životě a smrti* [Book about Life and Death]: Prague: Melantrich, 1969, p. 365). I voted to deny the petition in extenso.

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## **Dissenting Opinion of Ivana Janů to the reasoning of judgment file no. Pl. ÚS 36/11**

### 1. Economic and social rights are still waiting for systematic case law

The biggest task for the “third generation” of the Constitutional Court will be to create understandable, sustainable and internally consistent case law on the economic and social rights under Chapter Four of the Charter of Fundamental Rights and Freedoms, and in that regard, on the issue of the constitutional principle of equality. The external reason for my prediction is the increasing number of quite fundamental and complex issues of social politics that the Constitutional Court is forced to address or does in fact address; the internal reason is the existing instability of the case law on economic and social rights. The existing judgments are not unified, either in elementary starting points (the dogma of the fundamental rights) or in judicial review methods (the application of judicial tests), and are not unified in argumentation strategies (the quality and persuasiveness of the reasoning).

We can find various concepts in the Constitutional Court’s case law regarding review of economic and social rights. On the one hand, such a right appears basically as a strict measure of constitutionality, not differentiated from other fundamental rights, through moderate searching for the essential content of a fundamental right (the constitutionally protected minimum standard) all the way to a finding of the absence of subjective public rights arising from the affected provisions of the Charter and emphasis on objective protection of social institutions (employment, wages, social security, family, parenthood).

However, the case law in matters of economic and social rights is exceptionally important, regardless of the “lower category” of these rights, because it often affects complex social and health care systems and their functioning. By doing so it often breaks down certain political ideas about the functioning of the basic functions of the state and changes the government’s budget plans. While the first generation of true fundamental rights carries a minimum of direct expenses for the state for their protection, because the state’s fundamental duty is not to interfere in them, social rights are connected with political ideas about well-being and often progressive concepts of the “correct” functioning of existing social institutions and changes to them.

The actual implementation of social rights is subject to political deliberation and the state’s economic possibilities. A practical effect of social rights is that they gradually transfer social responsibility from the individual, family members, community, municipality, etc., to the state. Responsibility both material, i.e. financial and material support, and in the moral sense: wealthier people are not aware of the need for solidarity with poorer people, they see no reason for it; healthy people do not feel a need to concern themselves with the situation of the ill; children do not understand why they should have a joint (!) responsibility to support their parents. The sense of community is dying out. Likewise, awareness and conscience, including education and cultivation, are dying out. Everything is provided by the state and its social system, which removes from us the need for consideration toward fellow human beings, including those closest to us, who, in the past, made sacrifices for our benefit.

## 2. A small step for doctors, a large change for the health care insurance system

I observe a certain tension between the Constitutional Court's declared attempt to only protect (social) rights, on the one hand, and the de facto interference in the system and organization of insurance and social systems (through derogation of the organizational provisions of the Act), on the other hand. In the matter file no. Pl. ÚS 6/07 the Constitutional Court already faced a partial and inconspicuous objection that concerned the apparently formal question of what constitutional significance a contract between a health insurance company and a health services provider has if it is concluded for a definite period or an indefinite period. The problem was basically a case of changing already existing contracts for an indefinite period to contracts for a period of several years, on the basis of a later legal regulation. The matter was reviewed in terms of interference in the rights of health care services providers, and the legal regulation was found to be constitutional. During the hearing another aspect appeared: a request that the Constitutional Court, by making a "minor" derogation to the benefit of health care providers (which would not change anything in the content of the contracts), interfere substantially in the concept of the health insurance system and its organization. It is not advisable to review the nature of the contractual relationship between a health insurance company and a health care provider as an ordinary "private law" relationship, which involves the rights of two contractual parties. The nature of this contractual relationship has much greater effects on the functioning of the health care system as a whole. In judgment file no. Pl. ÚS 6/07 the Constitutional Court did not do so – correctly, in my opinion. However, I am concerned that the Constitutional Court will be placed in this situation again and again. The reasoning of the Constitutional Court's judgments will be able to hide under arguments on the right to free health care (or, now, arguments on general equality), its own ideas on the role of health insurance companies and the position of health care providers, and thus interfere in issues that are entrusted to the legislative branch. In this context the functioning of the health insurance system and medical care review of the increase of inpatient fees from CZK 60 to CZK 100 is a negligible detail, which, however, does have certain connections to Art. 31 of the Charter.

## 3. Regarding the reasoning for verdicts I. and II. (health care services alternatives in terms of their coverage by health care insurance, point 34 et seq.)

The supporting reasoning for verdicts I. and II. is found in point 49 and is based on the requirement of health care alternatives being regulated by statute and not by a decree. The provisions of §13 par. 4 first sentence of Act no. 48/1997 Coll. state that a more expensive alternative is a health care service that is identified as such by an implementing regulation. In my opinion this really cannot be considered an adequate statutory definition.

In my opinion, the requirement that the general definition of above-standard care be contained in a statute comes from the fact that it is part of the system of (partial) coverage by public health insurance anticipated by Art. 31 of the Charter, whereby they share in funds allocated for implementing health care. I agree with the reasoning on the merits, but I emphasize that I interpret the requirement expressed by the judgment to mean that the statute must contain a more detailed general framework, i.e. thorough definitions of the alternatives of health care services. Therefore, I reject the reason for derogation contained in point 49 in fine of the majority opinion, insofar as it requires that "the specific determination of what is, within the intent of Art. 31 of the Charter, free care" be regulated directly by statute and not by decree, as was the case until now. Thus, I reject the requirement of the majority of the plenum that would lead to the necessity of transferring the existing list of health care services, i.e. a list,



though only of “above standard services,” as contained in decree no. 134/1998 Coll., directly into the Act. I require a more detailed definition of both alternatives in the Act.

However, if the present approach taken by the majority of the plenum were to apply in the future, this would necessarily lead to annulling decree no. 134/1998 Coll. as a whole, as well as other key decrees by the Ministry of Health.

I consider the reference to Art. 4 par. 2 of the Charter in point 50 of the judgment to be unclear, because I interpret that provision to mean that it applies only to situations where the Charter assumes substantive limits to a fundamental right, such as are contained, e.g. in Art. 16 par. 4, Art. 17 par. 4, etc. of the Charter. In this case the requirement of regulation by statute arises directly from Art. 31 of the Charter, or Art. 41 par. 1 of the Charter. In this Art. 4 par. 2 of the Charter differs from Art. 4 par. 4 of the Charter, which is interpreted more broadly, so that it also applies to economic and social rights. However, in view of the cited construction of economic and social rights, application of Art. 4 par. 2 of the Charter to these rights as well would not fulfill any function.

The Constitutional Court’s position on the permissibility of legal regulation of the “bounds” of economic and social rights through a sub-statutory regulation changes over time, but it has not developed intelligibly or in a direct line. An illustrative example is the case law on Art. 26 of the Charter (which falls under economic and social rights, just as Art. 31 of the Charter), which guarantees the right to do business and conduct other economic activity. Judgment file no. Pl. ÚS 31/95 annulled a general decree that limited the opening hours of hospitality facilities (or public production, in the case of the other cited judgments), due to inconsistency with Art. 26 par. 1 and 2 of the Charter, because the conditions and limits for the exercise of certain professions or activities can only be set by statute. The same arguments were applied in judgments file no. Pl. ÚS 17/97 and file no. Pl. ÚS 22/97, or the much later judgment file no. Pl. ÚS 42/05. However, the following judgment, file no. Pl. ÚS 28/09, showed a substantial change in the Court’s position in two aspects: the possibility of limiting the conduct of economic activity under Art. 26 of the Charter was approved even in the case of regulation by (only) a general decree, on the basis of a general authorization to regulate local matters of public order in § 10 of Act no. 128/2000 Coll., on Municipalities. For more detail see my dissenting opinion to judgment file no. Pl. ÚS 28/09.

If Art. 31 of the Charter states that citizens have the right, on the basis of public insurance, to free health care and medical aids under conditions provided for by law (regarding this construction, cf. Art. 26 par. 2 of the Charter), it seems that the Constitutional Court is again judging the question of “conditions provided for by law” for economic and social rights more strictly than in the past. The provisions of Act no. 48/1997 Coll. (compared to Act no. 128/2000 Coll.) (esp. § 13) are much more specific and contain a substantive (i.e., not only formal) definition of covered services. Nevertheless, the majority of the plenum was not satisfied with this (relatively) more detailed legislative framework, and it completely rejected regulation by decree.

I close by saying that in my opinion one can consider constitutional a legislative framework that, at the statutory level, will contain more detailed, positively formulated general definitions of the individual alternatives of health care services, provided, however, that this does not rule out making them more concrete (a list) through a decree by the Ministry. I consider it desirable to make this framework easy to understand for insured persons, i.e. to give them an ability to find individual items in the extensive list through their own efforts.

4. Regarding the reasoning for verdict III. (increasing the co-payment for inpatient care, point 53 et seq.)

Article 31 of the Charter reads: “Everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.”

I see a fundamental defect in the reasoning in the failure to resolve the question of whether grounds exist to reverse the conclusions stated in a previous judgment, i.e. to change the case law. Although the Constitutional Court in this regard correctly cites judgment file no. Pl. ÚS 11/02, which defined three general situations in which it can change its own case law, the majority opinion lacks concrete arguments as to which of these reasons applies in the present matter. These general grounds are a change in the social and economic situation in the country, or a change in their structure, or a change in the society’s cultural expectations; also, a change or shift in the legal environment created by sub-constitutional legal norms which, in the aggregate, affect the view of constitutional principles; and finally, a change or supplementing of the legal norms and principles that are the binding reference points for the Constitutional Court, i.e., those that are contained in the constitutional order of the Czech Republic.

I do not consider the increase of the fee from CZK 60 to CZK 100 to be grounds for changing case law. Therefore, after deeper consideration I also disagree with the blunt conclusion that “increasing the fee by 2/3 is so marked, that this is in fact an essentially different provision” (point 55). The majority opinion does not specify which of the conditions formulated in judgment file no. Pl. ÚS 11/02 was met, and it thereby incorrectly opens the review of § 16a par. 1 let. f) of Act no. 48/1997 Coll. in the full scope, of all its substance. Because the appropriate presentation of proof was not made in this regard, I state my opinion, without aspiration to infallibility, that one can consider to have been met only an argument based on “a change in the social and economic situation in the country, or a change in their structure.” In this regard it is generally known to the Constitutional Court, including from its own previous case law, that in the last five years (since judgment file no. Pl. ÚS 1/08) there have been a number of changes in the social sphere, caused both by the state’s economic situation (the scope and structure of unemployment, amount of financial transfers into the social sphere in the wider sense of the word), and by the structure of financial transfers into the social sphere (changes to the system of paying various benefits, changes in the criteria for entitlement, other systemic changes). Of course, it is only within that scope that the contested provision could be reviewed.

In this regard I see grounds for derogation (which I voted for) exclusively in the fact that the act does not contain social safeguards, i.e., in particular the time (or financial) limits on payments set forth in point 58. More precisely, it was not proved that the complete legislative framework ruled out extreme situations of harsh social effects, in view of the current social and economic conditions, that could change and evidently did change the social structure of the population (the unemployment structure, creation of new socially at-risk groups, etc.) and in view of the amount of the fee (CZK 100 per day). In my conclusions I take account of the inclusion of the criterion of material need in § 16a par. 2 let. d) of Act no. 48/1997 Coll., but I consider it insufficient.

However, the majority opinion basically conducted a review of the constitutionality of the provision in the full scope, i.e., including its substance, with the setting of new criteria, which do not in any way arise from the changed social situation. In particular, there are no grounds for the Constitutional Court to repeatedly submit the provision in its present form to the test of rationality on the grounds of a lack of differentiation of the number of days of inpatient care depending on whether they are a necessary component of treatment or not.

I now have doubts – precisely on the basis of the majority opinion’s arguments – about the overall paradigm established by the previous judgments and by point 57 of the majority opinion (the fundamental grounds) about the concept of the fee in § 16 par. 1 let. f) of Act no. 48/1997 Coll., as a fee for “hotel services.” None of the fees under § 16a of Act no. 48/1997 Coll. is construed as a flat fee for any kind of services, i.e. as purchase. This is a political, not constitutional law, justification, and it little matters how much the parties or secondary parties to the proceeding refer to this classification of the fee under § 16 par. 1 let. f) of Act no. 48/1997 Coll.. It is on this, in my opinion incorrect, construction that the majority opinion incorrectly bases the fundamental grounds of unconstitutionality, when it criticizes application of the provision to a patient “in intensive care” who does not make use of “hotel services” but for whom the stay on a specialized hospital bed is a medical service. I consider this argumentation regarding § 16a par. 1 let. f) of Act no. 48/1997 Coll. to be incorrect in terms of constitutional law, because it creates room for argument to (retroactively) question all the fees under § 16a par. 1 of Act no. 48/1997 Coll.. If the fee now under review is, on a general level, constitutional only if it is conceived as a payment for particular services or food, it becomes difficult to defend the constitutionality of other co-payments (which nobody claims to be of the character of a purchase of services). I am not saying that payment for “hotel services” cannot be introduced in hospitals, but I believe that this was not done by the co-payment for inpatient care in § 16a par. 1 let. f) of Act no. 48/1997 Coll. The method of calculating the amount of the fee is then quite independent of this constitutional law evaluation; even if the CZK 100 corresponded to the value of food and accommodation, that would not make it payment for “hotel services.”

In this regard I am of the opinion that Art. 31 of the Charter, when it speaks of “public insurance,” although at the same time it recognizes “free” health care, does not rule out payments into the public health insurance system. Thus, it obviously does not rule out payments of premiums for health insurance, although at the same time it does not rule out direct payments in connection with the provision of health insurance, if the nature of these payments is that of a purchase of health care services. That is, as long as the insured person (patient) is not placed in a situation of economic deliberation as to whether to purchase a particular health care service (in view of the price of the service, his needs, and his economic possibilities). Such a situation would be outside the meaning and purpose of public health insurance, because the value (price) of medical services would in and of itself be an obstacle to access to it. Therefore, the co-payment under § 16a par. 1 let. f) of Act no. 48/1997 Coll., as it was now set, in no way denies “the essence of solidarity in receiving health care,” as claimed in point 58 of the majority opinion, nor does it come close to affecting the essence of solidarity. It merely does not contain sufficient guarantees for extreme situations (long-term or repeated hospital stays, in combination, of course, with other related expenditures).

However, fees under § 16a par. 1 of Act no. 48/1997 Coll. have not yet even come close to a situation that could be seen as unconstitutional, where a direct payment reflected the value (price) of a health care service. They do not, under any circumstances, express the equivalent value to the medical care provided, although the majority opinion attempts to suggest that in

points 57 and 61, where it speaks of an equivalent. A relationship of economic equivalence does not exist between the fees in § 16a par. 1 of Act no. 48/1997 Coll. and the medical services provided. To illustrate, even the cumulative amount of several fees for treatment by a specialist and a hospital stay cannot (other than symbolically) balance the value (price) of an operation routinely performed for tens of thousands of crowns.

The core of the second sentence of Art. 31 of the Charter is the constitutional establishment of an obligatory system of public health insurance, which collects and accumulates funds from individual subjects (payers), in order to redistribute them on the principle of solidarity and permit them to be drawn on by those in need, the ill and chronically ill. The constitutional guarantee based on which free health care is provided pertains only and exclusively to the sum of the funds thus accumulated. The reason for this framework is support for access to health care for persons whose income, or benefits – equivalently – do not cover the necessary health care they receive. I consider the fees under § 16a par. 1 of Act no. 48/1997 Coll. to be the income of the public health insurance system under Art. 31 of the Charter (regardless of how these payments are administered, to whose account they are paid). Therefore, defending them under constitutional law does not require any particular consideration to be provided in the form of “hotel services,” or merely sitting in a heated or air-conditioned waiting room (in the case of other types of co-payments).

Nonetheless, from the point of view of Art. 31 of the Charter, which speaks of public insurance in relation to “health care,” we can state that this provision does not require the legislature to adopt a framework that will use health insurance funds to secure coverage of services other than “health care,” that is, “hotel” services. There will then be more funds for actual health care; in this regard it is certainly possible to differentiate the nature of the complex of services provided in inpatient health care facilities.

If the framers of the constitution limited the right to free health care and to medical aids to what is possible through public insurance, that is, only up to the amount of funds thus accumulated, they acted quite realistically; at the same time, however, they also set the de facto limits of review for the constitutional Court: however, this criterion is absent in the majority opinion.

Thus, I summarize that the point of my reservations regarding the contested provision lies not in the requirement that health care be “free,” but in the issue of the social effects that the contested provision may cause (ex post, because admission to inpatient care is not conditioned on payment of a fee). Whereas, for example, routine living expenses can be planned, health problems (and related expenses) can be a sudden burden. I criticize the majority opinion because the legislative framework for co-payments for inpatient treatment was tested for constitutionality in Pl. ÚS 1/08 and it passed the test. If the Constitutional Court has now – in the reasoning – reached different conclusions, with reference to failure to take into account situations where inpatient care is a necessary component of the medical treatment itself, there has been a change of legal opinion, without there being material grounds for it (arising from the previous case law. In any case, I consider distinguishing the number of days of inpatient care depending on whether they are a necessary component of treatment or not to be medically complicated and difficult to perform, in terms of implementation and administrative processing.

5. Regarding the reasoning for verdict IV. (authorization of health insurance companies to impose penalties on health care services providers, point 62 et seq.)

I disagree with the approach of the majority of the plenum to evaluating the relationship between health insurance companies and medical facilities. As stated above, it appears that behind the veil of protection of fundamental rights, or non-accessory equality under Art. 1 of the Charter, here the Constitutional Court is heading toward fundamental institutional changes in the health insurance system, and that, I must add, without any sort of expert documentation of the functioning of such a complicated system. I maintain that there is no reason to consider the relationships arising from the public health insurance system (between a health insurance company and a medical facility) to be “private law” relationships (point 63), and force private law principles of contract law on them, with derogative consequences, i.e. unusually intensively.

It is precisely the complicated nature of the health care system and its financial flow, and the pervasive public interest in economy, effectiveness and access to health care, that, in my opinion, justifies the requirement for guarantees that penalty mechanisms will not be abused by health insurance companies to the advantage or disadvantage (both alternatives are possible) of individual health care services providers. I see a sufficient level of guarantee that the penalty system will not be abused in the Ministry of Health, public law entities that establish them, etc. From a constitutional law viewpoint, the object of the public interest is the overall effectiveness of the health care system, not the position of individual health care facilities.

Therefore, I disagree with the fundamental reason for the majority opinion (point 66), which is based on evaluating the subjective position of health care services providers vis-à-vis “dominant” health insurance companies. The “equality” that is now meant to be introduced by this derogatory verdict is quite illusory, because it collides with the facts, the completely different roles of both “contractual parties” in the health insurance system. The public health insurance system was, is, and will be based on increased public law regulation of the relationships that implement it.

If the majority opinion, for whatever reason, requires increased inspection of the activities of health insurance companies, it should have formulated this requirement generally, not with the aim of one-sidedly strengthening the group position of health care services providers through pressure to, for example, enter into contracts for an indefinite period (a requirement with which the majority opinion in judgment file no. Pl. ÚS 6/07 did not agree) or through a contract obligation on the part of insurance companies (majority opinion, point 66).

Thus, I summarize that in my deliberations I am guided exclusively by an interest in the effective functioning of the public health insurance system, as enshrined in Art. 31 of the Charter, because it is only through this system that the right to “free” health care is realized. This effectiveness will be achieved only by inspection of the management of public health insurance funds, including the assessment and penalization of excesses (poor economizing, violation of the law, etc.). This criterion for constitutional law review, a key criterion in my opinion, was quite outweighed in the majority opinion’s reasoning by review of the subjective position of individual health care services providers. Inspection of management of public funds (including the issue of collecting co-payments) is quite irreplaceable, and one cannot ask that it be “compensated for” by introducing a contract obligation on the part of insurance companies, introducing contracts for an indefinite period, etc. This is not to say that these changes in the position of health care providers cannot be introduced (by political decision),

but I reject the idea that the indicated strengthening of the position of health care providers is a requirement arising from the constitutional order.

## 6. Conclusion

Overall, one can summarize that a number of conclusions were reached by the majority of the plenum without sufficient examination of the issues, exceed the proposals submitted in the proceeding, and, above all, markedly compete with the political ideas about the form of the health insurance system and any attempts to reform it. The Constitutional Court is shifted into a role that does not belong to it and which, it must be said, it can handle only with difficulty as regards expertise, without extensive analyses and study of the practice of health insurance companies and health care services providers.

Health care is not an immobile system, one which it is sufficient to set up through laws and Constitutional Court judgments, then stabilize, and which will then function without problems. On the contrary, new technologies, treatment methods and medications appear on an ongoing basis, no doubt new diagnoses as well; moreover, at the same time life-spans are increasing, including the time when people are at an age when they need medical care most often. In addition, the demographic structure of the population is changing; the number of older people is growing, and the number of those in their productive years, who contribute into the system, is decreasing. The health care system and its financing must constantly adapt to this, if society is not to experience fundamental political conflicts that are in fact generational or social.

There is another aspect at play in the issue of above-standard health care, and that is the overall concept of a person's freedom to handle his health and his resources according to his own best judgment. It certainly cannot be said that someone who is not interested in "above-standard" care (higher quality or only higher comfort) and prefers to spend his health resources on prevention (e.g. a repeated expensive foreign vacation) is irresponsible. However, I see no reason for the person who wants to spend his own resources "in addition" for top-level treatment to be deprived of this choice. This choice cannot endanger the constitutional principle of equality.

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### **Dissenting opinion of judge Michaela Židlická**

I fully agree with the conclusions stated in the dissenting opinion by Judge Vladimír Kůrka, which I join, with the provision that I add the following deliberations:

The exceptional growth of medical science that has occurred in the last twenty years is a quantitative novum that requires a new look at the financing of health care. It is beneficial to realize in this regard that the common phrase "free health care" is, in its way, a euphemism, used instead of the more precise phrase "health care covered by public health insurance." Of course, the public health insurance system has its limits, and it is well known, that the funds gathered in it even now are far from permitting the use of all technical innovations. We can expect that the imaginary scissors blades between the funds obtained from public health insurance and the price of the most modern medical care will open wider and wider. I consider the introduction of "above-standard health care," that is, the related definition and guarantee of "standard health care" to be a beneficial step aimed at fulfilling the fundamental

aim pursued by Art. 31 of the Charter, which consists of ensuring accessible health care that corresponds to modern developments and possibilities for all participants in health insurance.

Likewise, as regards verdict II., I refer to the dissenting opinion of Judge Vladimír Kůrka, whose conclusions I agree with. Nonetheless, I consider it correct for an effective safeguard preventing burdensome social effects on a particular category of persons to be included in the legislative framework of the fee for hospital stays.

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### **Dissenting Opinion of judge Lastovecká to the judgment in file no. Pl. ÚS 36/11**

I join the dissenting opinion of Judge Vladimír Kůrka in point I. Re: “health care services alternatives” and point III. Re: “authorization of health insurance companies to impose penalties.”

I also agree with part of the arguments made in point II. Re: “increasing the co-payment,” according to which the Constitutional Court’s review of the fees does not involve a different matter in relation to Pl. ÚS 1/08, and the fee could have been reviewed only in terms of whether the conclusions in the cited judgment also fully apply to the fee that was increased from CZK 60 to CZK 100 per day of inpatient care.

In my opinion, as regards the increase in the co-payment one can agree with the petitioners (who, incidentally, did not seek a repeated review of the fee, but only the increase of the fee) that the amount of the increase is not negligible and for certain social groups in particular it may be an obstacle in access to health care.

However, in judgment Pl. ÚS 36/11 the majority of the plenum concluded that the constitutional deficit of the increase in fees lies in insufficient differentiation of the fees and blanket application of them, in combination with the absence of any limits, and that “the relationship of fees of CZK 100 per day is not, in and of itself, unconstitutional ... the amount is generally financially affordable.”. This conclusion was adopted, although the increased fee was not subjected to the reasonability test, as in judgment file no. Pl. ÚS 1/08, that is, as to whether it affects the very existence of the social right or its realization, whether the statutory framework pursues a legitimate aim (whether it is not an arbitrary fundamental lowering of the overall standard of fundamental rights), and whether it is a reasonable means to use to achieve a legitimate aim. I am convinced that if this review were conducted, in accordance with the Constitutional Court’s previous case law, the co-payment of CZK 100 would not stand, in particular as regards the last step of the reasonability test, and that therefore the contested legislative framework is inconsistent with Art. 31 of the Charter of Fundamental Rights and Freedoms.