Decision 72/2006 (XII.15.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking posterior establishment of the unconstitutionality of statutory provisions and establishment of an unconstitutional omission of legislative duty, the Constitutional Court has – with concurrent reasoning by *dr. László Kiss* and *dr. Péter Kovács*, Judges of the Constitutional Court – adopted the following

decision:

1. The Constitutional Court holds that Sections 9, 10, 12, 12/A, 12/B, 13 and 14 of Government Decree 233/2000 (XII.23) Korm. on the Implementation in the Healthcare Sector of Act XXXIII of 1992 on the Status of Public Employees are unconstitutional and, therefore, annuls them as of 30 June 2007.

2. The Constitutional Court rejects the petition seeking establishment of the unconstitutionality and annulment of Section 59 para. (5) of Act XXXIII of 1992 on the Status of Public Employees.

3. The Constitutional Court rejects the petitions seeking establishment of the unconstitutionality and annulment of Section 117/A para. (2) item *b)*, *e)* and *f)*, Section 117/B. para. (3), Section 119 para. (6), Section 127 para. (5), Section 128 para. (2) and Section 129 para. (7) of Act XXII of 1992 on the Labour Code.

4. The Constitutional Court rejects the petitions seeking establishment of the unconstitutionality and annulment of Section 59 para. (2) item *b)*, Section 59 para. (4) items *b)*, *c)* and *f)* as well as Section 76 para. (3) of Act XXXIII of 1992 on the Status of Public Employees.

5. The Constitutional Court rejects the petitions seeking establishment of the unconstitutionality and annulment of Section 11 of Government Decree 233/2000 (XII.23) Korm. on the Implementation in the Healthcare Sector of Act XXXIII of 1992 on the Status of Public Employees.

6. The Constitutional Court rejects the petition seeking establishment of the unconstitutionality and annulment of Section 13 para. (1) item *b)* and Section 13 para. (3) of Minister of Healthcare, Social and Family Affairs Decree 47/2004 (V. 11.) EszCsM on Certain Organisational Questions of the Continuous Operation of Healthcare Services.

7. The Constitutional Court rejects the petition seeking establishment of an unconstitutional omission of legislative duty concerning Act XXII of 1992 on the Labour Code, Act XXXIII of 1992 on the Status of Public Employees, and Government Decree 233/2000 (XII.23) Korm. on the Implementation in the Healthcare Sector of Act XXXIII of 1992 on the Status of Public Employees.

8. The Constitutional Court rejects the petition seeking examination of the collision with a treaty under international law by Section 117/A para. (2) items *b)* and *f)*, Section 119 para. (6) and Section 127 para. (5) of Act XXII of 1992 on the Labour Code, Section 59 para. (2) item *b)* and Section 59 para. (4) items *b)* and *f)* of Act XXXIII of 1992 on the Status of Public Employees, furthermore, Section 12 paras (5) and (6) as well as Section 12/A paras (1) and (2) of Government Decree 233/2000 (XII.23) Korm. on the Implementation in the Healthcare Sector of Act XXXIII of 1992 on the Status of Public Employees.

9. The Constitutional Court terminates the procedure in respect of the petition initiating establishment of the unconstitutionality of Government Decree 103/1995 (VIII. 25.) Korm. on Certain Questions of Financing Healthcare Under Social Security.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

The Constitutional Court has received several petitions affecting certain questions related to the employment and the remuneration of employees in healthcare.

The first petitioner has requested the Constitutional Court to establish the unconstitutionality of, and annul Sections 13, 14, 15 and 17 of Government Decree 113/1992 (VII. 14.) Korm. (hereinafter: D1)

on Implementing in the Social, Healthcare, As Well As Family, Child and Youth Protection Sectors of Act XXXIII of 1992 on the Status of Public Employees. As argued by the petitioner, Section 59 para. (2) item *b)* of Act XXXIII of 1992 on the Status of Public Employees (hereinafter: the ASPE) mentions attendance, in addition to be on standby, as a special case of performing work to be regulated separately in a decree by the Minister in charge. As in respect of healthcare, the regulation of attendance affects local government institutions, too, attendance in this field is regulated by the Government in Sections 11 to 17 of D1. Under Article 70/B para. (4) of the Constitution, everyone has the right to leisure time and free time. Based on the above, the regulations of Act XXII of 1992 on the Labour Code (hereinafter: the ALC) and of the ASPE provide for concrete rules on the guaranteed free times for the employees working in labour relations and in public employment. The challenged rules of D1 on attendance do not guarantee the enforcement of these regulations. While putting the workers at a serious disadvantage, this fact poses extraordinary risks to the patients using healthcare services. In practice, the incompleteness of the regulations on attendance allows that workers in attendance be employed – practically during the whole or a great part of the period of attendance – in a way forcing them to perform work assignments that fall into the scope of their main duties. Due to the incompleteness of the rules under Section 15 para. (5) of D1, the remuneration of this work is much less than that of extra work. At the same time, regulating attendance under D1 allows the employers to disregard without limits the provisions on the maximum amount of extra work to be ordered. Therefore, in the petitioner's opinion, the challenged provisions of D1 are contrary to Section 128 para. (2) of the ALC and they violate the provisions under Article 70/B paras (2) and (3) as well as Article 70/D of the Constitution. As detailed in the supplementary petition, the level of the attendance remuneration determined in Section 15 para. (6) of D1 contravenes the provision under Section 149 para. (2) of the ALC, as according to the rules of remuneration laid down in D1, healthcare employees regularly receive attendance remuneration lower than the levels specified in Section 149 para. (2) of the ALC.

The second petitioner has asked the Constitutional Court to conduct a procedure for establishing an unconstitutional omission of legislative duty. According to the petitioner, it is an unconstitutional legislative behaviour to maintain an unconstitutional omission of legislative duty instead of enforcing the requirement of legal certainty, as in the regulatory systems of the ALC and the ASPE, the labour law category of attendance has been omitted from the regulations on the employment of healthcare workers. In addition, the legislation failed to regulate up to 1 February 1997 the rules on calculating the attendance remuneration, and since then, D1 has only provided for a significantly reduced financing as

compared to the real, actual and necessary situation. Moreover, nor are other important categories (13th month's salary, average salary for leave etc.) financed under Government Decree 238/1996 (XII. 26.) Korm. on the Amendment of Government Decree 103/1995 (VIII. 25.) Korm. on Certain Questions of Financing Healthcare Under Social Security. In the opinion of the petitioner, with a view to securing an undisturbed operation of healthcare institutions while stressing the requirement of providing continuous services for the patients, it is impossible to tolerate the legislation's behaviour of not providing for a statutory regulation on certain fundamental categories under labour law, making it necessary to develop the rules to be applied on the basis of judgements by the courts. Therefore, as held by the petitioner, this legislative behaviour is deemed to cause legal uncertainty and it violates the rule of law granted in Article 2 para. (1) of the Constitution.

The third petitioner has requested posterior review of the unconstitutionality and annulment of Section 13 paras (3) to (5), Section 14, Section 15 para. (6), Section 16 paras (1) to (3) and Section 17 of D1, as the petitioner considers them to be in violation of Section 123 paras (1) to (3), Section 127 paras (1) and (2), Section 129 para. (1), Section 148 para. (1) and Section 149 para. (2) of the ALC.

The fourth petitioner has joined the initiative made by the third petitioner and asked the Constitutional Court to annul the provisions of D1 contradicting the ALC.

The fifth petitioner has filed an amended petition asking from the Constitutional Court posterior constitutional review and annulment of Sections 11 to 17 of D1. According to the petitioner, it is unlawful to delegate to the Minister – in violation of Article 8 para. (2) of the Constitution and Section 2 item *c)* of Act XI of 1987 on Legislation (hereinafter: the AL) – the restriction of the fundamental right determined in Section 59 paras (2) and (3) as well as in Section 76 para. (3) of the ASPE, by providing that the Minister may establish different rules for performing the attendance duties under Act CLIV of 1997 on Healthcare. In the petitioner's opinion, attendance and standby restrict the right to free time. The petitioner holds that the challenged provisions of D1 are discriminative concerning healthcare workers as compared to employees in other fields (judicial staff members, judges, and public servants), and therefore they are considered to violate Article 70/B paras (1) and (4) as well as Article 70/A of the Constitution. The petitioner has also requested elimination of the unconstitutional omission of legislative duty having regard to the fact that the lack of statutory regulations has put the public employees working in attendance in the field of healthcare at a disadvantage, since there is no definition of attendance under labour law and the workers in attendance do not receive the

compensation payable for extra work (remuneration on extra work and free time) as they only get remuneration for attendance and – in a certain limited scope – free time. According to the petitioner, the Parliament has failed to meet its legislative duty by not regulating on a statutory level – as requested in Article 8 para. (2) of the Constitution – the issue of attendance as a restriction of the fundamental right to leisure time concerning the public employees employed as healthcare workers in attendance, furthermore, the fundamental questions of employment and labour safety, including the compensation payable for attendance.

The Constitutional Court has noted in the course of its procedure that after the submission of the petitions, the provisions of D1 challenged by the petitioners were repealed as of 1 January 2001 by Government Decree 233/2000 (XII.23) Korm. on the Implementation in the Healthcare Sector of Act XXXIII of 1992 on the Status of Public Employees (hereinafter: D2). The challenged provisions under Sections 11 to 17 of D1 can be found in Sections 9 to 14 of D2. According to the established practice of the Constitutional Court, a regulation with similar contents replacing the challenged norm shall be examined on the basis of the aspects specified in the petition. [Decision 137/B/1991 AB, ABH 1992, 456, 457; Decision 138/B/1992 AB, ABH 1992, 579, 581; Decision 822/B/1998 AB, ABH 2002, 861, 862] As the amendment of the statutes examined in the present case has not resulted in a change with regard to the questions raised about the constitutionality of the challenged provisions, the Constitutional Court has performed examination on the merits in respect of the provisions in force at the time of the review.

The sixth petitioner has requested annulment of Sections 9 to 13 of D2 due to an alleged violation of the Constitution and of the ALC. As held by the petitioner, the challenged provisions of D2 allow the working hours of healthcare workers (ordinary working hours plus the time spent in attendance) to exceed the time limits specified in Section 117/B paras (1) and (3) as well as Section 123 paras (1) and (2) of the ALC, thus violating Article 70/B of the Constitution. In the petitioner's opinion, the conversion of attendance time to actual working hours under Section 12 para. (6) of D2 violates Article 70/B paras (2) and (3) of the Constitution.

The seventh petitioner has requested the Constitutional Court to establish the unconstitutionality of, and annul Section 59 para. (4) item *b)* and Section 59 para. (5) of the ASPE, as well as Section 9 para. (1), Section 10 paras (3) to (5) and para. (7), Section 12/A and Section 14 of D2. In the petitioner's opinion, under Section 59 para. (4) item *b)* of the ASPE, the labour law guarantee laid down in Section

119 para. (6) of ALC is not enforced in the healthcare sector, and under Section 59 para. (5) of the ASPE, only the healthcare workers in attendance are subject to the legislation allowing to order 300 hours of extraordinary work to be performed by them, which can be increased to 400 hours if a collective bargaining agreement provides so, and the quantities of time spent with actual work in each of the attendance types are regulated in Section 12/A of D2. According to the petitioner, the challenged provisions of D2 regulate in an unlawful and unconstitutional way the leisure times connected to attendance service, putting an inhumane burden on the workers in attendance as, under Section 10 para. (7) of D2, on weekdays, the attendance period starts after eight hours of daily work and ends when the next day's daily working hours start. The petitioner claims Section 9 para. (1) to be unconstitutional due to the fact that with the performance of six attendance periods per month, the maximum weekly working hours limited to 48 hours shall be exceeded even by the workers in attendance only on weekdays, and this is against the provisions of the ALC. Based on the above, the petitioner alleges the violation of Article 2 para. (1) as well as Article 70/B paras (3) and (4) of the Constitution.

The eighth petitioner has asked the Constitutional Court to establish an unconstitutional omission of legislative duty, as – in his opinion – the Parliament and the Government failed to perform their legislative duties under statutory authorisation by not adopting statutes on the working hours and the leisure time in the healthcare sector in compliance with the legislation of the European Union and the Constitution, resulting in unconstitutionality through the alleged violation of Article 2/A para. (1) and Article 7 para. (1) of the Constitution. The petitioner holds the Hungarian regulations in force to be contrary to Directive 2003/88/EC of the European Parliament and of the Council (hereinafter: the Directive). In the petitioner's opinion – subject to the provisions of the Directive – Section 117/A para. (2) items *b)* and *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, Section 59 para. (2) item *b)* as well as Section 59 para. (4) items *b)* and *f)* of the ASPE, furthermore, Section 12 paras (5) and (6) as well as Section 12/A paras (1) and (2) of D2 violate Article 2 para. (1), Article 7 para. (1) and Article 54 para. (1) of the Constitution, while Section 10 paras (3) to (7) of D2 violate Section 15 para. (1) of the AL and Article 8 para. (2) of the Constitution. In addition, the petitioner holds Section 59 para. (4) items *b)* and *f)* as well as Section 76 para. (3) of the ASPE to violate Section 15 para. (1) of the AL for not defining the limits of the authorisation given to the Minister, and the general character of the authorisation practically empowers the Minister to provide for a regulation replacing the statute instead of regulating the implementation of the statutory provision. In the petitioner's opinion, Section 117/A para. (2) and Section 117/B para. (3) of the ALC, Section 59 para. (4) items *b)* and *f)* as well as Section 76 para. (3) of the ASPE, furthermore, Section 12 paras (5) and (6) as well as Section 12/A

para. (1) and (2) of D2 make an unjustified discrimination between the healthcare sector and other sectors, and even within the healthcare sector itself to the prejudice of certain jobs, and this is deemed to violate Article 70/B paras (2) and (4), Article 70/D para. (1) and Article 70/E para. (1) of the Constitution. Therefore, the petitioner has asked for the establishment of the unconstitutionality and the annulment of the challenged statutory provisions.

The ninth petitioner has requested the Constitutional Court to establish the unconstitutionality of, and annul Section 59 para. (4) items *b)*, *c)* and *f)* as well as Section 59 para. (5) of the ASPE, furthermore, Section 9 para. (1), Section 10, Section 12 para. (6), Section 12/A paras (1) and (2) as well as Section 14 of D2 for violating Article 2 para. (1), Article 35 para. (2) and Article 70/B paras (2) to (4) of the Constitution.

The tenth petitioner has requested from the Constitutional Court posterior establishment of the unconstitutionality and annulment of Section 128 para. (2) and Section 129 para. (7) of the ALC, Section 9 para. (1), Section 10 paras (3) and (7) as well as Section 12/A of D2, furthermore, Section 13 para. (1) item *b)* and Section 13 para. (3) of Minister of Healthcare, Social and Family Affairs Decree 47/2004 (V. 11.) EszCsM on Certain Organisational Questions of the Continuous Operation of Healthcare Services (hereinafter: D3), and the retroactive annulment of D3 as of 1 May 2004. In the petitioner's opinion, Section 129 para. (7) of the ALC concerning employment relations fails to perform its duty of protecting fundamental rights, and therefore it is deemed to violate Article 70/B paras (2) to (4) of the Constitution, while Section 128 para. (2) and Section 129 para. (7) of the ALC is discriminative and violates Article 70/A para. (1) of the Constitution. The petitioner holds that Section 9 para. (1) of D2 provides for an indefinite period of time for attendance, since it can be interpreted as both 96 and 144 hours per month, wherefore, the text of the statute is unclear and its normative contents cannot be identified, resulting in violation of Article 2 para. (1) of the Constitution. In the petitioner's opinion, the attendance service time regulated in Section 10 paras (3) and (7) of D2 violates Article 70/B para. (4) of the Constitution. According to the petitioner, the duration of the attendance service and the period of actual working are separated under Section 12/A of D2, and it is a legally uninterpretable "norm impairing legal certainty", violating Article 2 para. (1) of the Constitution, and also contravening Section 13 para. (1) of Act LXXXIV of 2003 on Certain Questions on Performing Healthcare Activity (hereinafter: the APHA), thus violating Article 35 para. (2) of the Constitution as well. In addition, the petitioner also asked for the annulment of Section 13 para. (1) item *b)* and para. (3) of D3, as according to the challenged provisions, the employer may unlimitedly increase the work

burden of the physician in attendance by contracting and assigning to a single doctor the attendance tasks of departments with similar profile. In the petitioner's opinion, as the statutory category of "similar profile" is absolutely vague and depends on interpretation by the employer, the vagueness of the normative text impairs the principle of legal certainty originating from the rule of law enshrined in Article 2 para. (1) of the Constitution. Finally – as claimed by the petitioner – the challenged provisions of D3 violate Article 70/B paras (2) to (4) of the Constitution, too. Additionally, the petitioner has requested retroactive annulment of the challenged provisions of the ALC, D2 and D3 as of 1 May 2004.

Pursuant to Section 28 para. (1) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof (hereinafter: the Rules of Procedure, ABH 2003, 2065), the Constitutional Court has consolidated the ten petitions – on the basis of their similar contents – and judged them in a single procedure.

II

In the procedure, the Constitutional Court has taken into account the following statutory provisions:

1. The provisions of the Constitution relevant in respect of the petitions are as follows:

"Article 2 (1) The Republic of Hungary is an independent democratic state under the rule of law."

"Article 2/A (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union."

"Article 7 (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law."

"Article 8 (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined in Acts of the Parliament; such Acts, however, may not restrict the essential contents of fundamental rights."

"Article 35 (1) The Government shall

(…)

b) ensure the implementation of laws;"

"Article 35 (2) Within its sphere of authority, the Government shall issue decrees and pass resolutions, which shall be signed by the Prime Minister. Government decrees and resolutions may not conflict with Acts of Parliament. Government decrees shall be promulgated in the Official Gazette."

"Article 54 (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily deprived of these rights."

"Article 70/A (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."

(2) The law shall provide for strict punishment of discrimination on the basis of Paragraph (1).

(3) The Republic of Hungary shall endeavour to implement equal rights for everyone through measures that create fair opportunities for all.

Article 70/B (1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession.

(2) Everyone has the right to equal compensation for equal work, without any discrimination whatsoever.

(3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.

(4) Everyone has the right to leisure time, to free time and to regular paid vacation."

"Article 70/D (1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health."

"Article 70/E (1) Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own."

2. The provisions of the ASPE affected by the petitions are as follows:

"Section 59 (1) With regard to employment as public employee, from the provisions of the Labour Code on working hours and time off (Part Three, Chapter IV) Section 117/A para. (1), Section 117/B para. (2), para. (3) item b) and para. (4), Section 127 para. (4), Section 131 and Section 132 paras (4) to (6) shall not be applicable.

(2) In respect of the Labour Code,

a) the Minister may provide otherwise about the provisions under Section 123 para. (3),
b) in addition to the provisions laid down in Sections 127 and 129, the Minister may regulate the conditions of ordering extraordinary work, attendance and standby, as well as the level of lump-sum remuneration containing the remuneration of both attendance and of work ordered to be performed under attendance, and of standby and of work ordered to be performed under standby."
"Section 59 (4) In the case of public employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity
(…)
b) the Minister or a collective bargaining agreement may provide for a derogation from Section 119 para. (6) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 119 paras (3) to (6) of the Labour Code,
c) by way of derogation from Section 123 para. (2) of the Labour Code, a collective bargaining agreement or the parties' agreement may provide for securing at least eight hours of daily time off,
(...)
f) the Minister or a collective bargaining agreement may provide for a derogation from Section 127 para. (5) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to the annual amount of extraordinary work."
"Section 59 (5) By way of derogation from the provision under Section 55/A of this Act, in the case of public employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, the maximum amount of extraordinary work to be performed in a calendar year is three hundred hours or – if provided so in a collective bargaining agreement – four hundred hours."
"Section 76 (3) For the purpose of performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, the Minister may provide for regulations by way of derogation from the provisions under Section 146 to 149 of the Labour Code."

3. The provisions of the ALC relevant in respect of the petitions are as follows:
"Section 5 (1) In connection with the employment relation, the requirement of equal treatment shall be observed.
(2) Any consequence of violating the requirement of equal treatment shall be properly remedied, which may not result in impairing or diminishing the rights of another employee."

“Section 13 (1) Questions connected to the employment relation shall be regulated in Acts of Parliament or in other statutes based on an authorisation in an Act of Parliament.

(2) A collective bargaining agreement may govern any employment-related issues, however, with the exception set forth in paragraph (3), such agreement may not be contrary to a statutory provision.

(3) Unless otherwise provided for by this Act, a collective bargaining agreement or an agreement between the parties may deviate from the provisions set forth in Part Three of this Act on condition that such deviation provides more favourable terms for the employee.

(4) A collective bargaining agreement or an agreement between the parties shall be null and void if it violates the provisions set forth in paragraphs (2) and (3).

(5) Wherever this Act refers to employment-related regulations, it shall be interpreted as per the provisions set forth in paragraphs (1) and (2).”

“Section 117 (1) For the purposes of this Act

a) *working hours* shall mean the duration of time from the commencement until the end of the period prescribed for working, that is to include any preparatory and finishing activities. Unless prescribed or agreed to the contrary, the duration of break-time (Section 122) shall not be included in the working hours, with the exception of standby duty;

b) *daily working hours* shall mean the duration of working hours per calendar day or the working hours in a twenty-four hour uninterrupted period;

c) *weekly working hours* shall mean the duration of working hours per calendar week or the working hours in an uninterrupted period of one hundred and sixty-eight hours;

(…)

i) *rest day* shall mean any period between midnight and 12 p. m. of a calendar day, or - unless otherwise prescribed by employment-related regulation or otherwise agreed by the parties concerned - a period of twenty-four consecutive hours preceding the commencement of the next shift for workers working in three- or four-shift work schedule or at employers operating non-stop and employees employed in such a job;”

“117/A (2) In the case of employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, a collective bargaining agreement may

(...)

b) provide for a derogation from Section 119 para. (6) and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 119 paras (3) to (6),

(...)

e) provide for a derogation from Section 126 para. (1) item d) and – based on the customary duration of the work performed in the course of standby duty – may determine the average period of time per one standby duty,

f) provide for a derogation from Section 127 para. (5) and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 127 paras (4) and (5).”

“Section 117/B (1) The working hours of full-time employment shall be eight hours a day, or forty hours per week.”

“Section 117/B (3) The working hours of full-time employment may be increased – based on the agreement by the parties – to a maximum of twelve hours a day, or sixty hours per week, if the employee

a) performs a job of standby character;

b) is a close relative of the employer or the owner [Section 139 para. (2)].”

“Section 119 (3) The daily and weekly working hours of employees shall not exceed twelve and forty-eight hours, respectively; the daily and weekly working hours of employees employed in a job of standby character shall not exceed twenty-four and seventy-two hours, respectively. Any duration of extraordinary work ordered shall be included in the daily and weekly working hours.

(...)

(5) The daily working hours of workers employed under conditions of health hazards as specified by the law shall not exceed eight hours in respect of night work.

(6) For the purposes of paragraphs (3) to (5) and (7) the entire duration of attendance shall be considered working hours if the duration of work cannot be measured.

(7) If the commencing time of winter saving time falls in the period of regular working hours as scheduled, the daily working hours of employees may exceed with not more than one hour the twelve hours as specified in paragraph (3) or the twenty-four hours in the case of employees employed in a job of standby character.”

”Section 123 (1) Employees shall be afforded at least eleven hours of resting time after the conclusion of daily work and before the beginning of the next day's work.

(2) By way of derogation from paragraph (1) – with the exception of the employee specified in Section 127 para. (6) item c) – a collective bargaining agreement may provide for securing at least eight hours of resting time for the employee

a) working in a job of standby character,

b) employed in non-stop working order, and

c) employed in a multiple shift working order, as well as

d) performing seasonal work.

(3) A collective bargaining agreement may provide that the employee shall not be entitled to resting time after the standby duty.

(4) If the commencing time of summer saving time falls in the period of the resting time, the amount of the resting time shall be at least seven hours in the case specified in paragraph (2).”

“Section 126 (1) The following qualifies as extraordinary work:

a) work performed outside the work schedule,

b) work performed in excess of the working hours framework, and

c) work performed during attendance, as well as

d) in the case of work ordered under standby duty, the period between arrival to the workplace and the end of performing the work, or – if the employee is to perform work at different places – the period between arrival to the first place of work and the end of working at the last place of work.

(2) Work performed by an employee working extra hours by consent of the employer to compensate for any permitted leave of absence shall not be considered extraordinary work duty.”

“Section 127 (1) The employer may only order the performing of extraordinary work in a particularly justified case. Extraordinary work can be ordered on legal holidays only

a) if the employee can otherwise be required to work on such day in regular working hours, or

b) in the interest of the prevention or mitigation of an accident, natural disaster or serious damage, or any imminent serious danger to life, health or physical integrity.

(2) Extraordinary work may not be ordered if it imposes any danger to the physical integrity or health of the employee, or if it constitutes any unreasonable burden to the employee in respect of his/her personal, family or other conditions.

(...)

(4) An employee may be ordered to work not more than two hundred hours in any given calendar year in extraordinary work duty; or three hundred hours under collective bargaining agreement.

(5) For the purpose of calculating the amount of extraordinary work according to paragraph (4), the entire duration of attendance shall be taken into account if the duration of work cannot be measured during attendance.”

“Section 128 (1) No limitation shall be applicable to extraordinary work when – save in the case under Section 127 para. (6) – it is performed in the interest of the prevention or mitigation of an accident, natural disaster or serious damage, or any imminent serious danger to life, health or physical integrity.

(2) The detailed provisions for the requirements specified in paragraph (1) may be prescribed by legal regulation pertaining to public education and healthcare for the particular sector.”

“Section 129 (1) The employee may be required to be on duty at the place and for the length of time specified by the employer (attendance), or to be on standby duty at a place – accessible with regard to the place of work – specified by the employee, in the interest of

a) the continuous provision of a fundamental service satisfying a public demand of the society,

b) the prevention or mitigation of an accident, natural disaster or serious damage, or any imminent serious danger to life, health or physical integrity, and

c) maintaining the safe and proper application of the technology used.

(2) When in attendance or on standby duty the employee shall be obliged to remain in a condition suitable for work.

(3) Regarding the ordering of attendance the provisions of Section 127 paras (2) to (7), and regarding the ordering of standby duty the provisions of Section 127 paras (2) and (3) and paras (6) and (7) shall be applicable appropriately.

(4) Unless otherwise provided in a collective bargaining agreement, an employee may be ordered to work on standby duty not more than one hundred and sixty-eight hours in any given month or in a period of four weeks. In the case of applying a framework of working hours, the monthly or the four weeks’ amount of standby duty shall be taken into account regarding the average of the framework of working hours.

(5) Unless otherwise provided in a collective bargaining agreement, no standby duty shall be ordered during the weekly day off and the weekly resting time if in the preceding uninterrupted period of one hundred and sixty-eight hours the employee has been on standby duty on his weekly day off or in his weekly resting time.

(6) The ordering of attendance and standby duty shall be communicated at least one week prior to its commencement and in advance for a period of one month. The employer may differ from the above provision in a particularly justified case. In the case of differing, the requirements of healthy and safe working shall be taken into account. In respect of ordering attendance and standby duty, a collective bargaining agreement may contain regulations different from the provisions herein.

(7) The rules on attendance and standby duty as laid down in paragraphs (1) to (6) may be regulated differently in respect of employees engaged in healthcare activity in a special legislation pertaining to the relevant sector.”

“Section 146 (1) Employees shall be paid a fifteen per cent wage supplement for working night shift [Section 117 para. (1) item d)].

(2) The employees working in alternating shifts [Section 117 para. (1) item e)] or in continuous shifts [Section 118 para. (2)] shall be entitled to an afternoon or night shift supplement as defined in paragraph (3).

(3) The rate of supplement for work in afternoon shifts [Section 117 para. (1) item f)] shall be fifteen per cent, and thirty per cent for work in night shifts [Section 117 para. (1) item g)]. Employees working in continuous shifts shall be entitled to an additional five per cent shift supplement for afternoon shifts, and an additional ten per cent shift supplement for night shifts. The amount of shift supplements shall be established in due consideration of the provisions of Section 145.

Section 147 (1) In addition to regular wages, employees performing extraordinary work shall be entitled to extra remuneration as defined in paragraphs (2) to (4).

(2) Employees shall be entitled to a fifty per cent wage supplement for work performed in excess of the daily working hours according to the schedule of working hours or over and above the framework of working hours. Employment-related provisions or an agreement between the parties may stipulate the provision of time off in lieu of a wage supplement; the time off shall not be less than the duration of the work performed.

(3) Employees shall be entitled to a one hundred per cent wage supplement for work performed on a day off (in resting time) according to the schedule of working hours. The rate of wage supplement shall be fifty per cent if another day off (resting time) is provided.

(4) Unless otherwise agreed, the time off defined in paragraph (2) and the day off (resting time) defined in paragraph (3) shall be allocated at the latest in the month following the month in which the extraordinary work was performed. In the case of applying a framework of working hours, the time off, or the day off (resting time) shall be allocated before the end of the given framework of working hours.

(5) Notwithstanding paragraphs (2) and (3), flat rate compensation may also be provided for extraordinary work duty in addition to the regular wages due.

(6) Unless otherwise agreed, the provisions under paragraphs (1) to (3) and (5) shall not apply to the employee who is entitled to determine and to use up his/her own schedule of working time.

(7) As regards the employees defined in Section 117/A para. (1), different provision may be provided by collective bargaining agreement.

Section 148 (1) In the case of standby duty, a wage corresponding to twenty-five per cent and in the case of attendance, a wage corresponding to forty per cent of the personal base wage shall be paid respectively.

(2) If an employee in attendance or on standby duty is ordered to work, remuneration for the extraordinary work's time shall be paid in accordance with Section 147 paras. (2), (3) and (5). The

employer may provide for a flat rate remuneration containing both the remuneration under paragraph (1) and the compensation under Section 147 paras (2) and (3).
Section 149 (1) For any work performed on a legal holiday according to the schedule of working hours
a) for employees paid monthly, remuneration shall be paid as due for work on legal holidays in addition to the monthly wages,
a) for employees paid on the basis of performance or by hourly wages, absentee fee shall be paid in addition to the wages due for work on legal holidays.
(2) For extraordinary work duty on legal holidays the employee shall be entitled to remuneration as defined in Section 147 paragraph (3) or (5) over and above the wages defined in paragraph (1).”

4. The provisions of the APHA relevant to the petition are as follows:
“Section 7 (1) All patients have the right – within the statutory limitations – to receive appropriate and continuously available medical services justified by his or her state of health, in accordance with the requirement of equal treatment.
(2) The service shall be deemed appropriate when provided in compliance with the professional and ethical rules and directives pertaining to the medical service in question.
(3) The service shall be deemed to be continuously available if the operation of the healthcare service system secures its availability 24 hours a day.”
“Section 13 (1) A six months’ framework of working hours may be determined for an employed healthcare worker. The weekly working hours – save as provided in paragraph (2) – shall not exceed 48 hours as ordered by the employer.”
“Section 93 para. (1) The system of attendance shall secure the continuous availability of medical services according to Sections 88 to 92 in the cases of emergency outside the daily working hours.
(2) The purpose of providing service under attendance is – in the period between end of the working hours under the daily working order at the medical service provider and the commencement of the working hours under the next day’s daily working order – the examination of the patient, the detection of the patient’s state of health, the performance of casual and immediate emergency interventions, the urgent referral of the patient into an in-patient medical institution, and the participation in the procedures specified in specific laws.”

5. The provisions of Act II of 2000 on the Independent Medical Practice (hereinafter: the AIMP) related to the petitions are as follows:

“Recognising that the implementation of the healthcare reform, the prevention, the diagnosing and the curing of diseases requires the active participation of the society of medical practitioners who love their profession; with due account to the fact that curing is a public matter where the primary responsibility is borne by the physician who cures; in the interest of acknowledging this work, for the purpose of improving the position of the society of medical practitioners and this way the level of providing services for the patients, the Parliament hereby adopts the following Act:

Section 1 (1) The force of this Act shall cover the independent medical practices and the physicians engaged in such practices in the framework of providing healthcare services in the territory of the Republic of Hungary.

(2) For the purposes of this Act

a) *independent medical practice* shall mean the healthcare services provided by the family doctors, family paediatricians, and dentists (hereinafter jointly: “family doctor”) in the scope of the territorial obligation of providing services, in accordance with Act CLIV of 1997 on Healthcare;

b) *medical practitioner* shall mean a person with medical or dentist’s qualification, registered in the basic and the operational registry kept according to specific statutory provisions;”

6. The provisions of D2 relevant to the petitions are as follows:

“Section 9 (1) For the purpose of the continuous provision of the healthcare institution’s medical and related responsibilities, attendance and standby duty may be organised. The public employee may be required six times a month to be in attendance or on standby duty – unless otherwise provided by the law, or if necessitated by an extraordinary circumstance, situation or event (hereinafter: “emergency situation”).

(2) The public employee shall be considered to be in attendance – for the purpose of the provision of continuous services – when he/she is ready for work at the place of work in extraordinary working hours, performing the duties under attendance, in consideration of receiving attendance remuneration.

(3) Attendance duty shall be organised at an institution, service or job where it is unnecessary or impossible to organise shifts, but the permanent presence of the public employee is required for the performance of unforeseeable tasks.

Section 10 (1) An attendance service shall not be longer than the period between the end of the working hours and the commencement of the next working hours, and – with the exceptions provided for in paragraph (2) – it shall not exceed 18 hours.

(2) In an emergency situation, as well as on the weekly day off or on legal holidays, the duration of the attendance service may be 24 hours.

(3) No resting time shall be allocated upon attendance service – with the exceptions contained in paragraphs (4) and (5).

(4) Upon the working hours immediately following an attendance service reaching 18 hours

a) 6 hours of resting time shall be allocated in the case of qualified attendance, and

b) 4 hours of resting time may be allocated in the case of silent attendance and attendance.

(5) Upon the working hours immediately following an attendance service reaching 24 hours

a) 8 hours – or the number of hours corresponding to the public employee's total daily working hours if it is less than 8 hours – of resting time shall be allocated in the case of qualified attendance, and

b) 4 hours of resting time may be allocated in the case of silent attendance and attendance.

(6) A collective bargaining agreement may provide for a resting time exceeding the limits specified in paragraph (4) and paragraph (5) item b).

(7) If the total duration of an attendance service followed without interruption by regular working hours followed by another attendance service reaches 24 hours, 8 hours – or the number of hours corresponding to the public employee's total daily working hours if it is less than 8 hours – of resting time shall be allocated immediately after the attendance service.

Section 11 The schedule of attendance and standby services shall be prepared prior to the 20th day of the month preceding the relevant month and it shall be communicated to the affected public employee in writing. In an emergency situation, a deviation from the prescribed schedule may be made.

Section 12 (1) With regard to the yearly average amount of working in attendance, the attendance service may be

a) silent attendance,

b) attendance,

c) qualified attendance.

(2) Any attendance not falling under the cases regulated in paragraphs (3) or (4) shall qualify as silent attendance.

(3) Attendances performed at the following departments and services shall qualify as attendance:

a) surgical department,

b) casualty department,

c) intensive department,

d) premature and neonate department,

e) toxicology department,

f) dialysis department,

g) obstetrics and gynaecological department,

h) departments providing acute admission, including the admission matrix department,

i) all departments where tasks of the above nature are performed in a connected way, in particular departments providing for continuous diagnostics background, and

j) in the basic service.

(4) Attendances performed at the following departments shall qualify as qualified attendance:

a) anaesthesiology attendance, and

b) casualty department, on a day of admissions,

c) neurosurgery and stroke department, on a day of admissions,

d) neurotraumatology department, on a day of admissions,

e) department in charge of receiving alcohol- and drug-intoxicated patients,

f) central intensive department.

(5) A collective bargaining agreement may define the attendance services listed under paragraph (3) as qualified attendances.

(6) In line with the qualification laid down in paragraph (1), the hourly attendance remuneration payable – as a lump sum remuneration – upon the attendance service:

a) in silent attendance

aa) on weekdays: 55% of the amount of remuneration per 1 hour,

ab) on weekly days off: 60% of the amount of remuneration per 1 hour,

ac) on legal holidays: 70% of the amount of remuneration per 1 hour;

b) in attendance

ba) on weekdays: 70% of the amount of remuneration per 1 hour,

bb) on weekly days off: 80% of the amount of remuneration per 1 hour,

bc) on legal holidays: 90% of the amount of remuneration per 1 hour;

c) in qualified attendance

ca) on weekdays: 110% of the amount of remuneration per 1 hour,

cb) on weekly days off: 120% of the amount of remuneration per 1 hour,

cc) on legal holidays: 130% of the amount of remuneration per 1 hour.

A collective bargaining agreement may provide for an attendance remuneration higher than the one specified in items a) to (c).

(7) Attendance remuneration shall be payable to public employees in managerial positions as well.

Section 12/A (1) If the duration of the work performed in attendance is not measured at the employer, nor is it specified in a collective bargaining agreement, the duration of actual work per one attendance to be taken into account with regard to Section 119 paras (3) to (6) of the Labour Code is

a) in silent attendance:

aa) at least 2 hours on weekdays in the case of 16 hour attendance service,

ab) at least 3 hours on the weekly days off (weekends), on legal holidays, in the case of 24 hour attendance service;

b) in attendance:

ba) at least 4 hours on weekdays in the case of 16 hour attendance service,

bb) at least 6 hours on the weekly days off (weekends), on legal holidays, in the case of 24 hour attendance service;

c) in qualified attendance:

ca) at least 8 hours on weekdays in the case of 16 hour attendance service,

cb) at least 12 hours on the weekly days off (weekends), on legal holidays, in the case of 24 hour attendance service;

(2) The minimum rate of actual working within the attendance time is 12.5% in silent attendance, 25% in attendance and 50% in qualified attendance.

(3) In the ambulance departments serving the patients, the continuous service is provided by organising shifts. In the departments with qualified attendance where the duties cannot be performed adequately in attendance due to the intensity of the work, shifts are to be organised.

Section 12/B (1) According to Section 128 para. (2) of Act XXII of 1992 on the Labour Code, extraordinary work does not fall under restriction

a) in the case of the catastrophe-healthcare service under Chapter XIV of Act CLIV of 1997 on Healthcare and

b) when in the organised attendance service, the provision of an extraordinary, unforeseen, acute casual duty requires a workforce the extent of which cannot be met by the persons available in attendance duty, and therefore

ba) it becomes necessary to call in the staff members who are not on standby duty or attendance, or

bb) in the case of an institute not involved in the attendance, the organisation of an urgent attendance service becomes necessary upon the authority’s order.

(2) The necessity of ordering the extraordinary work under paragraph (1) items ba) and bb) shall be verified posteriorly on the request of the institute’s head by the metropolitan and the county institutes of the National Public Health and Medical Officer Service (hereinafter: the NPHMOS).

(3) The provisions under paragraph (1) item ba) and paragraph (2) shall be applicable to the public employees employed in multiple shifts at the Hungarian National Ambulance and Emergency Service.

Section 13 (1) The public employee shall be considered to be on standby duty for the purpose of the provision of continuous services when he/she is ready for work in extraordinary working hours in consideration of receiving extra remuneration, and he/she arrives at the workplace shortly after being called in.
(2) Where it is unnecessary to have additional shifts or attendance service, but there is a possibility of potential duties requiring the calling in of the public employee, standby duty is to be organised.
(3) The public employee shall not be entitled to resting time after the standby duty.
(4) If an employee on standby duty is ordered by the employer to work, consideration shall be paid for the period from calling in and the full duration of the work performed under standby duty, in accordance with the provisions on the remuneration for extraordinary work.
Section 14 If the total duration of the work performed in the period of standby duty followed without interruption by regular working hours and attendance service exceeds 24 hours, 8 hours – or the number of hours corresponding to the public employee's total daily working hours if it is less than 8 hours – of resting time shall be allocated immediately after the attendance service."

7. The provisions of D3 challenged by the petitioner are as follows:
"Section 13 (1) The medical service provider shall organise the attendance duty in the framework of the following attendance system or the combination of them:
a) department attendance,
b) contracted department attendance (matrix),
c) emergency attendance,
d) casual attendance, or
e) attendance in the basic service."
"Section 13 (3) If there are more than one departments with the same or similar profile operating at the medical service provider – with due account to the principles on the organisation of matrix department as laid down in specific legislation – a contracted department attendance is to be organised."

III

The petitions are, in part, well-founded.

1. The petitions are partly aimed at the constitutional review of the labour law regulations on the extra working hours of medical employees (primarily physicians), and in other respects, the petitions raise constitutional concerns about the remuneration of extra work.

Under Section 7 of the APHA, every patient shall have the right – within the statutory limitations – to receive appropriate and continuously available medical services justified by his or her state of health, in accordance with the requirement of equal treatment. The service shall be deemed appropriate when provided in compliance with the professional and ethical rules and directives pertaining to the medical service in question, and the service shall be deemed to be continuously available if the operation of the healthcare service system secures its availability 24 hours a day. Under Section 93, the system of attendance shall secure the continuous availability of medical services in the cases of emergency outside the daily working hours. The purpose of providing service under attendance is – in the period between end of the working hours under the daily working order at the medical service provider and the commencement of the working hours under the next day's daily working order – the examination of the patient, the detection of the patient's state of health, the performance of casual and immediate emergency interventions, the urgent referral of the patient into an in-patient medical institution, and the participation in the procedures specified in specific laws." Under Section 9 para. (2) of D2, the public employee shall be considered to be in attendance – for the purpose of the provision of continuous services – when he/she is ready for work at the place of work in extraordinary working hours, performing the duties under attendance, in consideration of receiving attendance remuneration.

The Constitutional Court has first examined the attendance system in the healthcare services. In the Hungarian medical attendance system, most of the employees involved are physicians, while in the case of nurses and other employees, the employers typically organise two or three shifts to perform the duties. There are two main forms of attendance: attendance by physicians employed in hospitals as public employees, and attendance by physicians employed in the basic healthcare service as public employees or as contractors under service provision contracts. In each case, the attendance is linked to the location of the place of work, and the attending physician has got well-defined attendance duties and job assignments. As the essence of attendance, upon completing the daily working hours, the physician starts, at the same or at another workplace, the attendance service that lasts from 4 p.m. to 8 a.m. the next day. In most of the cases, after completing the attendance service, the physician does not leave the workplace – where he/she has already spent 24 hours without interruption – but starts the next day's regular working hours. As a result, in the course of a regular weekday's attendance – allowed to

be ordered not more than six times per month under Section 9 para. (1) of D2 – the public employee spends 32 hours at the workplace without interruption.

According to the ALC'S rules on extraordinary work, if the public employee has been ordered to work on his/her weekly day off, another day off (resting time) is to be primarily provided for the employee until the end of the month following the performance of the work. Section 117 para. (1) item i) of the ALC defines the term of "day off", and Section 123 of the ALC provides for the amount of resting time. Under Section 126 para. (1) item c) of the ALC, the work performed in the period of attendance qualifies as extraordinary work. As regulated in Section 10 para. (3) of D2, as the general rule, no resting time shall be allocated after the attendance service, with the exception of attendances reaching 18 or 24 hours.

a) In the amendment of Section 59 para. (2) item b) of Act XXXIII of 1992 on the Status of Public Employees (hereinafter: the ASPE) by Section 28 para. (1) of Act LVI of 1999, the Minister has been empowered to regulate the attendance service in the healthcare sector. D2, the rules of which are challenged by the petitioners, is the result of this legislative effort. The provisions of Section 59 para. (2) item b) of the ASPE applicable as from 1 July 2003 have been laid down in Section 43 para. (1) of Act XX of 2003, according to which — in addition to the provisions laid down in Section 127 and 129 of the ALC — the Minister may regulate the conditions of ordering extraordinary work, attendance and standby, as well as the level of lump-sum remuneration containing the remuneration of both attendance and work ordered to be performed under attendance, and of standby and work ordered to be performed under standby.

The provisions under Section 59 of the ASPE are in many respects different from the ALC's rules on working hours and resting time, especially in respect of the legal relations of public employees, with particular regard to the healthcare activities. Section 59 para. (1) of the ALC lists all the sections of the ALC not applicable in the legal relation of public employment. The listed sections – without any exception – set up certain restrictions for the employer in respect of the daily working hours and the minimum resting time, and with regard to allowing the collective bargaining agreement to differ from these rules to a certain extent. Under Section 59 para. (5) of the ASPE, in the case of public employees performing attendance and standby duties specified in the APHA – by way of derogation from the provision of fixing 200 hours per year or 280 hours per year on the basis of a collective bargaining agreement pertaining to other public employees – the maximum amount of extraordinary work to be performed in a calendar year is 300 hours or – if provided so in a collective bargaining agreement – 400

hours. According to one of the petitioners, the provisions under Section 59 para. (5) of the ASPE violate the right to leisure time and free lime laid down in Article 70/B para. (4) of the Constitution and this way Article 2 para. (1) of the Constitution as well, while another petitioner alleges the violation of Article 70/B paras (3) and (4) of the Constitution.

It has been established in several decisions of the Constitutional Court in respect of Article 70/B para. (4) of the Constitution that the Constitution guarantees the right to leisure time, free time and paid leave as fundamental rights. (Decision 1403/B/1990 AB, ABH 1992, 493, 494; Decision 1005/B/1996 AB, ABH 1998, 939, 940; Decision 1030/B/2004 AB, ABH 2005, 1307; 1311) According to the established practice of the Constitutional Court, the specific provisions under Article 70/B of the Constitution are regulations concretising the general prohibition of discrimination, laid down in Article 70/A of the Constitution, to the world of labour. [Decision 25/2003 (V. 21.) AB, ABH 2003, 328, 346; Decision 142/B/1998 AB, ABH 2005, 757, 765]

The Constitutional Court has been engaged in interpreting Article 70/A of the Constitution in several decisions in many aspects. In the course of the interpretation, the Constitutional Court established in Decision 9/1990 (IV. 25.) AB in connection with the right to human dignity [Article 54 para. (1) of the Constitution] that “all people must be treated as equal (as persons with equal dignity) by law, i.e. the fundamental right to human dignity may not be impaired, and the criteria for the distribution of the entitlements and benefits shall be determined with the same respect and circumspection, and with the same degree of consideration of individual interests.” (ABH 1990, 46, 48)

As pointed out by the Constitutional Court in Decision 35/1994 (VI. 24.) AB, “the unconstitutionality of any discrimination or other restriction between persons concerning other rights not considered fundamental rights may only be established if the violation is in relation to any fundamental right, and finally to the general personality right to human dignity, and there is no reasonable ground for making the distinction or the restriction, wherefore, it is arbitrary." (ABH 1994, 197, 200)

To assess whether the legislature made an unconstitutional discrimination by way of the regulations challenged by the petitioners in respect of the public employees working in the healthcare sector, the Constitutional Court has first examined the broader legal environment where Section 59 para. (5) of the ASPE is fitted.

As pointed out by the Constitutional Court in Decision 44/B/1993 AB, “In 1992, the Parliament adopted three Acts – almost at the same time – for the purpose of the legal settlement of the relations connected to labour. The Acts of Parliament resulting from the above legislation have caused significant differentiation in respect of the legal regulation of the labour relations – with due account to the changes taking place in the society – as compared to the old unified Labour Code. The essential element of this differentiation has been the increasing level of contractual freedom in the world of labour in the private sphere. The legal regulations pertaining to the economy and the spheres of the State and the local governments have been differentiated. Another differentiation has been created in the legal regulation on the basis of whether or not the employee performs the work as the member of an organisation exercising public authority. One of the reasons of differentiating the legal regulations was the different position of the employer in the competitive sphere of the economy and in the budgetary sphere where the legal status of both the employer, the public servant and the public employee (i.e. the employer and the employee) depend primarily on the budget. Similarly, the differences found in the nature and the environment of the working activities performed in the specific legal relations are reflected in the differing legal regulations.” (ABH 1994, 574, 574-575)

As pointed out by the Constitutional Court in Decision 198/B/1998 AB, “the demonstrated differences in the relations connected to labour, and the obviously differing nature of the working activities performed in the specific legal relations justify the differentiation of the legal regulations. As the three Acts of Parliament pertain to three actual groups of employees, providing for different regulations in respect of the wages, the remuneration, the remuneration supplement and other supplements, the conditions of jubilee bonus and the 13th month’s salary, they cannot be regarded as discriminative. According to the consistent practice of the Constitutional Court [e.g. in Decision 4/1993 (II. 12.) AB], an unconstitutional discrimination »may only be established between comparable entitled or obliged persons«. (ABH 1993, 65) Public servants, public employees and the employees under the Labour Code fall into differentiated groups, in respect of which it is constitutionally justified to apply different labour law regulations.” (ABH 1999, 668, 669)

“By the adoption of the ASPE, the legislation created, as of 1 July 1992, a special new type of legal relation. In the formerly homogeneous field of labour law, the legal relation of public employment has been introduced – focusing on the special features – with a separate Act of Parliament laying down the relevant regulations.” [Decision 25/2003 (V. 21.) AB, ABH 2003, 328, 340] Accordingly, in Section 55/A of the ASPE the legislation regulated for the public employees in general the upper limit of 200 hours of extraordinary work allowed to be ordered in a calendar year, or the maximum of 280 hours in

the case of a collective bargaining agreement providing so. Under Section 59 para. (5) of the ASPE, by way of derogation from the general rule, in the case of public employees performing attendance and standby duties of healthcare activity, the maximum amount of extraordinary work to be performed in a calendar year is 300 hours or – if provided so in a collective bargaining agreement – 400 hours. In other fields of activity, the ASPE does not contain any provision differing from the general rule.

As declared in several decisions of the Constitutional Court, the prohibition of discrimination does not mean a prohibition of all forms of differentiation. The issue of whether differentiation remains within the constitutional bounds can only be examined in the objective and subjective contexts of the prevailing regulations. In addition, as explained by the Constitutional Court in numerous decisions, Article 70/A para. (1) only prohibits discrimination without due constitutional grounds between subjects of law within the same regulatory scope if the differentiation puts certain subjects of law in a disadvantageous position. The prohibition of discrimination addresses primarily differentiations made in respect of constitutional fundamental rights. If the discrimination concerned is not related to a human or fundamental right, the unconstitutionality of the different regulation may only be established if it violates the right to human dignity. In the case examined on the basis of the petition, the differentiation has been made, by way of adopting the regulation under Section 59 para. (5) of the ASPE, in respect of the right to leisure time and free time, as a fundamental right.

Having regard to the collision between Section 59 para. (5) of the ASPE and Article 70/B para. (4) of the Constitution, the Constitutional Court has examined whether there was any restriction of a fundamental right that has resulted in unconstitutionality.

In the opinion of the Constitutional Court, in order to enforce the patients' rights specified in Section 7 of the AH and to secure adequate continuous access to healthcare services, with regard to healthcare workers as a homogeneous group within the wide range of public employees Section 59 para. (5) of the ASPE provided for a regulation – differing from the general rules under Section 55/A of the ASPE – on the upper limits of extraordinary work performed in attendance or on standby duty, restricting the right to leisure time and free time as compared to the general regulations. The restriction in the healthcare sector of the fundamental right enshrined in Article 70/B para. (4) of the Constitution – as compared to the general rules – was adopted by the legislation in an Act of Parliament. "The determination of the content of a certain fundamental right and the establishment of the essential guarantees thereof may only occur in Acts of Parliament; furthermore, the direct and significant restriction of a fundamental

right also calls for an Act of Parliament." [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 300] The smooth operation of uninterrupted healthcare services in attendance and on standby duty is a paramount interest of the society, the absence of which would impair the right to the highest possible level of physical and mental health granted in Article 70/D of the Constitution. Beyond doubt, the continuous provision of attendance and standby duty services requires huge human resources capacity Consequently, the healthcare workers' constitutional right to leisure time and free time may and should be restricted in an Act of Parliament to the extent causing them the least harm of rights, in order to guarantee for all persons in the Republic of Hungary the protection of their fundamental right under Article 70/D para. (1).

It is the duty of the State to secure – through the organisation of healthcare institutions and medical services – the fundamental right to health granted in Article 70/D of the Constitution as well as the enforcement of the public interest in healthcare services under Article 70/D para. (2) of the Constitution. For the purpose of performing this duty of the State, the fundamental right granted in Article 70/B para. (4) of the Constitution has been restricted under Section 59 para. (5) of the ASPE, in respect of public employees working in the healthcare sector as employees working in special employment circumstances. In order to secure the performance of the State's duty, restricting the fundamental right in Section 59 para. (5) of the ASPE is necessary and not disproportionate. The securing of the right to the highest possible level of physical and mental health as granted in Article 70/ D of the Constitution requires the State to operate continuous and institutional healthcare services – sometimes implying the provision of extraordinary tasks and extraordinary work by the employees of the sector. The provision of extraordinary tasks makes it necessary to establish the regulations pertaining to extraordinary work. The challenged statutory provision of the ASPE does not violate Article 70/A para. (1), Article 70/B para. (4) and Article 2 para. (1) of the Constitution, as it does not provide for a discrimination between subjects of the law in the same regulatory scope. In view of the above, the Constitutional Court has rejected in this respect the petition seeking establishment of the unconstitutionality and annulment of Section 59 para. (5) of the ASPE.

Under Article 70/B para. (3) of the Constitution, "All persons who work have the right to an income that corresponds to the amount and quality of work they carry out." Section 59 para. (5) of the ASPE provides for the maximum amount of extraordinary work allowed to be ordered in the case of public employees engaged in attendance and standby duties of healthcare activity.

There is no constitutionally relevant relation between Section 59 para. (5) of the ASPE and Article 70/B para. (3) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking establishment of the unconstitutionality and annulment of Section 59 para. (5) of the ASPE.

b) As regulated in Section 9 para. (1) of D2, the public employee may be ordered to perform attendance or standby duty 6 times per month in line with Section 126 para. (1) item *c)* of the ALC, and calculating with 8 hours of attendance – not to mention 18 and 24 hours of attendance as provided for in Section 10 of D2 – this may reach 576 hours, thus exceeding the upper limit of extraordinary work allowed to be ordered according to Section 59 para. (5) of the ASPE (300 hours, or 400 hours if provided so in a collective bargaining agreement).

Section 9 para (1) of D2 does affect the fundamental right to leisure time and free time granted in Article 70/B para. (4) of the Constitution. The Constitutional Court has first examined the constitutionality of restricting the fundamental right in a decree, and in particular whether Article 8 para. (2) of the Constitution has been violated by the adoption of an implementing decree which is at a lower hierarchical level than an Act of Parliament. "Article 8 para. (2) of the Constitution provides for the conditions and the limitations of restricting fundamental rights exclusively by Acts of Parliament." [Decision 8/2004 (III. 25.) AB, ABH 2004, 144, 163] As pointed out by the Constitutional Court in Decision 64/1991 (XII. 17.) AB, "The determination of the content of a certain fundamental right and the establishment of the essential guarantees thereof may only occur in Acts of Parliament; furthermore, the direct and significant restriction of a fundamental right also calls for an Act of Parliament." (ABH 1991, 297, 300) As held by the Constitutional Court, the regulation of the duration and the level of attendance and standby duty is a question directly affecting the employee's fundamental right to leisure time and free time granted in Article 70/B para. (4) of the Constitution. The regulation – in the form of restricting the right to leisure time and free time laid down in Article 70/B para. (4) of the Constitution – of the amount of work in attendance and on standby duty by employees – in the present case, public employees – requires the adoption of statutory regulations in accordance with Article 8 para. (2) of the Constitution as the regulations pertain to fundamental rights. Therefore, the right to leisure time and free time may only be restricted on a statutory level, and Article 8 para. (2) of the Constitution is violated when such issues are regulated in an implementing decree instead of an Act of Parliament. The Constitutional Court notes that labour law regulations are diverse,

the fundamental regulations are laid down in Acts of Parliament, and the sectoral rules are established in Government Decrees, Ministerial Decrees, collective bargaining agreements and regulations. Any labour law rule not restricting a fundamental right may be adopted in the form of a statute of a rank lower than an Act of Parliament, or in a collective bargaining agreement or regulation. Based on the authorisation given in Section 59 paras (2) and (4) of the ASPE, the Minister may adopt a decree supplementing the statutory provisions, however, the authorisation to adopt a decree does not qualify as an empowerment to directly and significantly restrict a fundamental right.

However, the decree-level regulation found in Section 9 para (1) of D2 about the possibility to order the public employee to be in attendance or on standby duty six times a month – with due account to the attendance duration specified in Section 10 of D2 – does qualify as restricting on a decree-level the fundamental right to leisure time and free time – in excess of the amount determined in Section 59 para. (5) of the ASPE. The empowerment given to the employer in Section 9 para. (1) of D2 in respect of ordering the performance of extraordinary work exceeds the statutory authorisation. The level of the regulation under D2 may not jeopardise the feasibility of the timeframe of attendance specified in Section 59 para. (5) of the ASPE. The annual amount of extra work would only remain within the limit of not more than 400 hours when the public employee participating in the attendance service is in attendance only once a month. As the number of attendances allowed to be ordered in a month is 6, it means, on a yearly basis – depending on the number of weekend attendances – 1152 to 1536 hours of attendance, which is more than the triple of the upper limit. With 3 attendances per month the yearly hours are between 576 and 864, and with two attendances per month the yearly hours are between 384 and 576. It means that the maximum upper limit of 400 hours cannot be complied with. Although according to Section 59 para. (2) item *b)* of the ASPE, the Minister may regulate the conditions of ordering extraordinary work, attendance and standby in addition to the provisions laid down in Sections 127 and 129 of the ALC, as well as the level of lump-sum remuneration containing the remuneration of both attendance and of work ordered to be performed under attendance, and of standby and of work ordered to be performed under standby, in accordance with Section 1 para. (2) of Act XI of 1987, this regulation may not be in conflict with a provision laid down in a statute of higher rank. Article 35 para. (2) of the Constitution contains an explicit provision pertaining to the regulatory manner examined on the basis of the petitions, by stating that “Government decrees and resolutions may not conflict with Acts of Parliament”. Accordingly, as Section 9 para. (1) of D2 violates Section 1 para (2) of the AL, as well as Article 35 para. (2) and consequently Article 2 para. (1) and Article 8 para. (2) of the Constitution, the regulation concerned is unconstitutional. The Constitutional Court has established the

unconstitutionality of Section 9 paras (2) and (3) as well as of Sections 10, 12, 12/A, 12/B, 13 and 14 of D2 on the basis of their close connection with Section 9 para. (1).

The Constitutional Court has annulled the unconstitutional Sections 9, 10, 12, 12/A, 12/B, 13 and 14 of D2 as of 30 June 2007.

In respect of the *"pro futuro"* annulment of the provisions of D2, the Constitutional Court has taken account of the potential legal uncertainty that would be caused by the immediate annulment of the provisions, and therefore the date of annulment has been set at 30 June 2007 in order to allow the legislation to have enough time to elaborate constitutional regulations. In the repeated regulation of attendance time, the legislation shall have a chance to solve the problem of reaching a better balance between the patients' right to high-level services (Article 70/D of the Constitution) and the fundamental right to rest to be enjoyed by the public employees working in the healthcare sector [Article 70/B para. (4) of the Constitution].

2. According to the established practice of the Constitutional Court, when the statute challenged in the petition or a part of it is deemed to violate a provision in the Constitution and, therefore, it is annulled, then the Constitutional Court does not examine the violation of any further constitutional provisions regarding the statutory provision already annulled. [Decision 44/1995 (VI. 30.) AB, ABH 1995, 203, 205; Decision 4/1996 (II. 23.) AB, ABH 1996, 37, 44; Decision 61/1997 (XI. 19.) AB, ABH 1997, 361, 364; Decision 15/2000 (V. 24.) AB, ABH 2000, 420, 423; Decision 16/2000 (V. 24.) AB, ABH 2000, 425, 429; Decision 29/2000 (X. 11.) AB, ABH 2000, 193, 200]

As the Constitutional Court has established the unconstitutionality of Sections 9, 10, 12, 12/A, 12/B, 13 and 14 of D2 due to the violation of Article 2 para. (1) and Article 8 para. (2) of the Constitution, it has not reviewed the alleged violation of Article 35 para. (2), Article 54 para. (1), Article 70/A para. (1), Article 70/B paras (2) to (4), Article 70/D and Article 70/E para. (1) of the Constitution by Sections 9, 10, 12, 12/A, 12/B, 13 and 14 of D2.

3. According to one of the petitioners, Sections 11 to 17 of D1 are discriminative against healthcare workers as compared to employees in other fields (judicial staff members, judges and public servants), and therefore they violate Article 70/A of the Constitution, while being contrary to Article 70/B para. (4) of the Constitution as well. Due to the repealing of D1, the Constitutional Court – having regard to what has been detailed above – has performed the constitutional review in respect of the D2 provisions of similar contents. As the Constitutional Court has established above the unconstitutionality of, and

annulled Sections 9, 10, 12, 12/A, 12/B, 13 and 14 of D2 due to the violation of Article 8 para. (2) of the Constitution, it has only reviewed the alleged violation of Article 70/A of the Constitution in respect of the provisions under Section 11 of D2 remaining in force.

a) The Constitutional Court has been engaged in interpreting Article 70/A para. (1) of the Constitution in several of its decisions. According to the established practice of the Constitutional Court, this provision of the Constitution is interpreted as a constitutional requirement specifying the general principle of equal rights. As pointed out by the Constitutional Court in these decisions, although the text of the prohibition of discrimination under Article 70/A para. (1) of the Constitution is applicable to fundamental rights, the prohibition applies – provided that the discrimination violates the fundamental right to human dignity – to the whole legal system. If the discrimination concerned is not related to a fundamental right, the unconstitutionality of the different regulation may only be established if it violates the right to human dignity. According to its practice so far, the Constitutional Court has considered in the latter scope any discrimination between subjects of law to be unconstitutional if the legislature arbitrarily differentiated between subjects of law within the same regulatory scope without due reasons [Decision 9/1990 (IV. 25.) AB, ABH 1990, 48; Decision 21/1990 (X. 4.) AB, ABH 1990, 77-78; Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281; Decision 35/1994 (VI. 24.) AB, ABH 1994, 197; Decision 30/1997 (IV. 29.) AB, ABH 1997, 130, 138-140 etc.]

Contrary to what has been alleged by the petitioner, the public employees falling under the scope of D2 may not be regarded as persons enjoying the same status as judicial employees, judges and public servants. Indeed, their different positions served as the basis of regulating the status of employees belonging to various groups in different Acts of Parliament (the ASPE, Act LXVIII of 1997 on the Service Relations of Employees of the Judiciary, Act LXVII of 1997 on the Status and the Remuneration of Judges, Act XXIII of 1992 on the Legal Status of Public Officials). According to the practice of the Constitutional Court, discrimination between persons may only be established when individuals or a group of people face discrimination by the legislation in comparison with persons or groups in the same position. [Decision 32/1991 (VI. 6.) AB, ABH 1991, 146, 161-162; Decision 43/B/1992 AB, ABH 1994, 744, 745; Decision 397/B/1995 AB, ABH 1995, 786, 787; Decision 432/B/1995 AB, ABH 1995, 789, 792; Decision 719/B/1998 AB, ABH 2000, 769, 775; Decision 17/2000 (V. 26.) AB, ABH 2000, 112, 115; Decision 624/E/1999 AB, ABH 2002, 1023, 1035 etc.] Consequently, the Constitutional Court has rejected the petition seeking establishment of the unconstitutionality and

declaration of the nullification of Section 11 of D2 due to the violation of Article 70/A of the Constitution.

b) Under Article 70/B para. (4) of the Constitution, "Everyone has the right to leisure time, to free time and to regular paid vacation." As provided in Section 11 of D2, the schedule of attendance and standby services shall be prepared prior to the 20th day of the month preceding the relevant month and it shall be communicated to the affected public employee in writing.

There is no constitutionally relevant relation between Section 11 of D2 and Article 70/B para. (4) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking establishment of the unconstitutionality and annulment of Section 11 of D2.

4. Several petitioners have alleged the violation of Article 2 para. (1) of the Constitution: one of the petitioners has claimed it in respect of Section 59 para. (2) item *b)* and Section 76 para. (3) of the ASPE, another petitioner has claimed it regarding Section 117/A para. (2) items *b)* and *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, as well as Section 59 para. (2) item *b)* and Section 59 para. (4) of the ASPE, while the third petitioner has alleged it in the case of Section 59 para. (4) item *b)* of the ASPE.

Two petitioners have referred to the unconstitutionality of Section 59 para. (2) item *b)* of the ASPE. One of the petitioners considers it a violation of legal certainty when the Minister, authorised under Section 59 para. (2) item *b)* of the ASPE, restricts fundamental rights by way of regulating the conditions of ordering extraordinary work, attendance and standby, as well as the level of lump-sum remuneration containing the remuneration of both attendance and of work ordered to be performed under attendance, and of standby and of work ordered to be performed under standby. According to the other petitioner, Section 59 para. (2) item *b)* of the ASPE allows the statutes or the collective bargaining agreement to acknowledge only a certain part of the attendance time as working hours without specifying what the status of the remaining part of the attendance time is and what rules pertain to that part, and this regulation is considered by the petitioner to violate the requirement of legal certainty.

As pointed out by the Constitutional Court in Decision 9/1992 (I. 30.) AB, “Legal certainty is an indispensable component of the rule of law. Legal certainty compels the State – and primarily the legislature – to ensure that the law in its entirety, in its individual parts and in its specific statutes, is clear and unambiguous and that its operation is ascertainable and predictable by the addressees of the norm. Thus, legal certainty requires not merely the unambiguity of individual legal norms but also the predictability of the operation of the individual legal institutions. It is for these reasons that procedural guarantees are fundamental for legal certainty. Only by following the formal rules of procedure may a valid legal rule be created, and only by complying with the procedural norms do legal institutions operate in a constitutional manner.” (ABH 1992, 59, 65) Subsequently, the Constitutional Court underlined in Decision 25/1992 (IV. 30.) AB the following:
“Legal certainty is an important component of the rule of law, requiring among others
- the rights and obligations of the citizens to be regulated in statutes promulgated in the manner specified in an Act of Parliament and accessible by anyone,
- a real opportunity for the subjects of law to align their conducts with the provisions of the law, (...)
Neglecting any of the above two fundamental requirements of legal certainty is incompatible with Article 2 para. (1) of the Constitution and therefore unconstitutional.” (ABH 1992, 131, 132)

Under Section 15 para. (1) of the AL, in the empowerment to issue an implementing statute, the empowered entity as well as the subject and the framework of the empowerment shall be specified. The empowered entity shall not give further empowerment to another entity to issue the legal regulation in question. Section 59 para. (2) item *b)* of the ASPE authorised the Minister to issue an implementing statute within the limits of the Act, specifying the subject and the framework of the empowerment. On the basis of the authorisation, the Minister is not empowered to adopt regulations contrary to the Act and exceeding the limits of the authorisation.

Two petitioners allege the unconstitutionality of Section 59 para. (4) item *b)* of the ASPE. According to one of the petitioners, Section 59 para. (4) item *b)* of the ASPE allows the statutes or the collective bargaining agreement to acknowledge only a certain part of the attendance time as working hours without specifying what the status of the remaining part of the attendance time is and what rules pertain to that part, and this regulation is considered by the petitioner to violate the requirement of legal certainty. Another petitioner has claimed that Section 59 para. (4) item *b)* is contrary to Article 2 para. (1) of the Constitution by violating the employees’ fundamental constitutional rights.

According to Section 59 para. (4) item *b)* of the ASPE, in the case of public employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, the Minister or a collective bargaining agreement may provide for a derogation from Section 119 para. (6) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 119 paras (3) to (6) of the Labour Code.

Section 59 para. (4) item *b)* of the ASPE authorised the Minister to issue an implementing statute within the limits of the Act, specifying the subject and the framework of the empowerment. On the basis of the authorisation, the Minister is not empowered to adopt regulations contrary to the Act and exceeding the limits of the authorisation. Under the statutory authorisation, not only the Minister may provide for such rules, but it may be specified in a collective bargaining agreement as well.

The provision under Section 59 para. (2) item *b)* of ASPE is clear and unambiguous, and it does not contain any provision which would result in the violation of legal certainty under the rule of law guaranteed in Article 2 para. (1) of the Constitution. Consequently, the Constitutional Court has rejected the petition seeking establishment of the unconstitutionality and declaration of the nullification of Section 59 para. (4) item *b)* of the ASPE due to the violation of Article 2 para. (1) of the Constitution.

One of the petitioners considers it a violation of legal certainty granted under Article 2 para. (1) of the Constitution when the Minister, authorised under Section 76 para. (3) of the ASPE, restricts fundamental rights in the form of providing for regulations – by way of derogation from the provisions under Section 146 to 149 of the Labour Code – for the purpose of performing attendance and standby duties specified in a special legislation pertaining to healthcare activity. However, not even in this case does the authorisation of the Minister include the adoption of a decree against the provisions laid down in the Constitution, the ALC and the ASPE; indeed, this competence is restricted to the adoption of the rules necessary for performing the duties with regard to the scope — the remuneration of extraordinary work – specified in Sections 146 to 149 of the ALC.

Another petitioner has claimed the unconstitutionality of Section 117/A para. (2) items *b)* and *f)*, as well as of Section 119 para. (6) and Section 127 para. (5) of the ALC. According to this petitioner, Section 117/A para. (2) items *b)* and *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC allow the statutes or the collective bargaining agreement to acknowledge only a certain part of the

attendance time as working hours without specifying what the status of the remaining part of the attendance time is and what rules pertain to that part, and this regulation is considered by the petitioner to violate the requirement of legal certainty.

Under Section 117A para. (2) items *b)* and *f)* of the ALC, in the case of employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, a collective bargaining agreement may provide for a derogation from Section 119 para. (6) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 119 paras (3) to (6) of the Labour Code, and it may provide for a derogation from Section 127 para. (5) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 127 paras (4) and (5) of the Labour Code. Section 119 para. (6) and Section 127 para. (5) of the ALC provide for a supplementary rule to the above. In accordance with Section 119 para. (6) of the ALC, for the purposes of Section 119 paras (3) to (5) and para. (7) of the ALC the entire duration of attendance shall be considered working hours if the duration of work cannot be measured. As provided in Section 127 para. (5) of the ALC, for the purpose of calculating the amount of extraordinary work according to Section 127 para. (4) of the ALC, the entire duration of attendance shall be taken into account if the duration of work cannot be measured during attendance.

The provisions of the ALC challenged by the petition contain the subjects allowed to be regulated by collective bargaining agreement and the limitations thereof. Section 13 para. (4) of the ALC, specifying the cases when a collective bargaining agreement is null and void, provides for additional limitations.

The regulations under Section 59 para. (2) item *b)*, Section 59 para. (4) item *b)* and Section 76 para. (3) of the ASPE, furthermore, Section 117/A para. (2) items *b)* and *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC are clear and unambiguous, and they do not contain any provision which would result in the violation of legal certainty under the rule of law guaranteed in Article 2 para. (1) of the Constitution. Consequently, the Constitutional Court has rejected the petition seeking establishment of the unconstitutionality and declaration of the nullification of Section 59 para. (2) item *b)*, Section 59 para. (4) item *b)* and Section 76 para. (3) of the ASPE, as well as of Section 117/A para. (2) items *b)* and *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC due to the violation of Article 2 para. (1) of the Constitution.

5. In one of the petitioners' opinion, Section 117/A para. (2) items *b)*, *e)* and *f)* and Section 117/B para. (3) of the ALC, furthermore, Section 59 para. (4) items *b)* and *f)* and Section 76 para. (3) of the ASPE impair Article 70/A para. (1) of the Constitution, while Section 117/A para. (2) items *b)* and *f)* of the ALC and Section 59 para. (4) items *b)* and *f)* of the ASPE violate Article 70/B paras (2) and (4) of the Constitution. Another petitioner has also claimed that Section 59 para. (4) items *b)* and *f)* of the ASPE are contrary to Article 70/B paras (2) to (4) and Article 70/B para. (4) of the Constitution, alleging at the same time the violation of Article 70/B para. (4) of the Constitution by Section 59 para. (4) item *c)* of the ASPE.

a) The petitioner holds that Section 117/A para. (2) items *b)*, *e)* and *f)* are discriminative against healthcare workers as Section 119 para. (6) of the ALC provides in respect of all sectors that for the purpose of scheduling the working hours, the entire duration of attendance shall be considered working hours if the duration of work cannot be measured. In addition, the petitioner holds Section 117/B para. (3) of the ALC to be discriminative as it provides for a possibility of raising the 40 hours of weekly working hours to 60 hours, on the basis of the agreement by the parties, which – in the opinion of the petitioner – results in forcing the employees in such jobs to work up to twenty extra hours per week for the base wages, without being entitled to receive more favourable remuneration payable under extraordinary work.

According to the challenged provisions of the ALC, in the case of employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, a collective bargaining agreement may

- provide for a derogation from Section 119 para. (6) of the ALC and – based on the customary duration of the work performed in the course of the attendance – it may determine the average period of time per one attendance to be taken into account with regard to Section 119 paras (3) to (6),
- provide for a derogation from Section 126 para. (1) item *d)* of the ALC and – based on the customary duration of the work performed in the course of standby duty – it may determine the average period of time per one standby duty,
- provide for a derogation from Section 127 para. (5) of the ALC and – based on the customary duration of the work performed in the course of the attendance – it may determine the average period of time per one attendance to be taken into account with regard to Section 127 paras (4) and (5).

As underlined above by the Constitutional Court, discrimination between persons may only be established when individuals or a group of people face discrimination by the legislation in comparison with persons or groups in the same position. Under Section 13 para. (3) of the ALC, unless otherwise provided for by the ALC, a collective bargaining agreement or an agreement between the parties may deviate from the provisions on the employment relation. This provision applies on condition that such deviation provides more favourable terms for the employee. As according to Section 13 para. (3) of the ALC, a collective bargaining agreement may not provide for rules less advantageous than the statutory regulations, the application of the provisions set forth in Section 117/A para. (2) items *b)*, *e)* and *f)* does not allow to make discrimination – prohibited under Article 70/A para. (1) of the Constitution – in the healthcare sector. In accordance with Section 13 para. (4) of the ALC, a collective bargaining agreement is to be considered null and void if it provides for rules less advantageous than the statutory regulations. Therefore, the Constitutional Court has rejected the petition in this respect.

b) The petitioner has claimed the unconstitutionality of Section 117/A para. (2) items *b)* and *f)* due to the violation of Article 70/B paras (2) and (4) of the Constitution. Under Section 117A para. (2) the ALC, in the case of employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, which is in the present case the APHA, a collective bargaining agreement may provide for a derogation from Section 119 para. (6) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 119 paras (3) to (6) of the Labour Code, and it may provide for a derogation from Section 127 para. (5) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 127 paras (4) and (5) of the Labour Code.

As laid down in Article 70/B para. (2) of the Constitution, "(...) everyone has the right to equal compensation for equal work, without any discrimination whatsoever." (Decision 1086/B/1990 AB, ABH 1991, 749, 750) This means that the public employee shall not be discriminated against in any form concerning the wages payable for his/her work. The State only provides for guarantee regulations about wages. Article 70 (4) of the Constitution guarantees the right to leisure time, free time and paid vacation.

Under Section 117/A para. (2) items *b)* and *f)* of the ALC, the collective bargaining agreement may determine the average period of time per one attendance. These provisions do not affect directly the

constitutional rights determined in Article 70/B paras (2) and (4) of the Constitution, and the violation of these rights may only be established on examining the provisions of the collective bargaining agreement.

There is no constitutionally relevant relation between Section 117/A para. (2) items *b)* and *f)* of the ALC and Article 70/B paras (2) and (4) of the Constitution. In accordance with the Constitutional Court's established practice, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in these respects, too, the petition seeking establishment of the unconstitutionality and annulment of Section 117/A para. (2) items *b)* and *f)* of the ALC.

c) Section 117/B para. (3) of the ALC is not a peremptory but a dispositive regulation, allowing to increase the working hours of full-time employment – based on the agreement by the parties – to a maximum of twelve hours a day or sixty hours per week if the employee performs a job of standby character or he/she is a close relative of the employer or the owner [Section 139 para. (2) of the ALC]. This rule does not mean an obligatory application of the less advantageous amount of working hours in the jobs of standby duty character challenged by the petitioner; it only provides for a possibility of the parties to agree on it with mutual consent. This statutory provision also sets up a safeguard limitation of labour law: even in the case of mutual consent by the parties, the maximum amount of the working hours to be agreed upon shall be twelve hours per day and sixty hours per week, protecting the employee against the employer. When examining Section 117/B para. (3) of the ALC, the Constitutional Court has not established any negative discrimination violating Article 70/A para. (1) of the Constitution and, therefore, it has rejected the petition in this regard as well.

d) Under Section 59 para. (4) items *b)* and *f)* of the ASPE, in the case of public employees performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, the Minister or a collective bargaining agreement may provide for a derogation from Section 119 para. (6) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to Section 119 paras (3) to (6) of the Labour Code, and the Minister or a collective bargaining agreement may provide for a derogation from Section 127 para. (5) of the Labour Code and – based on the customary duration of the work performed in the course of the attendance – may determine the average period of time per one attendance to be taken into account with regard to

the yearly amount of extraordinary work. In the opinion of the petitioners, this regulation violates the principle of equal pay for equal work and the right to rest as granted in Article 70/B paras (2) and (4) of the Constitution.

Under Section 59 para. (4) items *b)* and *f)* of the ASPE, the Minister in respect of a sector and the collective bargaining agreement at a specific workplace may determine the average period of time per one attendance. These provisions do not affect directly the constitutional rights determined in Article 70/B paras (2) and (4) of the Constitution, and the potential violation of these rights may only be established on examining the provisions of the Minister's decree or the collective bargaining agreement.

There is no constitutionally relevant relation between Section 59 para. (4) items *b)* and *f)* of the ASPE and Article 70/B paras (2) and (4) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking annulment of the challenged provisions.

e) Another petitioner holds that Section 59 para. (4) item *c)* of the ASPE violates the right to leisure time, free time and paid vacation granted in Article 70/B para. (4) of the Constitution. In line with Section 59 para. (4) item *c)* of the ASPE, by way of derogation from Section 123 para. (2) of the Labour Code, a collective bargaining agreement or the parties' agreement may provide for securing at least eight hours of daily time off. Under Section 123 para. (2) of the ALC, by way of derogation from the general rule requiring to provide for the employees at least eleven hours of resting time after the conclusion of daily work and before the beginning of the next day's work, a collective bargaining agreement may provide for securing at least eight hours of resting time – with the exception of the employees specified under Section 127 para. (6) item *c)* of the ALC – for workers working in a job of standby character or for employees working in non-stop or multiple shift working schedule and employees working in seasonal jobs. The ASPE's challenged provision extends this possibility to the agreement by the parties, in addition to the collective bargaining agreement mentioned in the relevant provision of the ALC.

Section 59 para. (4) item *c)* of the ASPE is not a peremptory regulation: it is a dispositive rule only allowing to determine eight hours of resting time in a collective bargaining agreement or the agreement

by the parties by way of derogation from the general rule (eleven hours of resting time) laid down in the ALC. Both the collective agreement and the agreement by the parties are mutual declarations of will based on consent. At the same time, the dispositive rule intends to safeguard the public employees' resting time, as no resting time of less than eight hours may be agreed upon even by way of derogation from the Act. Should a collective bargaining agreement or the agreement by the parties establish conditions less advantageous than the statutory regulations, then – according to Section 13 para. (4) of the ALC – the collective bargaining agreement or the agreement by the parties would be considered null and void. As, in the opinion of the Constitutional Court, Section 59 para. (4) of the ASPE does not violate Article 70/B para. (4) of the Constitution, the Constitutional Court has rejected the petition in this respect.

f) Yet another petitioner has claimed that Section 59 para. (4) items *b)* and *f)* are contrary to Article 70/B para. (3) of the Constitution. Under Article 70/B para. (3) of the Constitution, all workers have the right to an income that corresponds to the amount and quality of work they carry out.

As laid down in Section 59 para. (4) items *b)* and *f)* of the ASPE, the Minister in respect of the healthcare sector and the collective bargaining agreement at a specific workplace may determine the average period of time per one attendance. These provisions do not affect directly the constitutional right determined in Article 70/B para. (3) of the Constitution, and the potential violation of this right may only be established on examining the provisions of the Minister's decree or the collective bargaining agreement.

There is no constitutionally relevant relation between Section 59 para. (4) items *b)* and *f)* of the ASPE and Article 70/B para. (3) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking annulment of the challenged provisions.

g) On the basis of Section 76 (3) of the ASPE, for the purpose of performing attendance and standby duties specified in a special legislation pertaining to healthcare activity, the Minister may provide for regulations by way of derogation from the provisions under Section 146 to 149 of the ALC. In the petitioner's opinion, this provision violates Article 70/A para. (1) of the Constitution. Section 93 para.

(1) of the APHA determines the task of the attendance system, while paragraph (2) provides for the purpose of the attendance services.

As underlined above by the Constitutional Court, discrimination between persons may only be established when individuals or a group of people face discrimination by the legislation in comparison with persons or groups in the same position. The authorisation for legislation under Section 76 para. (3) of the ASPE does not qualify as discrimination, it does not affect directly the prohibition of discrimination specified in Article 70/A para. (1) of the Constitution, and the potential violation of this prohibition might only be established on examining the provisions of the specific law adopted on the basis of the statutory authorisation.

There is no constitutionally relevant relation between Section 76 para. (3) of the ASPE and Article 70/A para. (1) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking annulment of the challenged provisions.

6. One of the petitioners has requested the Constitutional Court to establish the unconstitutionality of, and annul Section 117/A para. (2) item *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, as well as Section 59 para. (2) item *b)* and Section 59 para. (4) items *b)* and *f)* of the ASPE due to the violation of Article 54 para. (1) of the Constitution, furthermore, Section 117/A para. (2) item *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, as well as Section 59 para. (4) items *b)* and *f)* of the ASPE due to the violation of Article 70/E para. (1) of the Constitution.

a) Under Article 54 para. (1) of the Constitution, in the Republic of Hungary every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived. “The Constitutional Court regards the right to human dignity as another phrase for the so-called »general personality right«. In modern constitutions and in the practice of constitutional courts, the general right to personhood encompasses various aspects, such as the right to free personal development, the right to free self-determination, general freedom of action or the right to privacy. The general personality right is a »mother right«, i.e. a subsidiary fundamental right which may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual’s autonomy when none of

the concrete named fundamental rights are applicable to a particular set of facts.” [Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44]

In the opinion of the Constitutional Court, in the case of the regulations under Section 117/A para. (2) item *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, as well as Section 59 para. (2) item *b)* and Section 59 para. (4) items *b)* and *f)* of the ASPE, there is a fundamental right to be named and to be applied, and there is no constitutionally relevant relation between the challenged provisions and Article 54 para. (1) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect the petition seeking establishment of the unconstitutionality and annulment of Section 117/A para. (2) item *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, as well as Section 59 para. (2) item *b)* and Section 59 para. (4) items *b)* and *f)* of the ASPE.

b) Pursuant to Article 70/E para. (1) of the Constitution, "The citizens of the Republic of Hungary are entitled to social security; they are entitled to receive benefits necessary to sustain themselves in old age, sickness, disability, widowhood, orphanhood and if they become unemployed as a result of causes beyond their control”. This provision is about social security and the right to receive financial support necessary for sustenance, and the Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions. The obligations of the State in respect of the social security of its citizens are defined in a general manner by this provision, but it does not mean a subjective right to receive a certain level of income or to maintain a certain level of the quality of life.” (Decision 2093/B/1991 AB, ABH 1992, 546, 547)

The provisions challenged by the petitioner are not about social benefits; they deal with healthcare services, regulating in particular attendance and standby duty. There is no constitutionally relevant relation between Section 117/A para. (2) item *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, as well as Section 59 para. (4) items *b)* and *f)* of the ASPE and Article 70/E para. (1) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking establishment of the unconstitutionality and annulment of Section 117/A para. (2) item *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, as well as Section 59 para. (4) items *b)* and *f)* of the ASPE.

7. In one of the petitioners' opinion, Section 129 para. (7) of the ALC, with regard to employment relations, fails to perform its duty of protecting fundamental rights, and therefore it is deemed to violate Article 70/B paras (2) to (4) of the Constitution, and the petitioner also claims Section 128 para. (2) and Section 129 para. (7) of the ALC to be discriminative and contrary to Article 70/A para. (1) of the Constitution. Yet another petitioner has considered Section 129 para. (7) of the ALC to be discriminative and unconstitutional.

According to the petitioners, Section 129 para. (7) of the ALC does not comply with its duty of protecting the fundamental rights related to employment. With regard to employees engaged in healthcare activities, the challenged regulation of the ALC allows adopting specific statutory legislation for the sector. Its application does not affect directly the restriction of the rights granted in Article 70/B paras (2) to (4) of the Constitution, and the potential violation of these rights may only be established on examining the specific legislation mentioned under Section 129 para. (7) of the ALC. As provided in Section 128 para. (2) of the ALC, the detailed provisions on the requirements specified in Section 128 para. (1) of the ALC may be prescribed by legal regulation pertaining to public education and healthcare for the particular sector. This provision and Section 129 para. (7) of the ALC do not affect directly the prohibition of discrimination specified in Article 70/A para. (1) of the Constitution, and the potential violation of this prohibition might only be established on examining the provisions of the specific law adopted on the basis of Section 128 para. (2) and Section 129 para. (7) of the ALC.

There is no constitutionally relevant relation between Section 129 para. (7) of the ALC and Article 70/B paras (2)-(4) of the Constitution, or between Section 128 para. (2), Section 129 para. (7) and Article 70/A para. (1) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking annulment of the challenged provisions.

8. In one of the petitioners' opinion, Section 117/A para. (2) items *b)*, *e)* and *f)* of the ALC, as well as Section 59 para. (4) items *b)* and *f)* of the ASPE impair Article 8 para. (2) of the Constitution, as the challenged provisions – without specifying the limits of the regulation – authorise the Minister and allow the collective bargaining agreement to restrict the employees' rights granted under Article 70/B paras (2) and (4), Article 70/D para. (1) and Article 70/E para. (1) of the Constitution, by way of acknowledging as working hours only a part of the time spent at the workplace.

Under Section 15 para. (1) of the AL, in the empowerment to issue an implementing statute, the empowered entity as well as the subject and the framework of the empowerment shall be specified. The relevant provisions of the ALC as well as of the ASPE provide authorisation to issue an implementing statute, specifying the entitled person, the subject and the framework of the empowerment, with due account to the statutory regulations. In accordance with Article 8 para. (2) of the Constitution referred to by the petitioner, rules pertaining to fundamental rights and duties are determined by Acts of Parliament.

There is no constitutionally relevant relation between Section 117/A para. (2) items *b)*, *e)* and *f)* of the ALC, Section 59 para. (4) items *b)* and *f)* of the ASPE, and Article 8 para. (2) the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition, and therefore the Constitutional Court has rejected in this respect, too, the petition seeking annulment of the challenged provisions.

9. *a)* One of the petitioners has asked for the annulment of Section 13 para. (1) item *b)* and para. (3) of D3, as according to the challenged provisions, the employer may unlimitedly increase the work burden of the physician in attendance by contracting and assigning to a single physician the attendance tasks of the departments with similar profile. In the petitioner's opinion, as the statutory category of "similar profile" is absolutely vague and depends on interpretation by the employer, the vagueness of the normative text impairs the principle of legal certainty originating from the rule of law enshrined in Article 2 para. (1) of the Constitution.

"Under Section 18 para. (2) of the AL, statutes are to be formulated clearly, in accordance with the rules of the Hungarian language and in a generally comprehensible form. The mere fact that a statute may be interpreted in more than one ways does not necessarily imply the violation of the above provision of the AL. Even by the most careful preparation and construction of the statutes, there might be practical difficulties in interpreting the statutes – to be eliminated in general by way of legislative or judicial interpretation of the law. The same applies to the case when a certain provision is undoubtedly in collision with the above rule of the AL, but the correct application of the statute may be secured through the interpretation of the law. Accordingly, if a certain provision of an Act of Parliament does not comply with the requirement under Section 18 para. (2) of the AL, this is – in itself – not a cause of unconstitutionality. However, if the content of the challenged statute is so obscure, or its provisions

are so controversial that they cannot be clarified by way of interpreting the law, the deficiency of the legislation results in unconstitutionality due to the violation of legal certainty as an integral part of the rule of law declared in Article 2 para. (1) of the Constitution." (Decision 1263/B/1993 AB, ABH 1994, 672, 673-674)

The Constitutional Court has not established any unconstitutionality of such nature in the course of examining the provision on "departments with (...) similar profile" in Section 13 para. (3) of D3. Therefore, the Constitutional Court has rejected the petition in this part.

b) According to the petitioner, the challenged provisions of D3 violate Article 70/B paras (2) to (4) of the Constitution, too. As provided in Section 13 para. (1) item *b)* and para. (3), if there are more than one departments with the same or similar profile operating at the medical service provider, a contracted department attendance can be organised (matrix system). As the regulation pertains to the manner of providing attendance service, its application does not affect the duration and the remuneration of extraordinary work, and accordingly there is no constitutionally relevant relation between these provisions and Article 70/B paras (2) to (4) of the Constitution. According to the established practice of the Constitutional Court, the lack of any constitutional relation on the merits shall result in rejecting the petition [Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 201; Decision 698/B/1990 AB, ABH 1991, 716-717; Decision 108/B/1992 AB, ABH 1994, 523-524; Decision 141/B/1993 AB, ABH 1994, 584, 586; Decision 743/B/1993 AB, ABH 1996, 417-418; Decision 720/B/1997 AB, ABH 1998, 1005, 1007; Decision 575/B/1992 AB, ABH 1999, 456-460 etc.], and therefore the Constitutional Court has rejected in these respects, too, the petition aimed at the annulment of the challenged regulations.

10. Another petitioner has asked the Constitutional Court also to establish an unconstitutional omission of legislative duty, "as the Parliament and the Government have failed to perform their legislative duties under statutory authorisation by not adopting statutes on the working hours and the leisure time in the healthcare sector in compliance with the legislation of the European Union and the Hungarian Constitution", resulting in unconstitutionality through the violation of the requirement of legal certainty originating in Article 2 para. (1) of the Constitution. Under Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), an unconstitutional omission of legislative duty may be established if the legislature has failed to fulfil its legislative duty mandated by a legal norm, and this has given rise to an unconstitutional situation. Therefore, the two conditions, namely an omission by the legislation and the resulting unconstitutional situation are to exist jointly. [Decision

22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 1395/E/1996 AB, ABH, 1998, 667, 669; Decision 35/1999 (XI. 26.) AB, ABH 1999, 310, 317; Decision 6/2001 (III. 14.) AB, ABH 2001, 93, 103; Decision 49/2001 (XI. 22.) AB, ABH 2001, 351, 355]

The other case of an unconstitutional omission is regulation by the legislation with incorrect contents, causing an unconstitutional situation [Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138; Decision 4/1999 (III. 31.) AB, ABH 1999, 52, 63]. The petitioner has substantiated the claim concerning an unconstitutional omission of legislative duty by the failure of the challenged provisions of the ALC, the ASPE and D2 to comply with the Directive.

Having regard to legislation, the requirement of legal certainty – resulting from the rule of law granted in Article 2 para. (1) of the Constitution – demands, among others, the law as a whole to be clear and unambiguous, with foreseeable and calculable operation. [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65] In the practice of the Constitutional Court, "the contradictions – or potential contradictions, depending on interpretation – in the regulation of certain situations of life (...) are not considered in themselves to cause unconstitutionality. Such a provision shall only be deemed unconstitutional if, at the same time, it violates one of the provisions of the Constitution, i.e. if the contradicting regulation causes substantial unconstitutionality, for example, if one of the provisions results in prohibited discrimination, any other unconstitutional situation or in the restriction of a constitutional fundamental right". [Decision 35/1991 (VI. 20.) AB, ABH 1991, 175, 176]

In this respect, the petitioner does not refer to any constitutional provision – besides Article 2 para. (1) of the Constitution – alleged to be violated by the regulations in Hungary. "In the opinion of the Constitutional Court, in the lack of any unconstitutionality of substantive law, no unconstitutional omission of legislative duty can be established merely on the basis of Article 2 para. (1) of the Constitution." (Decision 1053/B/2005 AB, ABK June 2006, 498, 500)

As under Article 2 para. (1) of the Constitution, the Constitutional Court has not established unconstitutionality based on the omission of a concrete legislative duty, it has rejected the relevant petition.

11. One of the petitioners has referred to the violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention of Rome) – whereby everyone has the right to respect for his private and family life, his home and his correspondence – due to the

restriction by the employers in D1 the free time of healthcare workers under a cause not specified in an Act of Parliament, and therefore the petitioner has requested the review of D1 for its collision with an international treaty. (The Constitutional Court has noted in the course of its procedure that upon the submission of the petition the provisions of D1 – challenged by the petitioner – have been repealed by D2. The provisions of D1 challenged by the petitioner can be found in D2. As D2 has not resulted in a change with regard to the questions raised about the constitutionality of the challenged provisions, the Constitutional Court has performed the examination in respect of D2.

In accordance with Section 20 of the ACC, the Constitutional Court shall act on the basis of a petition submitted by an entitled person,. Under Section 21 para. (3) of the ACC, the procedure laid down in Section 1 item *c)* of the ACC may only be initiated by specific organs or persons. The procedure for examining the violation of an international treaty by a statute or another legal tool of state administration resulting in the impairment of Article 7 para. (1) of the Constitution can only be initiated by the persons specified under Section 21 para. (3) of the ACC. According to the relevant provision of ACC, the petitioner is not entitled to initiate a procedure aimed at establishing the violation of an international treaty in respect of the Treaty of Rome.

The other petitioner has requested establishment of the unconstitutionality and annulment of Section 117/A para. (2) items *b)* and *f)*, Section 119 para. (6) and Section 127 para. (5) of the ALC, Section 59 para. (2) item *b)*, Section 59 para. (4) items *b)* and *f)* of the ASPE, furthermore, Section 12 para. (5) and (6) as well as Section 12/A para. (1) and (2) of D2 due to the violation of Article 7 para. (1) of the Constitution. According to the petitioner, the founding treaties of the European Communities are regarded as treaties under international law in accordance with Article 2/A para. (1) of the Constitution, and the Treaty of Rome is the legal basis of the Directive.

The Constitutional Court has established in Decision 1053/E/2005 that the founding and amending treaties of the European Communities are not considered treaties under international law in respect of establishing the competence of the Constitutional Court, and these treaties – being primary sources of the law – and the Directive – being a secondary source of the law – are as community law part of the internal law, since Hungary has been a Member State of the European Union since 1 May 2004. With regard to the competence of the Constitutional Court, community law is not considered international law as specified in Article 7 para. (1) of the Constitution. In the petition aimed at the examination of

collision with a treaty under international law, the petitioner has not referred to any treaty under international law other than the Directive.

In view of the above, the Constitutional Court has rejected the petitions.

12. During the procedure of the Constitutional Court, Government Decree 103/1995 (VIII. 25.) Korm. on Certain Questions of Financing Healthcare Under Social Security (hereinafter: D4) was repealed as of 1 April 1999 by Government Decree 43/1999 (III. 3.) Korm. on the Detailed Rules of Financing Healthcare Services from the Healthcare Insurance Fund. Under Section 1 of the ACC, as the general rule, the Constitutional Court shall only examine the constitutionality of statutes and other legal tools of state administration in force. The only exceptions are the procedures performed on the basis of a judicial initiative under Section 38 of the ACC or a constitutional complaint filed in accordance with Section 48 of the ACC. As the petition does not fall into either of these categories, the Constitutional Court has terminated the procedure with regard to D4 pursuant to Section 31 item *a)* of the Rules of Procedure.

The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon Section 41 of the ACC.

Budapest, 12 December 2006

Dr. Mihály Bihari
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court, Rapporteur

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Péter Paczolay
Judge of the Constitutional Court

Concurrent reasoning by *Dr. Péter Kovács,* Judge of the Constitutional Court

I agree with the holdings of the Decision. However, as the assessment of the relation to the contents of Directive 93/104/EK has been an important element of the matter, and as it was stressed in the argumentation of the petitioners as well that the legal regulations in force do not seem to be harmonised with the Directive, in particular because of contradicting the judgements passed by the Court of Justice of the European Communities (hereinafter: the European Court of Justice), I add the following to those parts of the reasoning that support points 1 and 8 of the holdings.

I

The contexts of the case reflect the complexity of the interrelation between the Hungarian legal system and the European legal system (community law) as experienced since the accession of the Republic of Hungary to the European Union. Accordingly, it is important to define accurately the position of the European law in the Hungarian legal system not only in respect of the concrete problem, the qualification and the accounting of medical attendance services, but also because the relevant case actually represents the aspects of the so-called direct applicability of certain norms of the European law. Both the judiciary and the legislation have to get prepared for drawing the consequences from the above. Another special feature of the case is that the judicial practice of the European Court of Justice concretely referred to by the petitioners has been developed after the submission of the petitions, and now it only allows a single interpretation. It is the one correctly expected by several petitioners.

II

I hold it important to note that as established by the Constitutional Court in Decision 1053/E/2005 AB, referred to in the present Decision as well, “the so-called accession clause in Section 2/A of the

Constitution determines the conditions and the framework of the Republic of Hungary participating in the European Union as a Member State, as well as the structural position of community law in the Hungarian hierarchy of the sources of law". (ABK June 2006, 498, 500) In my opinion, the contexts of the present case clearly show the reasonable practical consequences primarily for the Hungarian courts as they form an integral part of the judicial system applying the European law. All the above are to be interpreted with due account to the fact that the final forum of settling the debates about the implementation of obligations under the European integration is the institutional system of the European Union, and in respect of legal debates the European Court of Justice rather than the Constitutional Court is to be addressed.

III

As for the merits of the case, let me note that the European Court of Justice has already interpreted Directive 93/104 – referred to by several petitioners – as follows:

„1. Directive 93/104/EC concerning certain aspects of the organisation of working time should be interpreted as precluding national legislation under which on-call duty performed by a doctor under a system where he is expected to be physically present at the place of work, but in the course of which he does no actual work, is not treated as wholly constituting working time within the meaning of the said directive.

2. Directive 93/104 should, in addition, be interpreted as follows:

— in circumstances such as those in the main proceedings, that directive precludes legislation of a Member State which, in the case of on-call duty where physical presence in the hospital is required, has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, an offset only in respect of periods of on-call duty during which the worker has actually been engaged in professional activities;

— in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest period of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked.

— furthermore, in no circumstances may such a reduction in the daily rest period lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded."

IV

In addition, it should be noted that since the submission of the petitions, the European Court of Justice has not only passed several decisions reinforcing the statements made in the Jaeger Case, correctly referred to by several petitioners, but it has also declared the direct applicability of the directive.

As declared in Article 63 of the preliminary ruling passed on 1 December 2005 in Case C-14/04 of Abdelkader Dellas c. Premier Ministre concerning the question submitted by the French Conseil d'État, "the Directive must be interpreted as precluding legislation of a Member State which, with respect to on-call duty performed by workers in certain social and medico-social establishments during which they are required to be physically present at their workplace, lays down, for the purpose of calculating the actual working time, a system of equivalence such as that at issue in the main proceedings" [using a presumption of lump-sum amount in respect of the actual work performed, by way of applying a rate of 3:1 in the first 9 hours of the duty and 2:1 in the remaining period – KP]. As pointed out by the European Court of Justice in Article 40 of the judgement passed on 7 September 2006 in Case C-484/04 of the Commission c. United Kingdom and in paragraph 1 of the theses at the end of the judgement concerning the interpretation of Articles 3 and 5 of the directive, the enforcement of the directive requires to secure to the employees "the right to enjoy actual resting". In the preliminary ruling passed on 16 March 2006 in Case C-131/04 Robinson-Steele/RD Retail Services Ltd, with reference to Article 7 (1) of the directive, the European Court of Justice stressed that it was against the directive to apply a part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done, and there can be no derogation from that entitlement by contractual arrangement" (Article 52 and para. (1) of the theses at the end of the judgement).

However, the European Court of Justice has made the most important declaration in Article 120 and in para. (3) of the theses at the end of the judgement passed on 5 October 2004 in the Pfeiffer Case (C-397/01) in respect of Article 6 item 2 of the directive [whereby "Member States shall take the measures necessary to ensure that (...) the average working time for each seven-day period, including overtime, does not exceed 48 hours"]: "the provision *fulfils all the conditions necessary for it to have direct effect*".

V

The declaration of the above thesis reflects a slightly different aspect with regard to the relation between the European law and the Constitutional Court's competence. This aspect not only allows the Constitutional Court to avoid establishing a breach of the European law, qualifying it as a violation of the Constitution (or – as some of the petitioners have put it – as an unconstitutional omission of legislative duty), but we have come close to settling the legal debate simply by establishing the position in the legal system of the concrete norm under the European law.

All in all, this means that in such cases the Constitutional Court interprets the "structural position in the hierarchy of the sources of law" as mentioned in Decision 1053/E/2005 AB on the interpretation of Article 2/A of the Constitution (ABK June 2006, 498), concretising it in respect of the given norm under European law. It is not about the announcement of a doctrinal definition; the Constitutional Court only draws consequences in the case under review. A directive – when it falls into the exceptional category of direct applicability – enjoys finally the same position as a decree directly applicable *ex lege*, i.e. it is a source of law of statutory level under the level of the Constitution, but as *lex specialis* it has primacy over domestic law in case of conflicts. As a causal consequence of this position, there can be no normative conflict with the domestic decrees (government and departmental decrees) as the European Directive (if it possesses the features of direct applicability) enjoys priority over government and departmental decrees based on the hierarchy of norms.

VI

It is important to note that in the case of hospitals (Article 17 2.1. c/i) the applicability of the derogation option in Article 17 of the directive does not apply to Article 6, and according to the itemised listing under Article 17 points 1 and 2, it may not apply *a contrario* to the definitions given in Article 2, including that of working time and rest period. They are as follows: 1. *working time* means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice; 2. *rest period* means any period which is not working time".

VII

In my opinion, the problematic elements of the challenged regulations are not at all applicable in accordance with Article 2/A of the Constitution, and thus the problem to be solved by the Constitutional Court is simplified. Consequently, the Constitutional Court could even by-pass the

review on the merits of the unconstitutionality of the challenged statutory regulations and decrees, as according to the rules of direct applicability consistently followed, those provisions *may not exercise any legal effect* on the directly applicable norms of the European law, with even their mere existence being questionable. The constitutional review is only to be implemented in respect of the parts not affected by the directly applicable norms of the European law. This way, I hold that the constitutional review of D2 could have been spared, as it is in fact not applicable – without the violation of the obligations under European law – due to the clearly stated direct applicability of the directive.

VIII

On the other hand, the mere fact that the Constitutional Court has rejected several elements of the petitions due to the lack of a constitutional relation on the merits – which I do agree with – does not guarantee that the statutory provisions in question would be free of any problems. Irrespectively of the fact that in the period of assessment of the petitions the Commission initiated a default procedure against Hungary – and against all Member States with two exceptions – the ordinary courts in Hungary may themselves enforce the relevant articles of Directive 93/104 – on the basis of direct applicability – against any statutory regulation challenged in the petitions as well. This is what the Supreme Court did when in the review procedure (BH2006.216: Legf. Bír. Pf.X.24. 705/2005.) it upheld the judgement of second instance passed by the Court of Jász-Nagykun-Szolnok County. Having noted that the county court had made a reference to the concordant judgements passed in the subject of Directive 93/104, with particular regard to the Jaeger and the Pfeiffer cases, the Supreme Court rejected the allegation in the defendant's motion as to which the county court had made a procedural mistake by not requesting an opinion from the European Court of Justice for the interpretation of the European law. The Supreme Court based its position on Article 2/A of the Constitution, agreeing with the plaintiff's opinion about not being necessary to request an opinion from the European Court of Justice, as "the law to be applied is clear, and the directive contains unconditional and accurate provisions". The Supreme Court of Spain adopted a similar judgement on 27 January 2005 also in a case related to medical attendance. (Case Tribunal Supremo, Sala de lo Social) a Sindicato de la Central Sindical Independiente y de Funcionarios (CSI-CSIF) c. el Servicio Andaluz de Salud.)

IX

Several Member States of the European Union have been faced with the challenges of constitutional assessment with regard to the directives. The French Constitutional Council elaborated a possible approach – receiving several comments in the European legal professional literature – on the basis of Article 88-1 of the French Constitution – which is very similar to Article 2/A of the Hungarian Constitution – significantly changing its former moderate position. This way, in addition to the Member States' obligation under European law to incorporate the directives into their national legal systems, the French Conseil Constitutionnel declared this to be a clear constitutional requirement (Décision nº 2004-496 DC du 10 juin 2004), establishing in principle – in the very respect of a directive – "the visible violation of community law"(Décision n°2006-540 DC du 27 juillet 2006). The latter decision only supplemented the principal thesis laid down in the former one about the Conseil Constitutionnel only intending to exercise constitutional control over the national laws serving the purpose of implementing the directives if, in the case concerned, the constitutional rights are not directly affected. More or less the same approach is adopted by the Italian Constitutional Court as well. As established by the Corte Constituzionale in a ruling related to the community directive in Case No 536/1995, "a constitutional review may be performed in the case of the violation of fundamental principles and inalienable rights, and on the other hand the Constitutional Court has no competence to interpret a community norm – save in the case of absolute clarity ("*chiara evidenza*") – and the Constitutional Court shall not resolve any contradiction in interpretation about the norm concerned, as an interpretation binding all Member States is to be requested from the European Court of Justice." (Ordinanza 15-29 Dicembre 1995). The Constitutional Court of Austria resolved the collision between a national decree and a directive with regard to bottled mineral waters by declaring that "on the basis of the order originating in Article 5 of the EC Treaty [i.e. the present Article 10 – KP] on interpreting the domestic law in conformity with the directives (...) the national courts, including the Constitutional Court, must interpret the domestic statutes issued for the purpose of the implementation of a directive in the light of and in accordance with the objectives of the directive." (VfGh Beschluss V 136/94-10, 12 Dezember 1995) Having regard to the European directives, the Constitutional Court of Germany explained in Article 81 of Decision 2 BvR 1570/03 passed on 1 March 2004 about the so-called European arrest warrant that, on the basis of the rule of *argumentum a contrario*, the Constitutional Court may finally examine the conditions of direct applicability and when the conditions are met it may establish the consequences. According to the Bundesverfassungsgericht, "As the measures in question are the elements of the European Union's third pillar, the responsibility is especially high here – as compared to the introduction of the directives of the European Communities into the domestic law – in respect of the constitutionality of introducing the framework decision into the domestic law. The

framework decision on the European arrest warrant (...) is among the secondary legislation of the Union and (...) it is very similar to a supranational community law directive. However, a framework decision is not directly applicable. When the Member States decided to exclude direct applicability in the Treaty on the European Union, they wanted to prevent the interpretation of the case law of the European Court of Justice about the direct applicability of directives as applying to framework decisions as well."

X

As an interesting lesson to learn from the present case, there would be no significant difference in respect of the legal effects in the concrete case between the annulment by the Constitutional Court of D2 challenged in the petition – in accordance with the Constitutional Court's stable judicial practice – and the declaration – in line with the obligations under the European law, which is also deductible, in my opinion, from Article 2/A of the Constitution, and which is in line with the ACC as well – of D2 being subordinated to Directive 93/104 (or to Directive 2003/88 that has replaced it since the submission of the petitions), i.e. that the domestic law is not applicable, which finally means an automatic resolution of the conflict of norms.

Budapest, 12 December 2006

Dr. Péter Kovács
Judge of the Constitutional Court

I agree with the concurrent reasoning.

Dr. László Kiss
Judge of the Constitutional Court, Rapporteur

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