JUDGEMENT
of 23 October 2001
Ref. No. K. 22/01[*]

The Constitutional Tribunal, in the bench composed of:

Janusz Niemcewicz – Presiding Judge
Krzysztof Kolasiński
Biruta Lewaszkiewicz-Petrykowska
Andrzej Mączyński
Jadwiga Skórzewska-Łosiak – Judge Rapporteur,

Joanna Szymczak – Recording Clerk,

having considered at a hearing on 23 October 2001 an application submitted by the National Physicians' Trade Union in the presence of duly authorised representatives of the parties to the case at hand: the applicant of the application, the Minister of Labour and Social Policy and the Public Prosecutor-General to determine that:

Article 241^{25} § 5 of the Labour Code does not conform to Article 59 paragraph 2 of the Constitution of the Republic of Poland,
and in case of dismissing the application, to determine that:
1) Article 241^{25a} § 1 of the Labour Code does not conform to Article 32 paragraph 1 of the Constitution of the Republic of Poland,
2) Article 241^{25a} § 1 subparagraph 2 of the Labour Code in connection with Article 241^{25} § 5 of the Labour Code does not conform to Article 32 paragraph 2 of the Constitution of the Republic of Poland,
3) The Article 241^{25a} § 3 first sentence of the Labour Code does not conform to Article 59 paragraph 2 i Article 32 of the Constitution of the Republic of Poland,

adjudicates as follows:

1. Article 241^{25} § 5 of the Act of Parliament of 26 June 1974 – the Labour Code (uniform text of 1998 Journal of Laws No 21, item 94; amended.: No 106, item 668, No 113, item 717; of 1999 No 99, item 1152; of 2000 No 19, item 239, No 43, item 489, No 107, item 1127, No 120, item1268; of 2001 No 28, item 301) **conforms to Article 59 paragraph 2 of the Constitution of the Republic of Poland.**

2. Article 241^{25a} § 1 subparagraph 1 of the Act of Parliament referred to in subparagraph 1 conforms to Article 32 paragraph 1 of the Constitution.

3. Article 241^{25a} § 1 subparagraph 2 in connection with Article 241^{25} § 5 of the Act of Parliament referred to in subparagraph 1 conforms to Article 32 paragraph 2 of the Constitution.

4. The Article 241^{25a} § 3 first sentence of the Act of Parliament referred to in subparagraph 1 conforms to Article 59 paragraph 2 and Article 32 of the Constitution.

Statement of Reasons:

I

[*] The sentencing part of the judgement was published in the Journal of Laws [Dziennik Ustaw] – Dz. U.. No 125, item 1378.

1. In an application of 2 April 2001 the Board of the National Physicians' Trade Union requested the Constitutional Tribunal to rule that the Article 241^{25} § 5 of the Labour Code does not conform to Article 59 paragraph 2 of the Constitution of the Republic of Poland, and in case of rejecting the request, to rule that:

1) Article 241^{25a} § 1 of the Labour Code does not conform to Article 32 paragraph 1 of the Constitution,

2) Article 241^{25a} § 1 subparagraph 2 in connection with Article 241^{25} § 5 of the Labour Code does not conform to Article 32 paragraph 2 of the Constitution,

3) The Article 241^{25a} § 3 first sentence of the Labour Code does not conform to Article 59 paragraph 2 and Article 32 of the Constitution.

In the opinion of the applicant, Article 241^{25} § 5 *in fine* of the Labour Code deprives a workplace trade union organisation that is not a representative organisation of a right to conclude a collective labour agreement in case when a position of such an unrepresentative union is not accepted by a representative union. Such a solution does not conform to Article 59 paragraph 2 of the Constitution. The cited Constitutional provision does not envisage a possibility to limit by law a right of trade unions to conclude collective labour agreements.

The applicant points to the fact that Article 241^{25a} § 1 defines the criteria of representativeness for workplace trade union organisations. For most unions it is a precondition to group at least 10% of workers employed by a given employer. But for the trade unions, characterised by the upper-level representativeness, listed in the Article 241^{17} subparagraph 1 of the Labour Code, it is a precondition to group at least 7% of the employees employed by the given employer. In the opinion of the applicant, such a solution breaches the constitutional principle of equality in two ways. First, by defining a different „threshold" of representativeness for different workplace organisations; second, by treating in a different manner the trade unions that are representative at upper level. From the point of view of the questioned regulations, the only significant feature is the fact that trade unions function at a specific workplace and group employees of a given workplace directly interested in the issue of a collective labour agreement. The fact that a given trade union has the feature of upper-level representativeness does not strengthen its mandate to represent the employees of a given workplace. The seemingly objective condition of upper-level representativeness under Article 241 paragraph 1 subparagraph 1 of the Labour Code, in fact, gives the two trade unions, the All-Polish Trade Union – OPZZ and Independent Self-governing Trade Union – NSZZ Solidarność, a privileged position. In addition, since the legislator decided that the fact of a trade union's being representative at the upper level is a sufficient justification to apply for it a less restrictive condition for acquiring the feature of upper-level representativeness, then the same privileges should be granted consistently to all the trade unions characterised by upper-level representativeness.

According to the applicant, the percentage of physicians in relation to all staff employed in Self-governing Public Health Care Institutions is usually around 10%, and frequently even less. Article 241^{25a} § 1 subparagraph 2 in connection with Article 241^{25} § 5 of the Labour Code practically deprives physicians, as a professional group, of a right to conclude a workplace collective labour agreement through the agency of their trade union. Such a solution represents evident discrimination.

The applicant also questions the Article 241^{25a} § 3 first sentence of the Labour Code. The regulation envisages that while establishing the number of employees grouped in the workplace union organisation that seeks to be recognised as a representative organisation, only employees that were members of the organisation for at least six months before the commencement of negotiations on concluding a collective labour agreement, are taken into account. Such limitations are inadmissible under Article 59 paragraph 2 of the Constitution.

The questioned regulation does not conform to the principle of equality because it differentiates representative trade unions in an inadmissible way on the basis of the criterion of membership seniority members of these unions. The introduced solution breaches the principle of equality also because it differentiates members of trade unions in an inadmissible way. For six months, persons that joined a trade union cannot exercise their right to form a representative trade union.

2. In a letter of 10 July 2000, the Public Prosecutor-General expressed the opinion that:

1. Article 241^{25} § 5 of the Labour Code, in the part after the second comma, is not in non-conformity to Article 59 paragraph 2 of the Constitution,

2. Article 241^{25a} § 1, first sentence, of the mentioned Act of Parliament conforms to Article 32 of the Constitution,

3. Article 241^{25a} § 3 of the mentioned Act of Parliament conforms to Article 32 and Article 59 paragraph 2 of the Constitution.

The Public Prosecutor-General pointed to the fact that the submitted material does not contain a resolution of the National Board of the Physicians' Trade Union, defining the scope of the complaint. It does not result from the information contained in the submitted letter that the authorised statutory organ defined in a resolution the purport and the scope of the complaint.

In the opinion of the Public Prosecutor-General, the applicant failed to take into consideration the context in which Article 241^{25} of the Labour Code appears. In the light of the regulations of the Labour Code, the basic principle is to conclude a collective labour agreement by an employer with a workplace trade union organisation or with common representation or with trade unions operating together. The law envisages subsequent possibilities to conclude a collective labour agreement, despite a failure to join negotiations by some trade unions operating at a workplace, and introduces the requirement for at least one representative trade union organisation to participate in the negotiations. Only when a union organisation fails to use any of these possibilities, a solution envisaged in the questioned regulation can be applied, consisting in the conclusion of a collective labour agreement by all trade union organisations involved in the negotiations on the agreement, or at least all representative trade union organisations, in the meaning of Article 241^{25a} that participated in the negotiations.

According to the Public Prosecutor-General, the raised charge of the discriminatory character of the questioned regulations cannot be accepted. The questioned solutions do not breach the constitutional right to the participation in negotiations on workplace collective labour agreements. The representative character of a trade union organisation chiefly results from the dominating number of members it groups and not from a program and preferences in its activities. Relevant legal solutions are designed to further the interest of persons grouped in trade unions and they limit trade union particularism. They also protect employers from being involved in negotiating unionist demands that are sometimes contradictory. The accepted criteria of the representativeness of a workplace trade union organisation are convincing on the grounds of the principle of legislator's rationality and find an indirect support in the regulations of the chapter 3 of an Act of Parliament on trade unions that also differentiates trade union organisations.

The General Prosecutor also judged the charges relating to Article 241^{25a} § 3 of the Labour Code to be irrelevant. The principle resulting from that regulation to the effect that a newly set up trade union organisation may take part in negotiations on a collective labour agreement only after six months from its establishment, is justified by the need of a trade union organisation to prepare itself organisationally and substantively to one of the most difficult tasks, which are negotiations on a collective labour agreement. The set time limit

prevents new trade union organisations from being set up rashly, exclusively with the aim to take part in negotiations on a collective labour agreement, as a rule initiated by another trade union organisation.

3. Following a call from the Constitutional Tribunal, the National Board of the National Physicians' Trade Union attached to its letter of 20 July 2001 the resolution by the Union's National Board, adopted on 30 March 2001, on submitting the request to the Constitutional Tribunal to examine the conformity of above mentioned Labour Code regulations to cited constitutional models, which later found expression in an application lodged with the Constitutional Tribunal.

4. The Minister of Labour and Social Policy expressed his opinion about the application of the National Physicians' Trade Union in a statement of 25 September 2001, where he recognised the presented charges to be unjustified.

Commenting on the claim of non-conformity of Article 241^{25} § 5 of the Labour Code to Article 59 paragraph 2 of the Constitution, the Minister of Labour and Social Policy expressed the view that freedom to conclude the collective labour agreement in constitutional terms is not absolute. The Constitution in Article 59 paragraph 2 authorises the legislator to impose restrictions on freedom to conclude collective labour agreements that are permissible under international treaties by which the Republic of Poland is bound. The category of such restrictions includes the exclusion or limitation of ability to conclude collective labour agreement resulting from the application of the concept of representativeness.

Taking a position on the charge of non-conformity of Article 241^{25a} of the Labour Code to Article 32 paragraph 1 of the Constitution, the Minister of Labour and Social Policy stated that referring to the principle of equality in the case at hand is not convincing. The concept of representativeness is in its essence a departure from the principle of equality accepted because of the need to set such legal rules that would prevent competence chaos and decision paralysis during collective negotiations and concluding collective labour agreements. The legislator may in a significant degree at his own discretion formulate the criteria of representativeness in a way that reflects his legislative policy towards the trade union movement. The regulation of Article 241^{25a} of the Labour Code questioned by the applicant is the expression of such policy based on a rational assumption that workplace organisations, which are part of the most representative, in fact, upper level organisations, referred to in Article 241^{17} § 1 subparagraph 1, have thereby a stronger position vis-à-vis an employer and may, even with a smaller number of members, effectively represent the employees.

The Minister of Labour and Social Policy also deemed to be unjustified the charge of non-conformity of Article 241^{25a} § 1 subparagraph 2 in connection with Article 241^{25} § 5 of the Labour Code to Article 32 paragraph 2 of the Constitution. There is no direct differentiation of regulations in the case under consideration relating to the situation of physicians and other employees in the scope of representation of their professional interests in agreement negotiations at workplaces. But such differentiation actually takes places. It has an indirect character and results from the number proportion between physicians and the remaining employees of health service institutions. The differentiation resulting indirectly from Article 241^{25a} § 1 of the Labour Code is justified and stems from the legislator's conviction that the workplace organisations which form part of the most representative upper organisations referred to in Article 241^{17} § 1 subparagraph 1, have for this reason a stronger position vis-à-vis the employer and may effectively represent employees even with smaller number of members.

According to the Minister of Labour and Social Policy, the charge of non-conformity of Article 241^{25a} § 3 of the Labour Code to Article 59 paragraph 2 of the Constitution is unclear.

The questioned regulation serves to facilitate negotiations, in order to place the concept of representativeness on a stable member basis and eliminate the influence of changing membership of trade union organisations on defining representativeness. The legislator's aim is to streamline the system of collective negotiations seen as a whole.

According to the Minister of Labour and Social Policy, Article 241^{25a} of the Labour Code does not breach the principle of equality in any of its aspects covered by Article 32 paragraph 1 of the Constitution. The conditions of inclusion of a member to the number of trade union-grouped employees that enables achieving representativeness relates to all trade union organisations in the same degree.

II

At a hearing on 23 October 2001, representatives of the parties to the case at hand upheld their statement presented in writing, developing arguments to support them. In absence of the representatives of the Sejm at the hearing, the position of the Sejm on the issue was not presented.

III

The Constitutional Tribunal considered the following.

1. Article 59 of the Constitution of the Republic of Poland ensures freedom to associate in trade unions, social and vocational farmer organisations and organisations of employers (paragraph 1). Trade unions enjoy the right to organise worker strikes and other forms of protest within limits defined in the Act of Parliament (paragraph 3), while trade unions and organisations of employers enjoy the right to negotiate, in particular to resolve collective disputes and to conclude collective labour agreements and other accords (paragraph 2). The regulation entails, among other things, the requirement to guarantee the trade unions and organisations of employers:

1) a right to launch an initiative to conclude a collective labour agreement,

2) a right to participate in negotiations on a collective labour agreement,

3) freedom to take a decision on being bound by a negotiated collective labour agreement and

4) as broad as possible scope of freedom in formulating collective labour agreements.

In addition, the analysed regulation imposes on a legislator the obligation to accept the legal force of collective labour agreements concluded by social partners in accordance with the principles set forth in the act of parliament. A vital importance for the interpretation of constitutional regulations relating to the right to conclude collective labour agreements has a social function of this right. This right is not only the means to further the interests of trade unions and organisations of employers, but first of all it serves to realisation of the interests of employees and employers.

In addition, Article 59 of the Constitution regulates some issues connected with imposing limitations on the rights guaranteed in this regulation. Under second sentence of paragraph 3, the law may limit a strike action or ban it in relation to certain categories of employees or in some specific fields. On the other hand, paragraph 4 envisages that the freedom to associate in trade unions and organisations of employers, and other trade union freedoms may be only subject to such legal restrictions as are admissible by international treaties by which Republic of Poland is bound. Article 59 of the Constitution, however, does not contain an *expressis verbis* authorisation to impose limitations on concluding collective labour agreements. In the opinion of the applicant, the lack of such authorisation signifies a

ban to impose limitations to the right under consideration by the Act of Parliament. The Constitutional Tribunal does not share this view. The authorisation to impose limitations on the right guaranteed in the Constitution may result not only from a clear constitutional regulation envisaging the possibility to impose limitations on the right but also from another constitutional norm that takes under protection specific constitutional goods. In some situations a conflict may arise between a constitutional norm that takes under protection specific right of an individual and a constitutional norm that orders the realisation of a specific good. In such cases the resolution of a conflict depends on the significance of a good that lies at the basis of a given right and a significance of a constitutional good that collides with a given right. There are situations where the significance of a specific constitutionally protected good justifies the limitation – to some extent – of a right of an individual. The principle also relates to the constitutional right to conclude collective labour agreements. The regulation under consideration does not then impose a ban on the legislator to impose limitations as to the contents of the concluded collective labour agreements if the limitations are indispensable for the realisation of other constitutional values. The Constitution does not exclude the regulation by way of a law of the procedure of concluding collective labour agreements.

It should be stressed that in the light of the regulations of the Constitution the building up of relations between social partners is done largely by the interested parties. But the role of the state in building up labour relations is not passive. The Republic of Poland has a constitutional obligation to protect labour. The state has in particular the obligation to supervise the conditions of labour performing (Article 24 of the Constitution). The concluded agreements cannot breach constitutional values.

2. Issues related to the conclusion of collective labour agreements were first of all regulated in the Labour Code. This law distinguishes two kinds of collective labour agreements: upper-level agreements and workplace agreements. A workplace collective labour agreement is concluded by an employer and workplace trade union organisation. Such an agreement is concluded for all employees employed by an employer, unless decided otherwise by the parties to the agreement. Thus the legislator prefers the agreements to cover all professional groups employed at a given workplace. But the law does not exclude the concluding of agreements restricted to a specific worker group or to a specific profession, if the parties to the agreement should decide so.

The legislator leaves to social partners a broad scope of freedom in shaping workplace labour agreements. The provisions of collective labour agreements cannot however be less advantageous for employees than the provisions of the Labour Code and other Acts of Parliament and secondary-law instruments. The agreements cannot regulate issues that are regulated by binding labour law regulations. In addition, provisions of a workplace agreements cannot be less advantageous for employees than the provisions of an upper-level agreement.

The evaluation whether charges presented by the applicant are justified require a brief presentation of regulations relating to the procedure of concluding workplace collective labour agreements, effective until 31 December 2000. An employer and every workplace trade union organisation had a right to launch an initiative to conclude a collective labour agreement. If workers, for whom a collective labour agreement was to be concluded, were represented by more than one trade union organisation, negotiations aimed at concluding the agreement were carried out by their joint representation. In case of a failure to select a joint representation, negotiations were conducted by all workplace trade union organisations operating together or some of the workplace trade union organisations along with a joint representation of remaining trade union organisations. Separate solutions were envisaged in case when not all trade union organisations had joined negotiations on concluding a

workplace collective labour agreement. In such situation negotiations could be conducted by those trade union organisations that jointly grouped at least 50% of employees and other persons working for the employer and that selected a joint representation or started joint negotiations. In the opinion of the Council of Ministers such a high degree of trade union membership was very rare. In effect, the lack of consent from one trade union organisation practically made it impossible to conclude the agreement (*Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw [Reasoning of a draft on changing the Act – Labour Code and some other laws],* Sejm document, 3rd term, No 1423). A collective labour agreement was concluded by all trade union organisations involved in negotiations. Such a solution signified that a refusal on the part of one trade union organisation, even with small membership, taking part in negotiations, made it impossible to conclude the agreement.

The presented regulations were amended by an Act of 9 November 2000 on Amending the Act – the Labour Code and some other laws (Journal of Laws No 107, item 1127). The law took effect on 1 January 2001. It follows from the substantiation of the draft that the main objective of the Council of Ministers, that had tabled the bill, was to streamline the process of negotiating and concluding collective labour agreements. In particular, the proposed solutions were designed to prevent the situation where the charge of one trade union organisation makes it possible to conduct negotiations on concluding a collective labour agreement, and a refusal to conclude the agreement by any of the organisations participating in the negotiations excludes the conclusion of a workplace agreement.

At present, under Labour Code regulations an employer and every workplace trade union organisation has a right to launch an initiative to conclude a collective labour agreement. The subject launching such initiative sets a date, not shorter than 30 days, for other trade union organisations to join the negotiations. If not all trade union organisations join the negotiations by a set date, union organisations that had joined the negotiations have a right to conduct them. If the employees, for whom the workplace agreement is to be concluded, are represented by more than one trade union organisation, the negotiations to conclude an agreement are conducted by their joint representation or individual trade union organisations operating jointly. A precondition for conducting negotiations is the participation in them of at least one representative workplace trade union organisation in the meaning of the regulations of Article 241^{25a} of the Labour Code. The refusal of any of the trade union organisations operating at a given workplace to take part in negotiations does not make it impossible for the remaining trade union organisations to conduct negotiations, if one of the organisations that meet the workplace representativeness criteria participates in them. The conducting of negotiations is impossible only in the situation where none of the representative organisations wants to take part in them.

According to Article 241^{25} § 5 of the Labour Code, a workplace agreement is concluded by all trade union organisations that were involved in negotiations on the agreement, or at least all representative trade union organisations, in the meaning of Article 241^{25a}, participating in negotiations. This means that in order to conclude a collective labour agreement it is sufficient for the trade union side to secure consent of all representative trade union organisations that took part in negotiations. A refusal to conclude an agreement by an organisation that does not meet workplace representativeness criteria does not make it impossible to conclude a workplace agreement. Concordant action of representative organisations that took part in negotiations may lead to concluding a collective labour agreement in defiance of a position of trade union organisations that do not meet the criteria of representativeness.

The notion of a representative workplace trade union organisation was defined in Article 241^{25a} § 1 of the Labour Code. Under the regulation, a representative workplace trade union organisation is the trade union organisation:

1) that is an organisational unit or a member-organisation of an upper-level trade union organisation that groups at least five hundred thousand employees, on condition that it groups at least 7% of employees employed by the given employer, or

2) that groups at least 10% of the employees employed by the given employer.

If none of the workplace trade union organisations meets the requirements specified in § 1, an organisation that groups the largest number of workers is a representative workplace trade union organisation. When establishing a number of employees grouped in a workplace trade union organisation, only employees that were members of this organisation for at least 6 months before starting negotiations on concluding a workplace agreement are taken into account. In case when an employee is a member of a few workplace trade union organisations, he can be taken into account only as a member of one trade union organisation indicated by him.

3. The first of the charges presented by the applicant relates to Article 241^{25} § 5 of the Labour Code. This provision stipulates: „The workplace agreement is concluded by all trade union organisations involved in negotiations on this agreement, or at least all representative trade union organisations, in the meaning of Article 241^{25a}, participating in negotiations." According to the applicant, the cited regulation does not conform to Article 59 paragraph 2 of the Constitution because it deprives a workplace trade union organisation, that is not a representative organisation, of a right to conclude a collective labour agreement, if the position of an unrepresentative organisation is not accepted by a representative union.

In order to evaluate whether the presented charge is justified, it should be stressed first of all that a right to conclude a collective labour agreement is a right performed collectively by interested trade union organisations. A series of subjects of various interests participate in the process of negotiating the contents of and concluding collective labour agreements. Trade union organisations may represent various worker groups, often with opposing interests. In effect, the legislator has to take into account potential conflicts between trade union organisations and prepare solutions in case when individual trade union organisations fail to agree a position. Acts of Parliament must contain rules for resolving conflicts between trade union organisations to make it possible to effectively conclude workplace collective labour agreements, preserving the interests of the possibly largest number of employees of a given plant and preserving the interests of an employer. These rules from their very essence may lead to a situation where – when taking a decision to conclude a collective labour agreement – a position of some trade union organisation may not be taken into account.

Article 241^{25} § 5 of the Labour Code concerns a situation where workplace trade union organisations that are taking part in negotiations on a workplace agreement, are unable to agree a joint position. This regulation makes it possible in such situation to conclude a collective labour agreement by all representative organisations that took part in the negotiations. The formulated charge in fact concerns the very principle of representativeness as a rule enabling to resolve conflicts between trade union organisations.

The labour law doctrine points to the fact that „the principle of representativeness can be applied when more than one trade union organisation or employer organisation, that did not select a joint representation nor agreed to joint activity, are interested in activity in a given case. In these conditions the rule of representativeness plays a role of a general collision rule, on the basis of which an organisation entitled to act as a party in these relations is selected" (M. Pliszkiewicz, M. Seweryński, *Problemy reprezentatywności w zbiorowych stosunkach pracy [Problems of representativeness in collective labour relations]* Państwo i Prawo No

9/1995, p. 4). The rule of representativeness is commonly approved by representatives of the labour law doctrine.

The Constitutional Tribunal examined the issue of permissibility to differentiate trade unions in the scope of participation in negotiations on upper-level collective labour agreements in a judgement of 11 December 1996, Ref. No. K. 11/96. The Tribunal ruled then that the „differentiation of the possibility of trade unions to participate in the second stage of negotiations, consisting in permitting only some of them to reach this stage, and excluding others does not clash with the principle of equality." Solutions accepted by the legislator are a manifestation of a legislative policy that seeks to balance the freedom to associate in trade union with the need to ensure effectiveness of negotiations aimed at concluding an upper-level agreement." In a cited verdict the Constitutional Tribunal did not, however, consider the issue whether the presented solutions conform to the right of trade unions to conclude collective labour agreements.

According to the Constitutional Tribunal the questioned regulation does not deprive unrepresentative trade union organisations of a right to conclude collective labour agreements. Trade union organisations that do not meet the criteria of representativeness may launch an initiative to conclude a workplace collective labour agreement. They may participate in negotiations and thus affect the contents of negotiated collective labour agreements. They may be parties to collective labour agreements. The organisations that do not meet the criteria of representativeness cannot, however, conduct negotiations on a collective labour agreement on their own, without the participation of at least one representative organisation. They cannot prevent the concluding of a collective labour agreement by representative organisations acting in concord. The organisations that do not meet the criteria of representativeness cannot conclude a collective labour agreement on their own either, without the participation in this agreement of all representative organisations participating in negotiations. However, such a solution is not in non-conformity to the Constitution. Article 59 paragraph 2 of the Constitution does not give grounds to press claims to conclude a workplace collective labour agreement by every trade union organisation that reaches an agreement with an employer regardless of a position of the majority of employees of a given workplace, represented by other trade union organisations.

4. Other charges presented by the applicant relate to the breaching of the principle of equality. According to the applicant, Article 241^{25a} § 1 of the Labour Code does not conform to Article 32 paragraph 1 of the Constitution, and subparagraph 2 of the above-mentioned regulation in connection with Article 241^{25} § 5 of the Labour Code does not conform to Article 32 paragraph 2 of the Constitution, and Article 241^{25a} § 3 first sentence of the Labour Code does not conform to Article 32 of the Constitution. It should be noted that the applicant defines the grounds for control of individual regulations in a different way. It is Article 32 paragraph 1, Article 32 paragraph 2 or the whole Article 32 of the Constitution. In the reasoning of the application it was not, however, clarified what normative purport is connected with the paragraphs 1 and 2 Article 32 of the Constitution.

According to the Constitutional Tribunal, Article 32 represents a normative set at large. Paragraph 1 of the article formulates in a general way the principle of equality as a constitutional norm addressed to all organs of public authorities – both to law applying and law making organs. Paragraph 2 specifies the meaning of the constitutional principle of equality. First, Article 32 paragraph 2 expresses the universal character of the principle of equality, ordering that it should be obeyed in all spheres of life – in political, social and economic life. Second, Article 32 paragraph 2 specifies the limits of admissible differentiation of legal entities. Under this regulation, no criterion can be the basis for unfair differentiations, discriminating against certain entities. In the light of these arguments, the presented

differences as to the way of defining the basis for control by the applicant give no grounds to differentiate the purport of constitutional norms expressed in the indicated provisions.

In line with recorded jurisdiction of the Constitutional Tribunal, the principle of equality, expressed in Article 32 paragraph1 and 2 of the Constitution, consists in the equal treatment of all legal entities characterised by a given feature that is significant in an equal degree, that is without differentiations both favouring and discriminating. At the same time the principle of equality envisages the different treatment of those legal entities that do not have a common significant feature. When examining the conformity of a legal regulation to the Constitution, it should be established whether certain entities are similar, that is whether it is possible to identify a common significant or factual feature justifying the equal treatment of these entities. This entails the analysis of a purport of a normative act, in which the controlled legal norm is contained. If the legislator differentiates legal entities that are characterised by a common significant feature, a departure from the principle of equality is introduced. Such a departure is admissible if three conditions are met. First, differentiations introduced by the legislator must be rationally justified. They have to be connected with the purport of the regulations in which a controlled norm is contained. Second, the weight of the interest, to be served by the differentiation of similar entities, must remain in an appropriate proportion to the weight of interests that will be breached in result of different treatment of similar entities. Third, the differentiation of similar entities must be based on constitutional values, principles or norms.

5. Article 241^{25a} § 1 of the Labour Code defines the criteria of representativeness of workplace trade union organisations. The regulation sets forth a general criterion of workplace representativeness – the requirement to group at least 10% of employees employed by a given employer. At the same time the legislator envisaged a special, more favourable criterion of workplace representativeness for trade union organisations that are an organisational unit or a member organisation of a trade union organisation at the upper level, grouping at least five hundred thousand employees. According to the applicant, the cited regulation breaches the principle of equality in two ways. First, it sets different criteria of workplace representativeness. For most trade union organisations the law introduces the criterion of grouping at least 10% of employees employed by an employer. But a trade union organisation that is an organisational unit or a member organisation of a trade union organisation at the upper level that was considered as a representative one on the grounds of Article 241^{17} § 1 subparagraph 1 (that is grouping at least five hundred thousand employees) is considered to be representative if it groups at least 7% of employees employed by a given employer. Second, the legislator differentiates trade union organisations at the upper level that meet the criteria of representatives at the upper level. Under Article 241^{17} of the Labour Code a representative trade union organisation is a trade union organisation at the upper level that groups:

1) at least five hundred employees or

2) at least 10% of the total number of employees covered by the operation scope of the statutes, but not fewer than ten thousand employees, or

3) the biggest number of employees for whom a definite upper-level agreement is to be concluded.

Under Article 241^{25a} § 1 the lowered threshold of workplace representatives concerns only workplace trade union organisations affiliated to upper-level trade union organisations listed in Article 241^{17}§ 1 subparagraph 1, but does not concern trade union organisations affiliated to upper-level trade union organisations listed in subparagraphs 2 and 3.

The applicant questions not only the fact of differentiating the criteria of workplace representativeness but also the condition to group at least 10% of employees employed by an

employer set for workplace organisations not affiliated with trade union organisations that group at least five thousand employees. According to the applicant, Article 241^{25a} § 1 subparagraph 2 in connection with Article 241^{25} § 5 of the Labour Code discriminates against physicians, making it impossible for physicians' trade unions to conclude collective workplace agreements.

When examining the conformity of questioned regulations to the principle of equality, this last charge should be considered first. The Constitutional Tribunal shares the view that the questioned regulations make it impossible to conclude their own collective labour agreements by trade unions grouping persons of one profession, if the persons constitute the minority of those employed. The legislator differentiates the position of trade unions that meet workplace representativeness criteria, grouping representatives of various professions and physicians' trade unions that in practice cannot meet the above-mentioned criteria. The legislative solution shows preference for collective labour agreements covering the broadest possible circle of employees of a given workplace, performing different professions.

The assumption of an equal, as to the principle, treatment of all trade unions is a starting point for evaluating the conformity of Article 241^{25a} § 1 subparagraph 2 in connection with Article 241^{25} § 5 of the Labour Code to the principle of equality. The activity of a trade union at a given workplace may be considered to be a common significant feature, justifying the equal treatment in labour relations. At the same time the law doctrine unanimously accepts the admissibility of the differentiation of trade unions on the basis of the criterion of representativeness, stressing at the same time a broad scope of the legislator's freedom in defining this criterion. But the regulatory freedom in this scope is not unlimited and the criteria introduced by the legislator should not lead to unjustified differentiations of workplace trade union organisations. The differentiation of trade unions on the basis of the questioned criterion meets all three premises for the admissible differentiation of similar entities. First, the differentiations introduced by the legislator are rationally justified and remain in connection with the purport of the regulations, in which the examined norm is contained. The questioned regulations are designed to protect weaker employee groups against the domination from stronger groups. Thus they find justification in the differentiation of the actual status and strength of individual professional groups. At the same time these regulations enable to effectively use the right to conclude collective labour agreements. Second, the weight of cited interests, to be affected by differentiation, remains in an appropriate proportion to the weight of interests that will be breached in effect of this differentiation. The protection of interests of weaker employee groups and the striving to ensure efficiency in negotiations justify the introduction of solutions that limit the possibility to conclude workplace agreements for individual professions. Third, in the light of presented arguments the introduced differentiation finds the foundation in constitutional values and principles, in particular Article 24 of the Constitution dealing with labour protection.

Next, the charge of breaching the principle of equality by unjustified differentiation of criterions of workplace representativeness should be examined. According to the Constitutional Tribunal, a significant feature from the point of view of the examined regulations is the actual ability of trade union organisations to represent in labour relations the interests of broad group workers. The legislator considers the fact of grouping a specific part of those employed at a given workplace to be the basic criterion of workplace representativeness. At the same time this criterion is differentiated depending on whether a trade union organisation is an organisational unit or a member organisation of an upper-level trade union organisation grouping at least five hundred thousand employees. In this connection attention should be paid to the fact that the ability of trade union organisations to represent worker interests depends on many factors. One of the most important factors is the percentage of employees of a given workplace grouped in a given trade union. But this is not

the only factor. The social profile of a trade union and the number of represented worker groups may also be of great importance. From this point of view the fact of the membership in an upper-level trade union organisation grouping at least five hundred thousand workers is of significance for representing by this organisation of worker interests at a given workplace. The Constitutional Tribunal shares the view of the Minister of Labour and Social Policy that workplace organisations that are part of upper-level organisations, mentioned in Article 241^{17} § 1 subparagraph 1, have stronger position vis-à-vis the employer and may effectively represent worker interests even with a smaller number of members.

Trade unions, grouped in big upper-level structures, integrate the interests of various worker groups, including those of weaker employee groups, that are not able to effectively defend their interests through their own actions. The accepted criteria of workplace representativeness correspond with the above mentioned preference of the legislator to conclude workplace agreements covering possible the broadest scope of professional groups and do not differentiate trade union organisations that have a common significant feature. In the light of the presented arguments the charge of differentiating organisations that meet the upper-level representativeness criteria is also unjustified. It should be also noted that the criterion specified in Article 241^{17} § 1 subparagraph 3 can be applied only in the context of specific negotiations on the collective labour agreement at the upper level. It is not possible to apply it in the context of negotiations on a workplace collective labour agreement.

In the face of the presented arguments it should be said that the questioned regulations do not generate unjustified differentiations and do not go beyond the limits of the regulatory freedom defined by the Constitution.

6. Another charge presented by the National Physicians' Trade Union concerns Article 241^{25a} § 3 first sentence of the Labour Code. Under this regulation, when defining the number of employees grouped in a workplace trade union organisation, cited in § 1 and 2, that is a representative organisation, only workers that were members of this organisation for at least 6 moths before starting negotiations on concluding a workplace agreement are taken into account. According to the applicant, the regulation does not conform to Article 59 paragraph 2 and Article 32 of the Constitution.

The Constitutional Tribunal does not share the view of the applicant, that a feature of representativeness is acquired solely according to the criterion of the number of members of a given trade union. The regulation, questioned by the applicant, specifies the criteria of workplace representativeness of trade unions. Under Article 241^{25a} § 3 first sentence, only organisations that can prove to have certain stability of their membership basis over a definite period of time can be regarded as representative trade union organisations. Thus the legislator states that the ability of trade unions to represent worker interests depends not only on the number of their members at a given moment of time but also on some minimum stability of the number of grouped employees. In particular, a trade union organisation that achieved the number criteria defined in the law only in a transitory way, by conducting intensive recruitment of new members with the participation in negotiations on a collective labour agreement in mind, cannot be regarded to be a representative organisation. As was rightly noted by the Minister of Labour and Social Policy, the questioned regulation eliminates the influence of short-term changes in the membership of a trade union organisation on the establishing of representativeness.

According to the Constitutional Tribunal, Article 241^{25a} § 3 first sentence of the Labour Code is within boundaries of regulatory freedom to which the legislator is entitled and does not lead to unjustified differentiation of entities that have a common significant feature. It does not breach a right to launch initiative to conclude a collective labour agreement, a right to participate in negotiations concerning a collective labour agreement, freedom to take

decisions on being bound by the negotiated collective labour agreement and does not limit the freedom to shape the purport of collective labour agreements.

In the light of arguments already presented in the justification, it does not breach the right of trade unions to conclude collective labour agreements. The adopted solution is applicable in particular in case of conflicts and split in the trade union movement and facilitates the effective use of a right to conclude collective labour agreements.

For the presented reasons, the Constitutional Tribunal passes the judgement that was stated in the introduction.