SVK-2012-1-001
a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 26-01-2011 / **e)** PL. ÚS 3/09 / **f)** Constitutionality of changes in health insurance system - «ban on profit» amendment / **g)** / **h)** CODICES (Slovak).

Keywords of the Systematic Thesaurus:

03.10	General Principles - **Certainty of the law.**
05.03.39	Fundamental Rights - Civil and political rights - **Right to property.**
05.04.06	Fundamental Rights - Economic, social and cultural rights - **Commercial and industrial freedom.**
05.04.19	Fundamental Rights - Economic, social and cultural rights - **Right to health.**

Keywords of the alphabetical index:

Health insurance / Health, reform / Privatisation .

Headnotes:

The legislature is entitled to pursue significant reform of the health care system in the legitimate public interest, but this must be done in conformity with the Constitution, which requires, in particular, that the legislature must take into account any ensuing interference with the position of legal entities which have provided health care insurance in good faith before the amendment, and must undertake to address such interference.

The Treaty on the Functioning of the European Union is a valid reference norm for the constitutional review of laws.

Summary:

I. In Slovakia the government substantially reformed the health care system in 2004. The possibility to establish private health-care insurance companies (hereinafter, «HICs») in the form of joint-stock entities was part of this reform. HICs established following the reform distribute resources which come from the legally-required payments of individuals (both employees and self-employed persons). In 2007 the new government amended the Law on Health Insurance and precluded the possibility of HICs making profit from their activities.

The challenged provision loosely reads: once HICs providing health-care insurance to the public have settled their fiscal obligations (liabilities) and the result of their business in this field is net profit, this profit may only be used for the purposes of further public health-care insurance.

One HIC sued the Slovak Republic for compensation. The ordinary court suspended the proceedings and sought a review of the relevant provision of the Law on Health Insurance by the Constitutional Court. At the same time a group of Members of Parliament (hereinafter, «MPs») challenged the same provision.

The MPs contended that the challenged amendment was not in the public interest, on the basis that the goal of the amendment was not really non-profit health insurance, but to put private HICs out of business. The MPs observed that the legal order does not allow HICs to return their license and to transform their business and carry out voluntary health insurance, that Article 40 of the Constitution does not prescribe any particular kind of health insurance system and that, although state-controlled HICs are in the form of joint-stock companies (the government owns 100% of shares), they are not affected by the amendment, because they are not concerned with net profit. The MPs argued that the amendment could not pass the proportionality test. The MPs also contended that the amendment is not in conformity with the principle of a state governed by the rule of law, particularly with the principle of legal certainty, on the basis that it is too vague and that it has retroactive effect due to its removal of the license to provide health-care on a business basis. They also argued that the restriction on the pursuit of profit violates the freedom of enterprise.

II. The Court identified three points in the case:

1. the legal status of HICs;

2. the retroactive effect of the amendment; and

3. interference with the right to property and freedom of enterprise. Although Parliament (as the opposing party in the case) argued that HICs are public entities and that therefore the amendment has no effect on private persons, the Court decided that the 2004 reform established HICs which carry out distribution of finances for public health on a business basis and for profit.

The Court held that the challenged amendment did not have retroactive effect. It had merely so-called *unechte-Rückwirkung* (' false retroactive effect'), in that it adversely affected the current and prospective legal position of HICs.

The Court decided that the amendment interfered unconstitutionally with the right to property which also covers shares and licenses, because no compensation of any kind was provided for this interference. The elimination of the possibility to make or pursue a profit, without compensation, interferes with the freedom of enterprise.

The Court applied the proportionality test. The Court affirmed that the objective of improving health care is constitutionally acceptable but expressed doubts as to whether an amendment which eliminates the possibility of profit for HICs, thereby eliminating the commercial aims of HICs, is rationally connected to that objective. These doubts notwithstanding, the Court proceeded to the test of necessity. The Court stated that there were other less drastic means of improving health care, so the amendment did not pass the test at this stage. Nevertheless, the Court reiterated in the third step (i.e. the test of proportionality in the strict sense) that there was imbalance in the fact that not only did doubts exist concerning the rational connection of the amendment to its objective, but the amendment also interfered significantly with the right to property and even with the essence of the right to enterprise.

The MPs also challenged the amendment's conformity to the Treaty on the Functioning of the European Union (hereinafter, the «TFEU»). The Court stated that it considered the TFEU as a reference norm for the constitutional review of laws because it is an international treaty signed with the consent of Parliament (Article 125.1a Constitution). However, in this

particular case the Court did not consider it necessary to carry out this review, because it was sufficient to state that the amendment was not in conformity with the national Constitution.

Supplementary information:

The essential point to note in this case, popularly known as «the profit ban» case, is that the Court did not state that profit could not be banned, but that if profit is banned, the legislator must compensate the private entities affected for the worsened legal position in which they are placed as a result of such ban.