

**Case number:**

U-I-194/17

ECLI:

ECLI:SI:USRS:2018:U.I.194.17

Challenged act:**Operative provisions:****Abstract:**

[Publisher's Note: The full text of this Decision/Order is available only in Slovene. The text published below is a summary prepared for the annual report.]

Free Economic Initiative in the Performance of a Public Health Care Service

By Decision No. **U-I-194/17**, dated 15 November 2018 (Official Gazette RS, No. 1/19), the Constitutional Court decided on the constitutionality of multiple provisions of the Health Care Services Act (the HCSA) insofar as they concerned individuals who had a concession to perform a public health care service.

Firstly, the Constitutional Court considered the allegations regarding the inconsistency of the second paragraph of Article 3 of the HCSA with the principle of the clarity and substantive precision of regulations determined by Article 2 of the Constitution. The challenged statutory provision determined that the providers of public health care services perform such services on a non-profit basis, namely such that they must spend any surplus of revenue over expenditure on the performance and development of health care services. The law qualified those services as non-commercial services of general interest. The Constitutional Court established that the introduction of the term non-commercial services of general interest (which is an EU term) in the national legislation does not entail that from the viewpoint of national law public health care service is no longer a non-commercial public service. According to Slovene law, the term non-commercial public service is broader than the term non-commercial service of general interest under EU law. In EU law, the doctrine regarding non-commercial services of general interest sets the criteria for assessing to what degree certain activities regulated by national laws are excluded from the field of application of EU law. In view of the established criteria, it is the Court of Justice of the EU that has competence to answer the question of whether a certain activity is a non-commercial activity of general interest. The Constitutional Court thus established that it can interpret the second sentence of the second paragraph of Article 3 of the HCSA; hence, it is not inconsistent with the principle of the clarity and substantive precision of regulations determined by Article 2 of the Constitution.

The Constitutional Court also reviewed the second sentence of the second paragraph of Article 3 of the HCSA from the viewpoint of the right to free economic initiative determined by Article 74 of the Constitution. Namely, that provision imposes on private providers the obligation to perform a public commercial service on a non-profit basis; hence they must keep the surplus from the public service in the public service. By prohibiting private providers from paying out the surplus from the activity or from using it for personal needs, the legislature *de facto* changed private providers into a non-profit legal form. The Constitutional Court adopted the position that the performance of a public health care

service as a non-commercial public service must be deemed to be protected, from the viewpoint of private providers – concessionaires, by Article 74 of the Constitution. Concessionaires who perform a public service in the field of health care gain the protection of the guarantees determined by this constitutional provision.

The Constitutional Court opined that this limitation of the freedom to decide how to allocate the surplus of revenue over expenditure very significantly narrows the scope of the entrepreneurial freedom of private providers and interferes with their economic initiative. There certainly exists a public interest in providing durable, high-quality, and universal access to public health care services. However, such an intense limitation of the freedom to allocate the surplus of revenue over expenditure undermines one of the key motives for performing a concessionary activity, the quality of which can be ensured by adopting appropriate professional standards. Since the balance of the assessed interference with the human right to free economic initiative exceeds the weight of the public interest, the Constitutional Court abrogated the challenged regulation in that part.

Thesaurus:

Legal basis:

Cases joined:

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Full text:

Type of procedure:

ocena ustavnosti in zakonitosti predpisov in drugih splošnih aktov

Type of act:

zakon

Applicant:

Professional Association of Private Doctors and Dentists of Slovenia

Date of application:

19. 12. 2017

Date of Decision:

15. 11. 2018

Type of decision adopted:

odločba

Outcome of proceedings:

razveljavitev ali odprava
ugotovitev – ni v neskladju z Ustavo/zakonom

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