

**Petr Frischmann**

ŠKODA AUTO University

pert.frischmann@savs.cz

ORCID ID: <https://orcid.org/0000-0002-3843-9188>

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## Freedom of Enterprise in the Perspective of Czech Professional Self-Governing Associations

**Abstract:** The present text addresses the specific nature of regulated professions in relation to the reasonable and justifiable restrictions as principles of free enterprise. Based on recent Czech experience, the article provides considerations and analysis identifying current trends in regulated self-governing associations with compulsory membership focusing on the principal questions concerning the constitutional conformity of compulsory membership, justifiable level of restrictions of free access to professions and training and pre-requisites for entry to a profession with special regard to the protection of free economic competition. The article analyzes the different forms of restrictions of free enterprise in regulated services having their origin in the legislation, internal rules and the decision making of professional associations themselves. The analyses illustrate the search for the optimum balance between legitimate professional group interests and fundamental rights, which is not easy to determine, as the present text tries to demonstrate by analyzing the existing Czech approach to the issue. Furthermore, the article presents the considerations based on the recent leading decisions analysing immanent and persistent tendencies for the expansion of influence of the existing associations together with tendencies for the formation of new self-governing associations.

**Keywords:** professional association, self-governance, access to profession, price regulation, internal rules, economic competition

### 1. Introduction

Specific regulated professions rendered with guaranteed qualifications and quality standards constitute an important element of the business environment and traditional part of the liberal economy. The principles of guaranteed quality based on qualification requirements together with the self-governing principles of regulated professions are not only subject to legal considerations and public discussion, but also

to court review including the constitutional court control agenda.<sup>1</sup> Potential conflict of constitutional rights in the respective business is immanent reflecting conflict of the rights to enterprising with the values manifested primarily in the protection of the public interest represented mainly by the idea of specific consumer protection. The principles of free enterprise and self-governance are of special significance in social systems recently transformed from the long-lasting period of non-liberal regimes. Lack of tradition and experience together with the remaining elements of paternalism and etatism in societies of this type result in potential problems arising that endanger vulnerable consumers. The shift from communist paternalism and its replacement by personal freedom together with individual responsibility resulted in the need for new specific instruments of consumer protection including in the area of services rendered by regulated professions.<sup>2</sup>

Self-governing principles are adopted by the Czech constitutional order not only in the form of human rights granted by the respective part of the Charter of Fundamental Rights and Freedoms<sup>3</sup> (hereinafter “The Charter”) but also as the leading principle embodied *expressis verbis* in the preamble of the same document. This fact is traditionally used in cases referring to self-governance as the keystone of the sole organization of civic society.<sup>4</sup> New political rights and freedoms resulted in rocketing number and in a variety of different forms of professional or business associations in the early 1990s. Only a certain small group of such organizations, however, is established *ex-lege*, require compulsory membership and exercise delegated state authority especially in providing the administration control over certain specified professions.<sup>5</sup> There are currently 12 professional associations with compulsory membership required for the rendering specific professions in the Republic:

- Czech Medical Chamber<sup>6</sup> (CMC)

1 A. Malach, J. Selešovský, M. Ustohal, Samosprávné podnikatelské instituce = Self-management entrepreneurial institutions: monografie, Masarykova univerzita v Brně, 2002 ; Z. Koudelka, Je stavovská organizace a stavovský předpis neústavní?, „Bulletin advokacie“ 4/2000.

2 P.H. Rubin, Growing a Legal System in the Post-Communist Economies, “Cornell International Law Journal”, Volume 27, Winter 1994.

3 Constitutional act No. 2/1993 Coll. as amended by constitutional act No. 162/1998 Coll. (Hereinafter “The Charter”) In English available at: [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Pravni\\_uprava/AJ/Listina\\_English\\_version.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf) (accessed 1.12.2018).

4 E.g. Constitutional Court Decision No 6/2009 Coll. Available at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=60093&pos=2&cnt=2&typ=result>, (accessed 12.12.2018).

5 N. Persico, The Political Economy of Occupational Licensing Associations, “The Journal of Law, Economics and Organization”, Volume 31, Issue 2, 1 May 2015, available at: <https://doi.org/10.1093/jleo/ewu011> (accessed 12.12.2019).

6 Act no. 220/1991 Coll., available at: [https://www.lkcr.cz/doc/cms\\_library/zak-c-220-1991-sb-100530.pdf](https://www.lkcr.cz/doc/cms_library/zak-c-220-1991-sb-100530.pdf) (accessed 2.12.2018).

- Czech Chamber of Pharmacists<sup>7</sup> (CCP)
- Czech Dental Chamber<sup>8</sup> (CDC)
- Chamber of Architects<sup>9</sup> (CA)
- Czech Chamber of Chartered Engineers and Technicians<sup>10</sup> (CCET)
- Czech Bar Association<sup>11</sup> (CBA)
- Chamber of Executors<sup>12</sup> (CE)
- The Chamber of Auditors<sup>13</sup> (CA)
- Chamber of Tax Advisors<sup>14</sup> (CTA)
- Chamber of Patent Attorneys<sup>15</sup> (CPA)
- Chamber of Veterinary Surgeons<sup>16</sup> (CVS)
- Notarial Chamber<sup>17</sup> (NC).

Despite all specifics of particular professions, common reasons for the existence and of self-governing professional organization in all areas can be identified, such as internal self-governing norms legislation activity (ethical codex, disciplinary proceedings rules, rules of compulsory insurance, social fund rules, etc.), control over the professional standards of the services provided<sup>18</sup> including complaints of clients agenda, disciplinary power over members of the association including the power to terminate membership in the case of serious disciplinary breach of duties, control over access to the profession in regard to qualification, educational activities provided

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7 Act no. 220/1991 Coll., available at: [https://www.lkcr.cz/doc/cms\\_library/zak-c-220-1991-sb-100530.pdf](https://www.lkcr.cz/doc/cms_library/zak-c-220-1991-sb-100530.pdf) (access 2.12.2018).

8 Act no.220/1991 Coll., available at: [https://www.lkcr.cz/doc/cms\\_library/zak-c-220-1991-sb-100530.pdf](https://www.lkcr.cz/doc/cms_library/zak-c-220-1991-sb-100530.pdf) (accessed 2.12.2018).

9 Act no. 360/1992 Coll., available at: <http://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=2596> (accessed 2.12.2018).

10 Act no. 360/1992 Coll., available at: <http://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=2596> (accessed 2.12.2018).

11 Act no. 85/1996 Coll., available at: <http://zakony-online.cz/?s82&q82=all> (accessed 2.12.2018).

12 Act no. 120/2001 Coll., available at: [http://www.pracepropravniky.cz/\\_userfiles/texty\\_prilohy/10106.pdf](http://www.pracepropravniky.cz/_userfiles/texty_prilohy/10106.pdf) (accessed 2.12.2018).

13 Act no. 93/2009 Coll., available at: [https://www.kacr.cz/file/1819/10\\_2010.pdf](https://www.kacr.cz/file/1819/10_2010.pdf) (accessed 2.12.2018).

14 Act no. 523/1992 Coll., available at: <https://www.kdpcr.cz/informace/predpisy/zakon-o-danovem-poradenstvi> (accessed 2.12.2018); Fára, I., Paštiková, V., Daňové poradenství: Změny v úpravě Komory, „Právní rádce“, 7/2012.

15 Act no. 237/1991 Coll., available at: <https://www.zakonyprolidi.cz/cs/1991-237> (accessed 2.12.2018).

16 Act no. 381/1991 Coll., available at: <http://www.zakony.cz/zakon-SB1991381> (accessed 2.12.2018).

17 Act no. 358/1992 Coll., available at: <https://www.nkr.cz/data/predpisy/notarsky-rad.pdf> (accessed 2.12.2018).

18 M. Kopecký, Odpovědnost za škodu způsobenou profesní komorou při výkonu veřejné moci, „Jurisprudence“, 4/2018, L. Ládek, Disciplinární řízení v České lékárnické komoře, „Zdravotnictví a právo“, 12/2001.

for members and prospective members, representation of professional interests including legislation activities and the lobbying and international representation of professional interests.<sup>19</sup> The above specifics confirmed by the Constitutional Court interpretation<sup>20</sup> constitute the basis for further considerations concerning the justifiable limitation of human rights guaranteed especially by Art. 20 of the Charter protecting the right to associate freely in clubs, societies, and other associations, especially in light of the notion of negative freedom. Freedom of not being forced to socialize constitutes frequent argumentation especially in compulsory membership contested claims. With respect to human rights guaranteed by Art. 26 of the Charter protecting the right to the free choice of profession and the training for that profession, the test of proportionality should be instrumental here in determining the legitimate purpose of limitation and the justifiable nature of tools.

The character of the membership of each particular professional association is of main significance. The membership structure forms the goals, tools, setup and consequently the social and political power of such body.<sup>21</sup> Based on this, associations can in principle be divided into two types in which the membership is limited to the subjects rendering services independently as free contractors or in labor relationship to such contractors.<sup>22</sup> The second type is organized as a comprehensive body involving all professionals of the respective profession. Association membership is not defined by the legal form of rendering the services and the membership therefore includes, among others, also state, municipal or other employees. This characteristic applies mainly to the associations of medical doctors, dentists and pharmaceuticals,<sup>23</sup> but also in large extent to certified architects and other professions involved in the construction industry.<sup>24</sup>

As already mentioned, the joint membership of entrepreneurs together with employees in one professional chamber significantly shapes its setup and agenda. On top of this, the mix of all types of members rendering services both in the private and public sector results in a very special heterogeneity of the membership giving rise (especially in the sector of health services) to the further differentiation of particular

19 J. Fiala, P. Mates, Komory podnikatelů a svobodných povolání, "Právo a podnikání", 6/1993; M. Janovec, Zájmová samospráva, "Právní forum", 8/2011; Jokl, M. V., Proč profesní Komora?, "Právní rádce", 4/2001.

20 Constitutional Court Decision No. 6/2009 Coll., available at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=60093&pos=2&cnt=2&typ=result> (accessed 28.12.2018).

21 P. Fiala, Definice zájmových skupin. K některým teoretickým problémům politologického výzkumu organizovaných zájmů. In "Politologický časopis", VI/1, 1999.; Š. Lipertová, Některé otázky zájmové samosprávy a její činnost, "Správní právo" 3/2010.

22 E.g. attorney (Bar member) employed by another attorney or by corporation of attorneys.

23 Sec.3, 4, 5, Act no.220/1991 Coll., available at: [https://www.lkcr.cz/doc/cms\\_library/zak-c-220-1991-sb-100530.pdf](https://www.lkcr.cz/doc/cms_library/zak-c-220-1991-sb-100530.pdf) (accessed 19.12.2018).

24 Sec. 14, Act no.360/1992 Coll., available at: <http://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=2596> (accessed 22.12.2018)

interest groups within the associations. This phenomenon is supported by the institutionalization of group interests in clubs and informal or semiformal associations existing within the professional association and representing especially particular specializations, medical or paramedical professions.<sup>25</sup> Because of the involvement of many employees in associations of this type the tendency to supplement or replace the trade union function can be witnessed in certain cases. This tendency is largely supported by immense professional influence and social power enabling the medical association to be an efficient influential pressure group. This phenomenon was supported by the tendency toward strong personal unity between the medical trade union<sup>26</sup> and the CMC in recent history when trade union leaders were frequently nominated to fill top management positions in the CMC. The influence of the association is targeted not only to the level of state organs and institutions (e.g. the Ministry of Health or health insurance companies), but also at the local level in negotiations with the management of hospitals and other health service providers. Professional associations of the type described are involved in social and political affairs in regard to employees' rights and their agenda, forms and instruments of activities are consequently specific in comparison with professional associations whose membership consists primarily of independent service contractors.

Social rights guaranteed by Article 27 of the Charter include the protection of group interests of the regulated professions. Professional associations, however, must not be identified with the organizations primarily fulfilling that function. The danger of mixing the two by professional associations was contested in recent history mainly in respect to the CMC where trade union leaders in the management traditionally acquired significant influence and power. Even though economic conditions of rendering the services including the remuneration schemes are considered to be an important element of the exercise of the profession, self-governing associations' role is not identical with that of the trade unions. This issue was contested mainly in controversies related to protest activities including strikes especially in the public health sector. The legitimate role of the professional associations on the other hand is focused on the negotiation process including representation and lobbying in the course of the legislative process especially in professions strictly limited by legislation in relation to their remuneration. In such cases, professional associations also take part in the potential constitutional review of the respective legislation. Significant

25 E.g. Sdružení ambulantních specialistů, [www.sasp.cz](http://www.sasp.cz), Sdružení praktických lékařů ČR, available at: <http://www.splcr.cz>, Sdružení praktických lékařů pro děti a dorost ČR, available at: <http://www.detskylekar.cz/cps/rde/xchg/dlekar/xsl/index.html> (accessed 12.12.2018).

26 Medical Trade Union established in 1996 explicitly referred to reaction to the lack of representation of profession by Czech Medical Association. During the first year of its existence it organized three strikes, available at: <https://www.lok-scl.cz/o-nas/lok-scl.php> (accessed 12.12.2018). See also: Mach, J., Změna délky funkčního období orgánů a funkcionářů ČLK není nedemokratická, tím méně protiprávní, „Zdravotnictví a právo“, 9/2004.

in recent history are the Constitutional Court decisions in the cases of legislation regulating the remuneration in the health care sector in 2016,<sup>27</sup> review of legislation providing for flat rate attorney and notary fees in small claims in 2013<sup>28</sup> and legislation limiting executors' fees in 2018.<sup>29</sup>

## 2. Requirement of Nationality for Entry to a Profession

The restriction of rendering services to nationals of the country represents an extremely radical limitation of free enterprise principles. Such restriction was not imposed in the recent history of regulated professions since the protection of national group self-interests was mostly based on less evident mechanisms such as the type and content of education or knowledge of the national language. The practice of the notary profession in imposing a nationality restriction, however, represented an exception based on the alleged specifics of delegated state power exercised until recent times.<sup>30</sup> The Notary Act,<sup>31</sup> explicitly citing Czech nationality as a precondition for exercise of the notarial profession, was reviewed by the European Court of Justice (hereinafter ECJ) in 2018.<sup>32</sup> In resolving the question of conformity of the restriction of access to the profession of notary based on nationality in the case of the Czech Republic, the ECJ's decision fell in line with similar cases involving other EU member states.<sup>33</sup>

The legal analysis provided by respective decisions assessed the conflict of the right of free access to a profession with the exercise of the official state authority legitimizing the exemption subject to Article 51 of the Treaty on the Functioning of the European Union (hereinafter TFEU). The ECJ adjudicated that despite the fact that the notary profession in many jurisdictions exercises some limited and specific state authority (inheritance proceedings, drafting official protocols certifying relevant legal issues, entry to public registers, etc.), this is not a legitimate reason for

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27 Con. Court Decision Pl. ÚS 19/16, available at: [https://www.usoud.cz/fileadmin/user\\_upload/Tiskova\\_mluvci/Publikovane\\_nalezy/2016/Pl.\\_US\\_19\\_16\\_na\\_web.pdf](https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/2016/Pl._US_19_16_na_web.pdf) (accessed 2.1.2019).

28 Con. Court Decision Pl. ÚS 25/12, available at: <http://kraken.slv.cz/Pl.US25/12> (accessed 2.1.2019).

29 Act. No. 441/2016 Coll., available at: [http://www.uohs.cz/download/Legislativa/HS/CR/143\\_2001\\_Sb\\_2017.pdf](http://www.uohs.cz/download/Legislativa/HS/CR/143_2001_Sb_2017.pdf), (accessed 2.1.2019).

30 Klein, Š., Perspektivy vývoje notářství v 21. století, „Ad notam“, 3/2016; Míka, L., Zájmová samospráva s přihlédnutím k notářské samosprávě ve světle změny zákona o advokacii, „Ad Notam“, 4/2004.

31 Act no. 358/1992 Coll., available at: <https://www.nkcr.cz/data/predpisy/notarsky-rad.pdf>, (accessed 2.12.2018).

32 ECJ decision C-575/16 Commission vs. Czech Republic.

33 ECJ decisions C-47/08 Commission vs. Belgium, C-50/08 Commission vs. France, C-51/08 Commission vs. Luxembourg, C-53/08 Commission vs. Austria, C-54/08 Commission vs. Germany, C-61/08 Commission vs. Greece, C-52/08 Commission vs. Portugal.

limitation of the freedom of establishment including the right to take up and pursue activities as self-employed persons subject to Article 49 TFEU. In all similar cases involving EU member-states, the limitation of access in question was not found to be justifiable based on analysis of the structure and character of services rendered by the notary profession. Courts specifically pointed out that only a limited notarial agenda involves the actual exercise of state power and that most of this agenda exercising state power is shared with other state organs (e.g. courts). The second reason for applying a negative decision was the fact that most of the decision-making agenda of a notary represents declaratory confirmations while disputes (typically in inheritance proceedings) are subject to court proceedings. Similarly, most of the other agenda (e.g. drafting official protocols certifying relevant legal issues, entry to public registers and the like) does not involve dispute resolution. In light of the ruling of the ECJ in 2018, the Czech nationality prerequisite was abolished. However, after the amendment of respective national jurisdiction was adopted in conformity with the above decision, other conditions for entry to the notary profession such as Czech legal education, court training and the final judicial exam, still apply. The practical impact on the profession is therefore not expected to be overwhelming.

### 3. Compulsory Membership in Professional Associations

The mandatory membership principle in regulated professional associations represents a traditional rigid requirement for rendering regulated services in the Czech Republic as well as in many EU member states and other countries.<sup>34</sup> In recent history, the principle of compulsory membership in regulated professions has been the subject of various court proceedings and constitutional complaints along with being a perpetual topic of debate among professionals.<sup>35</sup> Leading Constitutional Court Decision No. 6/2009 Coll.,<sup>36</sup> was established by way of claims contesting compulsory membership in the Czech Medical Chamber, Czech Dental Chamber and Czech Pharmacists' Chamber.<sup>37</sup> Here, the breach of constitutionally guaranteed

34 IBA Global Cross Border Legal Services Report, Available at: [https://www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/BIC\\_ITILS\\_Map.aspx](https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx) (accessed 19.12.2018); Key figures of six countries of the European Union – 2013; available at: [EN\\_STAT\\_2013\\_Key\\_figures\\_of\\_six\\_countries\\_of\\_the\\_European\\_Union.pdf](#) (accessed 5.1.2019);

35 J. Schulz, Profesní komory – povinné či nepovinné členství?, "Právní rádce" 2/1994; K. Havlíček, Soudní přezkum úkonů profesní komory. Autonomní normotvorba veřejnoprávní korporace. Nezákonný zásah, „Zdravotnictví a právo“, 5, 2009.

36 Constitutional Court Decision No. 6/2009 Coll., available at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=60093&pos=2&cnt=2&typ=result> (accessed 28.12.2018).

37 Act No.220/1991 Coll. on Czech Medical Chamber, Czech Dental Chamber and Czech Pharmacists' Chamber, available at: [https://www.lkcr.cz/doc/cms\\_library/zak-c-220-1991-sb-100530.pdf](https://www.lkcr.cz/doc/cms_library/zak-c-220-1991-sb-100530.pdf) (accessed 28.12.2018).



rights to associate freely with others “*in clubs, societies and other associations*”,<sup>38</sup> the right to choose freely a profession and the training for such profession<sup>39</sup> and the right to associate freely with others for the protection of his or her economic and social interests,<sup>40</sup> were claimed. The petitioners referred to the principle of negative freedom, claiming that the freedom of association includes the right not to be forced to associate. A personal right to decide on this matter is an inevitable part of such freedom.<sup>41</sup> According to the plaintiffs, professional associations regardless of being associations of public law are fully subject to the rights guaranteed by Article 11 of the European Convention of Human Rights (hereinafter “Convention”) and subject to Article 20 of the Charter which provides for no difference between private and public associations.

In rejection of this motion the public interest was identified as a prevailing value and criterion in the test of proportionality. The protection of public health constitutes a fundamental prevailing human right<sup>42</sup> which requires solid respective institutional support according to the decision. The determining factor for the choice of particular forms and methods of organization of the profession is therefore predominantly the protection of public health criterion. Since the constitutional order gives legislators wide discretion in shaping the medical care system, it follows that this also includes the exercise of the medical profession and professional association setup. This directly refers to the self-governing traditions included in the preamble of the Charter of Fundamental Rights of the Czech Republic where “national traditions of democracy and self-government principles” are incorporated. The tradition of professional autonomy is according to quoted decision undoubtedly included in this sense.<sup>43</sup> The use of Art. 11 of the Convention in the CMC decision was interpreted in conformity with relevant decisions of the European Court of Human Rights (hereinafter ECtHR)<sup>44</sup> together with decisions of the European Commission for Human Rights (hereinafter ECHR)<sup>45</sup>. With regard to the specific nature of professional associations not being associations within the meaning of Art. 11 interference with the negative

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38 Art. 20/1 of the Charter.

39 Art. 26/1 of the Charter.

40 Art. 27/1 of the Charter.

41 J.M. Chamberlain, *Doctoring Medical Governance: medical self-regulation in transition* [online]. New York: Nova Science Publishers, 2009. Social issues, justice and status series, available at: <http://site.ebrary.com/lib/natl/Doc?id=10680956> (accessed 12.12.2018).

42 Art. 6/1 and 31 of the Charter.

43 R. Ptáček, M. Kubek, P. Kubiček, *Česká lékařská komora: historie a význam*. Praha: Grada, 2011.

44 Judgment of ECtHR of 23. 6. 1981 in *Le Compte, Van Leuven and De Meyer v. Belgium*, application no. 6878/75; 7238/75, decisions on the acceptability of 6. 11. 2003 in case *Popov and others Vakarelova, Markov and Bankov v. Bulgaria*, application no. 48047/99, 48961/99, 50786/99 and 50792/99.

45 Commission of human rights in its decision on admissibility of 8.7.1992 regarding *Simon v. Spain*, Application no. 16685/90.



component of freedom of association, compulsory membership was found justifiable and legitimate.

Although it was only compulsory membership in medical associations that was originally contested, the thorough analysis and findings of the Constitutional Court were seen to be applicable to all regulated professions in the above sense, thus establishing application of the decision *expressis verbis* to all twelve existing self-governing professional associations with compulsory membership.<sup>46</sup>

#### 4. Restriction of Access to Training for a Profession

Compulsory membership in associations gives significant control of access to a profession to the associations themselves even though they do not exercise the power to decide membership on individual bases. Regarding the fact that membership is automatic upon fulfillment of legal prerequisites, the role of the professional associations is mostly limited to participation in the process of formulating those prerequisites and in practical implementation in the administration of the application process.<sup>47</sup> While in some professional associations achieving a set level of required education is the main criterion and prerequisite for membership (typically in medical chambers), in others additional training finalized by a professional examination organized by the associations concerned is required. This is typical for associations in the legal sector. Given that traineeship is the compulsory prerequisite for entry to the profession it follows that any restrictions in the admission process inevitably leads to the restriction of access to the profession itself as such.

Admissions to legal professions are traditionally based on legal education, professional traineeship and final Bar examination.<sup>48</sup> Qualification control is secured by supervision during practice in articles required strictly in the form of employment by CBA members and by the Bar examination provided and controlled by the CBA. In absence of the *Numerus Clausus* principle, the foregoing requirements represent a filter for safeguarding necessary professional standards. However, certain controversies are beginning to emerge in relation to the required qualification of applicants for traineeship. Training itself is subject to specific human rights protection according to which, not only the right to freely choose a profession but also the right to training for that profession is guaranteed.<sup>49</sup> Claims of this nature

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46 Z. Červínek, Standardy přezkumu ústavnosti v judikatuře Ústavního soudu, "Jurisprudence", 4/2015.

47 E. Dobrovolná, M. Králík, K soudní ochraně při rozhodování o žalobě žadatele o zápis do seznamu advokátních koncipientů, „Bulletin advokacie“, 11/2017.

48 V. Mandák, Výchova advokátních koncipientů a advokátní zkoušky, „Bulletin advokacie“, 4/1997; J. Svejkský, a kol. Advokátní právo. Praha: C.H. Beck, 2017.

49 Art. 26 para. 1 of the Charter.

are therefore also subject to review by the Constitutional Court. In this regard, a leading case was established based on the practice of Police Academy<sup>50</sup> graduates being denied admission to the CBA. This negative decision of the CBA supported by court review,<sup>51</sup> was based on the lack of appropriate legal education defined in the legislation, as a “*degree in law granted by a Law Faculty seated in the Czech or Slovak Federal<sup>52</sup> Republic*”.<sup>53</sup> A graduate of the Police Academy who later acquired a JUDr.<sup>54</sup> degree by way of a law faculty postgraduate study program, contested the judgment of the Court of Appeal and requested cancelation of the respective provisions of legislation limiting required legal education to be obtained exclusively at law faculties, claiming this to be unconstitutional based on the violation of fundamental rights to education granted by the Charter - the right to free choice of profession,<sup>55</sup> the right to equality before the law and non-discrimination.<sup>56</sup> The Constitutional Court not only considered the historical background affecting the curricula of the study programs but also the general guidelines by analyzing the character of the contested education in comparison to law faculty curricula. The principal differences were established in the orientation and proportions of the educational programs profile of graduates. Based on this argumentation the Constitutional Court did not find any violation of human rights granted by the Charter and rejected the application leaving the legislation’s strict requirement for legal education at Czech law faculties unchanged.<sup>57</sup>

The qualification requirement of a “*degree in law granted by a Law Faculty seated in the Czech or Slovak Federal Republic*”,<sup>58</sup> was also contested in relation to foreign law schools (some of them having branches in the Czech Republic). A significant case in this regard was formed by the Constitutional Court’s decision concerning the Pan-European University, a private Slovak law school.<sup>59</sup> It was cited that the CBA shall

50 The Communist controlled *National Security Corps College* of that time was later transformed to the *Police Academy* (herein “Police Academy”).

51 Constitutional Court decision I. ÚS 134/94 (25. 1. 1996) on Decisions of District Court for Prague 1, 12 C 519/93 (19.01.1994) and Decision of the Municipal Court in Prague, 22 Co 223/94, (09.06.1994), available at: <http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-7-95> (accessed 20.12.2018),

52 Original version is reflecting existence of Czech and Slovak Federal Republic until 1.1.1994.

53 See Sec. 3/b of the Attorney Act No.128/1990 Coll. available at: <https://www.zakonyprolidi.cz/cs/1990-128> (accessed 20.12.2018).

54 *JUDr. - Juris utriusque doctor* - title was used until 1990 when replaced by *Mgr.* Since 1990 *JUDr.* is used for specific postgraduate study graduates only. This one-year program, however, is different to the postgraduate Ph.D. law programs offered by Law faculties simultaneously.

55 Art. 26, para. 1 of the Charter.

56 Art. 1, Art. 3 para. 1 and 3, Art. 33 para.1 of the Charter.

57 Decision of the Constitutional Court on the case I.ÚS 134/94 (13.9.1995), 225/1995 Coll., available at: <https://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=2873> (accessed 20.12.2018).

58 Sec. 3/b Act. No. 128/1990 Coll.

59 M. Skřejpek, Soukromá právnická fakulta UNINOVA zahajuje, „Právní rozhledy“, 13/2009.

enter in the Register of Legal Trainees an applicant who has obtained a University degree in *“a foreign university, if such degree is recognized in the Czech Republic [...] if it corresponds, in its content and extent, to the general education which may be acquired within a Master’s program in law at a university in the Czech Republic”*.<sup>60</sup> The restrictive interpretation of the above principle by the CBA is largely based on the fact that the purpose of legal traineeship is to acquire knowledge of the experience needed to practice and as such cannot be substituted by higher academic education. It also reflects the fact that a trainee can be appointed and empowered to substitute Attorneys in legal services and must therefore be provided with the necessary knowledge of Czech law, including procedural law, since the very beginning of their legal traineeship. In this context, the CBA concluded that the legal systems of other countries, including EU countries, differ from the laws of the Czech Republic to such extent that respective knowledge is not guaranteed for the proper performance of legal traineeship.<sup>61</sup>

The Constitutional Court on the other hand adjudicated that knowledge of practical implementation of Czech law and experience is not limited to academic education only. The negative decision in this case was based on a stated lack of educational requirements despite the fact that the applicant had graduated from The Jagiellonian University in Krakow in the master’s degree law program; this education was recognized by respective Czech authorities and the individual concerned was later employed as a lawyer by a Czech attorney. In light of this, the original CBA requirement of additional Czech legal education in the form of special or postgraduate study at a Czech law school, originally recognized as the only form of qualification, was found to be unjustified by the Constitutional Court using in its analysis the general principles of EU law. The decision identified the scope of the skills that an applicant for registration on the list of trainees had already acquired during current practical experience especially in relation to legal skills such as the search, collection and processing of information, conflict management, communication (written and oral), conducting client interviews and presentation of legal advice, negotiation, etc. Based on this, the Constitutional Court found the interpretation of the CBA too restrictive also in the light of not taking into account the content, scope and high quality of legal education in Poland generally and of the Jagiellonian University in particular.<sup>62</sup> The decision specifically emphasized the quality of Polish law schools curricula in respect to practical skills<sup>63</sup> incorporating a method of clinical legal education allowing students to accumulate skills in providing legal advice to clients.

60 Sec. 37 Act. No. 85/1996 Coll. Attorney Act.

61 See at: <https://www.cak.cz/scripts/detail.php?id=7108>, (accessed 2.12.2018).

62 Decision explicitly refers to the fact that The Jagiellonian University Law school was in 2016 awarded by Gazeta Prawna for the sixth time in a row the best Polish law school.

63 D. Aksamović, P. Genty, An Examination of the Challenges, Successes and Setbacks for Clinical Legal Education in Eastern Europe; 2014

## 5. Protection of Group Interests in Professional Associations' Decision Making

The protection of group interests of a profession is considered legitimate in the agenda of regulated self-governing associations. In some cases, however, the degree of protectionism can result in violation of the principles of free economic competition.<sup>64</sup> Of particular significance in this respect are cases involving the collision of a professional organization's policy with the ban on associations making decisions which have as their object or effect the distortion of competition law.<sup>65</sup> Various attempts at fixing fees for services, restrictions on the advertising of services and other restrictions on the mechanisms of acquisition of new clients, along with previously mentioned restrictions concerning access to the profession, are the most typical competition distortions in this regard. Such distortions represent a particular danger in the case of professional associations with compulsory membership. The monopoly of self-governing associations over their respective professions can result in a negative impact on the economic conditions of rendering services. Such situation can also lead to the discrimination of new professionals attempting to enter the market. Protection against the undercutting of fees which may serve to harm the quality of services provided represents a legitimate concern. However, this has to be balanced with the principles of free economic competition. According to such principles, practitioners within a profession are free to determine their economic behaviour autonomously and with the only restrictions being those governed by law and the standards of fair competition.<sup>66</sup>

The Czech Office for the Protection of Economic Competition (hereinafter the Office) established leading cases concerning both professional associations with compulsory membership and other associations of various types.<sup>67</sup> The decisions made by the Office in some of these cases was subject to court review and issues of the nature and proportionality of the regulations assessed, especially by the Supreme Administrative Court, are of significance.

In the case of some of public law self-governing professional organizations delegation of state administration also involve the right to issue internal rules<sup>68</sup>

64 P. Mates, Státní dozor nad zájmovou samosprávou, „Právní rozhledy“, 19/2011.

65 Sec. 3 of the Act No. 143/2001 Coll. on the Protection of Competition, available at: [http://www.uohs.cz/download/Legislativa/HS/CR/143\\_2001\\_Sb\\_2017.pdf](http://www.uohs.cz/download/Legislativa/HS/CR/143_2001_Sb_2017.pdf), (accessed 2.12.2018).

66 I. Pospíšil, Sdružení soutěžitelů z hlediska soutěžního práva, in „Sdružení soutěžitelů pohledem UOHS“, available at: <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (accessed 12.12.2018); M. Petr, Zakázané dohody a zneužívání dominantního postavení v ČR, C.H. Beck, 2010.

67 Š. Vlašínová, Vybrané případy UOHS, in „Sdružení soutěžitelů pohledem UOHS“, available at: <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (accessed 20.12.2018).

68 Z. Koudelka, Zájmová samospráva a její předpisy, „Bulletin advokacie“, 5/2001.

including the fixing of fee scales. The power to issue such internal rules, however, has to be in each particular case based on an explicit legal authorization. In this regard the 2003 case of the CCET (the Czech Chamber of Chartered Engineers and Technicians) is of significance. Until 2008, the association was legally authorized to issue a scale of fees for services provided by its members.<sup>69</sup> Regardless of such authorization, the decision of the association to issue a list of recommended minimum service fees was sanctioned by the Office.<sup>70</sup> The judicial review of the decision by the Supreme Administrative Court cancelled the sanction but did not find the wording of legal authorization sufficient to create an exemption from the generally applicable free pricing principles.<sup>71</sup> In light of this, the Court found the principles of free economic competition prevailing. The situation was finally resolved by a change of legislation in 2008, when the authorization for the CCET to issue a scale of fee charges was abolished.

Besides cases involving fixed fees or recommended fee guidelines, other forms of distorting economic competition were also subject to scrutiny by the Office. In 2007, the CCP (Czech Chamber of Pharmacists), was sanctioned for the negativity of an opinion published by the association in its official bulletin. The opinion concerned the breach of ethical standards of the profession by the refund policy of a particular group of major pharmacy chains that was considered prohibited, void and distorting the principles of economic competition.<sup>72</sup>

Although price-fixing offences are the most frequent and serious forms of prohibited protection of group interests by professional associations, various other restrictive acts have been subject to review by the Office. The CVS (Chamber of Veterinary Surgeons) case concerning restrictions limiting the acquisitions of new clients by association members, is of significance in this regard. The 1998 version of the internal rules of the association explicitly conditioned the acquisition of new clients by the fulfillment of financial obligations of the client to the preceding veterinary surgeon. This restriction was applicable to all claims with the exception of minor debts and emergency cases. The internal rules also provided for restrictions concerning advertising and the participation of association members in public

69 Sec. 23/6/j of the Act No. 360/1992, Act on the Profession of the Chartered Engineers and Technicians in Construction, available at: <https://www.cka.cz/cs/pro-architektu/legislativa/pravni-predpisy/hlavni-zakony/zakon-o-vykonu-povolani/360-1992-od-1-1-2017.rtf> (accessed 2.1.2019).

70 Decision of the Office on the case S 188/03-7531/03- ORP (15. 12. 2003), available at: <http://www.uohs.cz/cs/verejna-podpora/sbirky-rozhodnuti/detail-8089.html> (accessed 2.1.2019).

71 Judgment of the Supreme Administrative Court on the case 5 AS 55/2006, (24.9.2007), available at: <https://iudicium.cz/1411/5-as-55-2006> (accessed 2.1.2019).

72 Decision of the Office on the case S 284/2007/KD-13557/2008/850 (12.8.2008), available at: <https://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti/detail-7955.html> (accessed 2.12.2018).

tenders. The sanction of membership termination was imposed by the association in several individual cases during the existence of restrictions referring to the ethical standards of the profession. The restrictive provisions of the internal rules of the CVS were abolished for breach of economic competition law by the Office and the association was fined.<sup>73</sup>

Not only associations with compulsory membership fall within the scope of the Office's agenda. Several other associations e.g. the Union of Translators and Interpreters,<sup>74</sup> the Association of Graphical Design,<sup>75</sup> the Association of Funeral Services<sup>76</sup> and others, have been subject to proceedings and consequent sanction by the Office for the distortion of economic competition, typically related to the price of services. It is also worth noting that sanctions were imposed by the Office despite the nature of said associations being based on voluntary membership. Cases of mutual harmonization or unification of pricing policy qualify in all instances as a violation of economic competition rules regardless of whether the association concerned falls into the category of being a regulated self-governing entity or otherwise.

Apart from twelve currently existing regulated professional associations in the Czech Republic, in some of the other associations based on voluntary membership a tendency towards a change in status can be identified. This phenomenon can be witnessed in cases where the management of certain associations can be seen to be striving for influence and power relating to improvements in the protection of joint interests of the profession along with a claimed improvement in professional and ethical standards. Considerations of compulsory membership in professional associations can be identified across the whole spectrum of business from specific and clearly defined professions (e.g. interpreters and translators, court appointed experts) to broad and extremely heterogenic groups (e.g. agricultural entrepreneurs). Here, the early identification of possible group self-interests concealed behind a cloak of purported professional and ethical standards as a means to exploit a monopoly position in economic competition, is of crucial importance. Likewise, it is also important to ensure that future legislative efforts utilize detailed and qualified

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73 Decision of the Office on the case ÚOHS-S566/2012/ KD-11841/2014/850/MSk, (4.6.2014), available at: <https://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti/detail-12000.html> (accessed 2.12.2018).

74 See <https://www.uohs.cz/cs/informacni-centrum/tiskove-zpravy/hospodarska-soutez/2446-sdruzeni-prekladatelů-a-tlumočnicků-porušovala-soutěžní-právo.html> (accessed 12.12.2018); Sdružení překladatelů a tlumočnicků porušovala soutěžní právo, 2018, available at: <http://www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/2446-sdruzeni-prekladatelů-a-tlumočnicků-porušovala-soutěžní-právo.html> (accessed 5.1.2019).

75 Decision of the Office on the case ÚOHS-S070/2008/KD-4545/2009/850 (17.4.2009), available at: <http://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti/detail-8250.html> (accessed 2.12.2018).

76 See at: <http://www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/718-sdruzeni-pohrebniectvi-negativne-ovlivnovalo-soutez.html> (accessed 12.12.2018).



analysis to balance professional freedoms (right of access to and right to practice in a profession) with the necessary principles of consumer protection.

## 6. Conclusions

The specific character and status of professional associations protecting both private and public interests produces inherent tensions. Representation of group-interests of the professions constitutes one of the significant legitimate roles of associations. However, as the cases examined illustrate, in the exercise of this function a tendency toward excesses in the protection of those interests exists. This commonly adverse and often contested phenomenon can be identified in overly favouring the interests of professional groups in the decision-making process of associations. In order to limit such influence, associations are traditionally subject to judicial and administrative review which forms the regulatory framework over their functioning.

Based on the analysis of recent Czech experience, certain current trends in regulated self-governing associations can be identified. Apart from the currently existing public law associations, a tendency towards a change in the status of some associations based on voluntary membership is observable. This phenomenon is largely influenced by the management of such associations striving for influence. The grounds cited for such efforts regularly refer to improvements in the protection of joint interests of the profession along with a claimed improvement of professional and ethical standards. Establishing whether such claims are true or merely a guise to exploit a monopoly position in economic competition is of critical importance. Consequently, any proposed limitation on the freedom of enterprise in existing or newly created self-regulated professional associations justified by the stated specifics of the profession, ethical standards and protection of consumer interests, must be thoroughly tested given that maintaining proportionality and balance between public and private interest is of vital importance. Therefore, and to reinforce this point, legitimate limitations justified by professional and ethical requirements must be clearly identified and separated from those that represent a risk to free market enterprise or which lean toward political and economic lobbying to achieve a position of market dominance.

The analyzed case law shows that Czech courts together with the Office for the Protection of Economic Competition, have already established practical guidelines that confirm a conservative approach in which the principle of free economic competition values prevail. However, both the principle of free enterprise and the right of free access to a profession, represent important protected values. Persistently contested parameters of the regulatory framework reveal the dynamics of the system especially in terms of tensions between the complex functions of professional associations combining the protection of both public and private interests. Therefore,



the status, scope of powers, principles of organization and sole *raison d'être* of self-governing organizations have to be subject to detailed legal analysis in each particular case. This especially applies in relation to future legislative efforts in which limitation of the right of free enterprise should be considered a rare exemption justified only by a fundamental, real and legitimate need to serve the best interests of the public.

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