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# BIAŁOSTOCKIE STUDIA PRAWNICZE

# BIAŁYSTOK LEGAL STUDIES

BIAŁYSTOK 2019 VOLUME 24 nr 2

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# HUMAN RIGHTS IN BUSINESS

# Contents

# Introduction

Fundamental (human) rights are nowadays ubiquitous in the discourse of the Western world. It is no longer just about the rights of natural persons, but also of legal persons. It is not just public subjective rights that an individual can claim against public authorities, but also rights that are protected in horizontal relationships between individuals. According to some, human rights represent the only shared ideology in an otherwise relativistic, individualistic and hedonism-oriented liberal society.

We understand how important they are when they present a fragile backstop against cynical manipulation of individuals as mere instruments used in the interests of more powerful individuals or their differently conceived collective entities. At the same time, we see how problematic they are, if broadly conceived fundamental rights called for "by all against everyone" are of purely utilitarian use that further atomizes societies. This inherent tension makes them fragile. If they are to survive and serve well both individuals and their societies a sufficient number of people must take them seriously and understand them in correlation with the obligations and responsibilities not only of others but of everyone. Therefore, fundamental (human) rights have their philosophy, sociology and law, and quite naturally, they are more often than not subject to political disputes and academic dissertations.

The present volume obviously belongs to the category of academic dissertations. It was written by academics from several East-Central European countries. Every author chose his theme from the wide range of topics given by the joint title "Human rights in business". Each of them treated his or her human rights topic from the national, European and sometimes wider international perspective. Their contributions thus confront national practices with standards of the UN, EU or ECHR, by analyzing statutory provisions and case law in areas such as social dialogue, privacy in the workplace, employment of persons with disabilities, as well as customers', professionals' and companies' fundamental "market" rights etc.

Such variety of contributions shows that the common aim was not to elaborate the topic "Human rights in business" systematically, from a deep general theory, through an exhaustive analysis of all aspects, to the final report on the state of things in this area. The team's ambition was more modest: bring the East-Central European

insight into the issues that are in international comparisons often treated from the perspective of large jurisdictions, i.e. of the legislation and legal practice of world or regional powers. Here, the problems of the "new EU Member States", which are sometimes viewed only as apprentices of the West more or less successfully catching up with their more advanced tutors, are analyzed in detail and presented in their European or international context. The following contributions prove that in East-Central Europe solutions to contemporary problems are also being sought and that the experience of those countries can be internationally interesting and relevant.

And that is precisely the purpose of this volume dedicated to "Human rights in business": to enable the "Eastern" states of the European Union to contribute to the debate on how to legally define and effectively enforce these rights in the 21st century world of business.

We end this brief editorial note with expressions of deep gratitude. We wish to thank the authors and various anonymous reviewers who willingly gave their time and expertise to contribute to the current volume.

*Anna Piszcz, University of Białystok*
*Václav Šmejkal, Škoda Auto University & Charles University in Prague*
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# ARTICLES

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# The UN Guiding Principles on Business and Human Rights and their Implementation in Germany and the Czech Republic

**Abstract:** In this paper the authors focus on the United Nations Guiding Principles on Business and Human Rights of 2011 which present the most ambitious international attempt to tackle the problem of business and human rights. The authors deal with the genesis and the added value of the UN Guiding Principles and analyze which legal tools may be used by victims against business entities that have violated their human rights. A special view is given on law and legal practice in Germany and in the Czech Republic. Although the UN Guiding Principles, so far, have had only little influence on national rules concerning jurisdiction, procedural and material law in liability cases we find that their pontential shall not be underestimated. We expect that the implementation of the UN Guiding Principles will lead to a reform of national procedural regulations. States will have to consider ways how to introduce new procedural instruments like e.g. representative action and class action and how to address issues concerning evidence in international cases.
**Keywords:** UN Guiding Principles, business, human rights, jurisdiction, legal remedies, Czech Republic, Germany, European Union

1 Jitka Brodská works at the Ministry of Foreign Affairs of the Czech Republic. The opinions expressed in this article are the author's own and do not reflect the views of the Ministry of Foreign Affairs.

## 1. Introduction

In the context of globalization, there is little dispute that business activities may have a negative impact on human rights. With regard to human rights violations caused by transnational corporations, world media have been informing e.g. about inhuman working conditions, disrespect for indigenous rights and the destruction of the natural environment. In situations when TNCs based in rich countries transfer their activities to poor countries, the risk of human rights violations may be enormous. One of the reasons for this is that the economic power of some private business entities exceeds the economic power of many states.

In the past two decades the UN has intensively dealt with the responsibility of private corporations for human rights violations. The UN Guiding Principles on Business and Human Rights of 2011 are the most ambitious international attempt to tackle the problem of business and human rights. In this study we will present the genesis and the added value of the UNGPs. Thereafter we will describe which legal tools may be used by victims against business entities violating their rights. In the last part, we will focus on the problem of legal redress in Germany and in the Czech Republic. In this context we will see how the UNGPs as a document of international soft law may influence national regulations on jurisdiction, procedural and material law in international liability cases.

## 2. The UN Guiding Principles on Business and Human Rights

### 2.1. International law and foreign business activities

International law, as a coordinative legal system, is established by sovereign states. Rights and obligations under international law are, in principle, addressed to states. Therefore, international investment law that governs issues of capital transactions is mainly based upon international treaties binding to states parties. Also human rights law which stipulates e.g. property rights and fair trial standards in favour of private individuals including business entities is conceived in terms of state obligations.

According to the principles of state responsibility, it is the host state of the business corporations which actually under international law bears the responsibility for the prevention of acts that violate human rights. However, governments in developing countries, too often, are not willing to enact appropriate enforcement and control measures. In cases of human rights violations, they are afraid of serious disadvantages in international location competition. In some cases they are simply unable to react properly as those responsible within the complex structures of transnational business entities can hardly be determined. From this perspective, the traditional mechanisms of state responsibility do not help.

Therefore, the assumption that private business corporations are not legal subjects under international law meets with skepticism. It is feared that international

law might become ineffective if transnational corporations as relevant actors were not included in the system. Relevant UN bodies started to deal with corporate responsibility in terms of international soft law. In August 2003, the then UN Sub-Commission on Promotion and Protection of Human Rights, as a sub-organ of the UN Commission on Human Rights, recommended the adoption of "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights".[2] The Draft Norms were based on international treaties, on guidelines of international organizations on voluntary corporate codes of conduct and on model guidelines of NGOs and trade unions. So, in part, the "Draft Norms" were simply reformulating what already existed. However it partly also intended to transform the concept of voluntary commitments to more concrete obligations of business entities.

In the light of significant disagreement by business corporations criticizing the alleged privatization of human rights protection, the UN Human Rights Commission finally decided not to adopt the document.[3] As a consequence thereof, UN Secretary-General Kofi Annan in July 2005 appointed John G. Ruggie as Special Representative on Human Rights and Business.

The UN Guiding Principles on Business and Human Rights which are the final product of John Ruggie´s work[4] were endorsed by consensus in the UN Human Rights Council in June 2011.[5] They represent the universally accepted authoritative framework and the global standard of practice for preventing and addressing the risk of the adverse impact of business activities on human rights. Although they do not constitute a legally binding document and rather fall under international soft law, they build on existing standards and include elements covered in international and domestic law. They also do not preclude developments leading to the adoption of a legally binding instrument in the future.

### 2.2. The Structure of the UN Guiding Principles

The Guiding Principles establish a framework of three pillars: firstly the state's duty to protect human rights, secondly corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing the rights of others, and thirdly access to remedies for victims of business-related abuse. The document clarifies and details duties of states and responsibilities of business entities which are distinct but complementary. 14 of the 31 Guiding Principles are addressed to business entities. As the Guiding Principles have been conceived to be as inclusive as possible,

2 E/CN.4/Sub.2/2003/12 (2003).

3 M. Kube, Chancen globaler Gerechtigkeit? Möglichkeiten der Bindung transnationaler Unternehmen an die Menschenrechte, "Forum Recht" 2006, vol. 4, pp. 114-117.

4 The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council A/HRC/17/31.

5 Human Rights Council resolution 17/4 of 16 June 2011.

they shall apply to all states and to all companies of all sizes, in every sector, and in any country.

Especially through the principles of the second pillar, the UNGPs provide a foundation for expanding the international human rights regime to encompass not only countries and individuals, but also companies.[6] After the mandate of Special Representative John Ruggie had expired in 2011, a UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Entities[7] was established to promote the "effective and comprehensive dissemination and implementation" of the UN Guiding Principles.[8] Its mandate includes also exploring options and making recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas.[9]

### 2.3. State Duties and Corporate Responsibility to Protect Human Rights

International human rights law obligations require that states respect, protect, and fulfill the human rights of individuals within their territory and/or jurisdiction.[10] These obligations frame the first pillar of the UN Guiding Principles. The duty to protect is a standard of conduct, not result. This means that states are not per se responsible when a business enterprise commits a human rights abuse but they may breach their international human rights law obligations if they fail to take appropriate steps to prevent such abuse and to investigate, punish, and redress when it occurs.[11]

The second pillar identifies the responsibility of business entities to respect human rights and it specifies a due diligence process which companies should give effect to.[12] According to Ruggie, the second pillar required the most significant conceptual departure from the standard human rights discourse and has become the centrepiece of the Guiding Principles.[13] The responsibility to respect human rights

6 J.G. Ruggie, Just Business, Multinational Corporations and Human Rights, W.W. Norton and Company LTD, London 2013, p. 124.

7 More information available at: https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx (accessed 24.04.2019).

8 D. Augestein, M. Dawson, P. Thielborger, The UNGPS in the European Union: The Open Coordination of Business and Human Rights, "Business and Human Rights Journal" 2018, vol. 3, pp. 1-22.

9 Resolution of the Human Rights Council 17/4 of 16 June 2011.

10 Commentary to the Guiding Principle 1 – The state's duty to protect human rights; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

11 J.G. Ruggie, Just Business…, *op. cit.*, p. 84.

12 UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, Geneva 2015, p. 1.

13 J.G. Ruggie, Just Business…, *op. cit.*, p. 90.

represents a global standard of expected conduct for all business enterprises wherever they operate[14] and refers to internationally recognized human rights. At a minimum, it refers to those rights that have been expressed in the International Bill of Human Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[15] In principle, business activities can have an impact, directly or indirectly, on the entire spectrum of human rights. However, in practice, some human rights may be at greater risk than others.[16]

The word "responsibility" was intended to signal that it differs from legal duties as it exists over and above legal compliance.[17] To identify, prevent, mitigate, and account for human rights abuses, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and communicating how impacts are addressed.[18] The due diligence process shall go beyond identifying and managing material risks to the company itself and should include risks the business activities may pose to the rights of affected individuals.[19]

## 3. The UNGPs and the Concept of Due Diligence

The concept of human rights due diligence is introduced in both the first and second pillar of the UNGPs. Human rights due diligence, however, should not be confused with other forms of legal due diligence activities, such as those carried out in preparation for corporate mergers and acquisitions or those required for compliance monitoring purposes in areas such as banking or anti-corruption. These activities

14 Commentary to the Guiding Principle 11 – The corporate responsibility to respect human rights; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

15 Guiding Principle No 12; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

16 Commentary to the Guiding Principle No 12; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

17 Office of the UN High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, United Nations 2012, p. 13.

18 Guiding Principle No 17 – Human Rights Due Diligence; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

19 J.G. Ruggie, Just Business…, *op. cit*., p. 99.

are generally concerned with identifying, preventing and mitigating risks to business, whereas human rights due diligence is concerned with risks to people.[20]

The Commentary to the Guiding Principles notes that "conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[21] Understanding the linkages between human rights due diligence and legal liability can offer insights into different ways to strengthen domestic legal regimes from a business and human rights perspective.[22] Clarification of the relationship between human rights due diligence and determination of corporate liability has been provided by the Office of the United Nations High Commissioner for Human Rights in its recent report presented to the Human Rights Council in June 2018.

The exercise of human rights due diligence by a business enterprise may become relevant to questions of corporate legal liability in several ways. It can be firstly made an explicit legal requirement under national law; secondly part of evidence presented to prove that a company was not negligent; thirdly invoked as a statutory defence to an offense, and fourthly relevant when determining the appropriate sanction or remedy if legal liability was established.[23]

Domestic regulatory regime can require human rights due diligence as a standard of conduct. States can adopt laws that require companies to carry out human rights due diligence activities or else face legal liability. French duty of vigilance law[24] requires French companies with at least 5,000 employees in France, or 10,000 employees throughout the corporate group to publish an effective vigilance plan detailing measures for risk identification and for the prevention of severe violations of human rights resulting directly or indirectly from their operations, as well as the operations from companies they control, and certain subcontractors and suppliers. In the Netherlands, a new act establishing due diligence standards with respect to

20 OHCHR, Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability, Report of the UN High Commissioner for Human Rights, A/HRC/38/20/Add.2, p. 4.

21 Commentary to the Guiding Principle 17, UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

22 OHCHR, Improving accountability…, *op. cit.*, p. 4.

23 OHCHR, Consultation: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, Concept Note, October 2017, p. 3.

24 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

the problem of child labour has been adopted. It requires companies to develop and apply strategies in their supply chains and sanctions non-compliance.[25]

In Switzerland, a Responsible Business Initiative and related parliamentary initiative requiring companies to exercise due diligence in their own operations as well as companies they control were proposed. In June 2018, a counter-proposal representing a compromise between the initiators of the Responsible Business Initiative, the parliament and business representatives was adopted by the National Council. The proposal still has to be approved by the Council of State. It covers companies exceeding set thresholds, companies with particular high-risk activities regardless of their size; however, the proposal excludes large companies with particular low risks.[26]

At the EU level, the Non-Financial Reporting Directive 2014/95 establishes a basis for due diligence to be required in respect of human rights and corruption.[27] The Directive requires companies to "*prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. (…) The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.*" Besides the Non-financial Reporting Directive, it is worth noting also the EU Regulation on conflict minerals adopted in 2017 which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.[28]

The corporate due diligence in respecting human rights has been incorporated also into the German national action plan on Business and Human Rights. The Federal Government articulated its expectation that all enterprises introduce the corporate due diligence in a manner commensurate with their size, the sector in which they operate, and their position in the supply and value chain. Compliance will be reviewed annually from 2018. In the absence of adequate compliance, the Government will consider further action, which may culminate in legislative measures and in the widening of the circle of enterprises to be reviewed. The goal is

25 D. Blackburn, Removing barriers: How a treaty on business and human rights could improve access to remedy for victims, International Centre for Trade Union Rights 2017 (available at https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf, accessed 24.04.2019), p. 52.

26 For further information see the webpages of the citizens' initiative: https://corporatejustice.ch/press-release/compromise-remains-open (accessed 24.04.2019).

27 Directive 2014/95/EU, Article 1.

28 Regulation EU/2017/821 on conflict minerals.

that at least 50% of all enterprises based in Germany with more than 500 employees will have incorporated due diligence standards by 2020.[29]

The Czech national action plan on business and human rights formulates due diligence requirement in a soft way. It recommends that businesses consider introducing an internal due diligence mechanism to spot and eliminate human rights risk, or incorporate human rights risks into their existing due diligence mechanisms.[30] As for the EU requirements, the Czech Republic has transposed the Non-financial Reporting Directive into Act No 563/1991 on accounting. Non-financial information will be disclosed by large public-interest entities with more than 500 employees. Information on respect for human rights will be a mandatory part of the report.

The concept of negligence is a basis for corporate liability in many jurisdictions. Human rights due diligence can be relevant when determining whether a company negligently caused or contributed to harm. Tests of negligence frequently include the following elements: a) the existence of a legal duty of care towards an affected person; b) a breach of the applicable standard of care by the defendant and c) a resulting injury to the affected person; d) caused by the breach. Although many companies appear to view human rights due diligence as relevant, there is little evidence as yet that the Guiding Principles have an impact on judicial decision-making about the nature and scope of corporate duties and standard of care in cases where businesses are alleged to have caused or contributed to adverse human rights impacts. There are few instances[31] of the Guiding Principles being referred to directly in court judgements.[32]

While not appropriate in all cases, the exercise of human rights due diligence could be a basis for a possible defence to liability. In the field of bribery, the UK Bribery Act 2010 created a strict liability offense for companies for failing to prevent bribery. However, the Act gives companies a defence if they can show that they had in place "adequate procedures" designed to prevent from undertaking such conduct.[33] Conducting human rights due diligence could also help companies to reduce the risk of secondary liability or "complicity" when a business enterprise contributes to adverse human rights impacts caused by other parties.

Human rights due diligence can also be relevant for determining the type and severity of sanctions and remedies once liability is established. Under Italian Legislative Decree 231/2001, companies can receive a reduction of pecuniary

29 German Federal Foreign Office, National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, Berlin 2017, p. 10.

30 National Action Plan for Business and Human Rights of the Czech Republic for the years 2017–2022, approved by the government on 23rd October 2017, p. 35.

31 Decisions in Canadian courts have made references to the Guiding Principles – e.g. Araya v. Nevsun Resources Ltd., 2016 BCSC 1856 or Choc v. Hudbay Minerals Inc., 2013 ONSC 1414.

32 OHCHR, Improving accountability…, *op. cit.*, p. 7.

33 Bribery Act 2010, § 7 (2).

sanctions if, before any trial starts, they fully compensate any damage, and adopt and implement an organizational model suitable to prevent similar crimes from occurring again.[34]

## 4. The UNGPs and Access to Legal Remedies

The third pillar of the Guiding Principles specifies the need to ensure better access to legal remedies which address the joint responsibility of states and business enterprises for human rights violations. States are required to take steps to investigate, punish, and redress business related abuses of human rights. Through judicial, administrative, legislative or other appropriate means, states shall ensure that those affected have access to an effective remedy.[35] Besides judicial remedies, also state-based non-judicial and non-state-based mechanisms may be used.

Effective remedies on the national level shall tackle both procedural and substantive aspects. According to the Commentary to the Guiding Principles, state-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. In this respect, domestic judicial mechanisms shall be effective, and legal, practical and other relevant barriers that could lead to a denial of access to remedy shall be reduced. Relevant barriers may be for example the costs of bringing claims against business corporations, difficulties in securing legal representation and inadequate options for aggregating claims or enabling representative proceedings such as class actions and other collective action procedures.

### 4.1. Measures at the EU level

As issues related to access to justice fall partly under EU law, the EU has considered ways of how to implement the third pillar of the UNGPs. In its Conclusions of 2016, the EU Council requested the EU Agency for Fundamental Rights (FRA) to issue an expert opinion on possible avenues to lower barriers for access to remedy. The FRA opinion has been delivered in April 2017 and deals with a number of important aspects related to legal remedies.[36]

It is natural that the EU Charter of Fundamental Rights, besides other international human rights documents, serves as the main point of reference in the FRA opinion. Business-related human rights abuses may affect concrete rights laid

34 Italian Legislative Decree No 231/2001, Criminal Liability of Legal Entities, art. 12(2). The provision is regulating cases where the fine can be reduced.

35 Guiding Principle No 25 – Access to Remedy; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

36 FRA Opinion – 1/2017 [B&HR], Vienna, 10.04.2017.

down in the Charter, e.g. the right to security of the person, economic and social rights, civil and political rights, the right to non-discrimination, the right to privacy, labour rights, and rights of communities or groups including indigenous peoples, as well as consumer rights and rights related to environmental protection.

The FRA has pointed out that, from the perspective of EU law, extraterritorial access to remedy is an important issue. In the past, the EU has adopted harmonized rules on the choice of court and the choice of law. In principle, the Brussel regulation (Brussel I recast) provides for companies that have their statutory seat or their central administration in an EU Member State to be sued before the courts of that state for damages that have been caused by the company outside of the EU. Europeanized rules of private international law (Rome II Regulation) further provide that, as a rule, applicable law is that where the damage occurs.

However, the FRA opinion found that despite harmonized EU rules on jurisdiction EU Member States continue to apply different approaches to issues which have not been harmonized so far: e.g. the liability of a parent company for acts of a subsidiary and due diligence criteria of a parent company with respect to a subsidiary. Therefore, it remains unclear under which conditions the connection between an EU based company and a subsidiary outside the EU is sufficiently strong to establish the jurisdiction of an EU court rather that a court in a host state. By the way, the problem of "forum shopping" does not apply only in relation between an EU Member State and a third country but also between two Member States. In some Member States remedies are more accessible than in others.

With a view to divergent standards on the Member State level, it is appropriate to study concrete national solutions. For the purpose of this paper we will focus on the legal situation in Germany and the Czech Republic.

### 4.2. Germany

#### 4.2.1. General considerations

Although Germany is one of the world's largest economies and is hosting many internationally operating business entities, German courts, so far, have dealt with transnational tort litigation very rarely. According to Philipp Wesche[37] this situation is due to two main factors, first, a lack of advocacy organizations specialized in the enforcement of human rights and, second, the poor legal framework relating to such litigation. Wesche believes that the problem is not so much the issue of jurisdiction as German courts can exercise jurisdiction over companies domiciled in Germany, irrespective of where the damage occurred.

37 P. Wesche, Corporate human rights abuses and access to justice in Germany – why so little tort-litigation? (available at https://www.business-humanrights.org/en/corporate-human-rights-abuses-and-access-to-justice-in-germany-%E2%80%93-why-so-little-tort-litigation, accessed 24.04.2019).

In general, there are no jurisdictional rules specific to transnational disputes. If the standard rules of the German Code of Civil Procedure (ZPO) provide for local jurisdiction, this means that the German court will also have international jurisdiction. German law, further, does not distinguish between national and foreign plaintiffs.[38] Jurisdiction of the German courts is, in principle, established through the place of residence of the defendant in Germany. In the field of tort law, German courts according to § 32 ZPO assume jurisdiction over foreign parties if the tort took place in Germany. The way to German courts, however, remains closed in a situation with a pure foreign connection, in which there is no sufficient territorial or personal connection to Germany. Therefore it is not possible to assert the jurisdiction of German courts in cases of human rights violations which have been perpetrated by foreign-based subsidiaries in relation to citizens of the host State or other persons who are not German nationals.[39]

Moreover, even in those international cases over which German courts assert jurisdiction, German material law does not apply and, besides this, procedural barriers make litigation very difficult in practice. Wesche has pointed out that, unlike common law systems, German procedural law does not provide for discovery procedures. In common law this tool enables claimants to obtain large amounts of documents from within companies. Under German procedural law however, claimants have to specify the name and describe the documents they want to obtain. Therefore, evidence on the internal structure of a business entity or internal health and safety practices will be hardly available.[40]

Besides this, several authors have criticized the lack of collective actions under German law.[41] As representative proceedings and class actions are not available, it is not very attractive for law firms to litigate on behalf of many victims of human rights violations. According to Wesche, the statutory lawyers' fees which are dependent on the value of the matter in dispute are often too low to cover the costs of developing cross-border litigation.

Another problem is related to the applicable law. Although German courts, under specific circumstances, may assert jurisdiction in cases of human rights violations caused by German-based business entities, they will have to apply the law of the host country. Such approach is questionable in cases in which the local standards of human rights protection are significantly lower than in Germany. Besides this, most German law firms are not very familiar with the national law of countries in which

38 M. Molitoris, A. Abt, Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU. National report for Germany (available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_germany_en.pdf, accessed 24.04.2019).

39 A. Hennings, Über das Verhältnis von Multinationalen Unternehmen zu Menschenrechten. Eine Bestandaufnahme aus juristischer Perspektive, Göttingen 2009, p. 132.

40 P. Wesche, Corporate human rights abuses…, *op. cit*.

41 See e.g. C. Geiger, Kollektiver Rechtsschutz im Zivilprozess, Tübingen 2015.

systematic human rights violations happen. Also for judges the application of foreign law may be difficult in such cases.[42]

In order to increase access to compensation for victims Wesche suggests that the German government shall take up the UN Guiding Principles on Business and Human Rights and provide operational recommendations to improve access to remedy. Second, an impartial study on the material and procedural barriers to litigation in German law should be conducted.

4.2.2. The case of Jabir et alii v. KiK

In September 2012, more than 260 workers died in a fire at a textile factory in the Pakistani town of Baldia, hundreds of people were very seriously injured. As the German clothing retail company "KiK Textilien und Non-Food GmbH" (KiK) was the main customer of the factory, a survivor and 3 families of victims filed a lawsuit against the company at a German court. According to the claimants KiK should be held responsible for safety deficiencies in the factory which caused the high number of casualties. It was reported that the factory was built in violation of applicable building and fire safety standards, electrical installations were in bad condition and, despite previous fire incidents, it did not possess sufficient fire alarms and extinguishers. Moreover, there were insufficient emergency exits, and those that did exist were locked at the time of the fire.[43]

After KiK had paid US$1 million in emergency compensation shortly after the accident, the International Labour Organization, in September 2016, informed that, during its mission to Pakistan, it had facilitated an agreement in which KiK agreed to pay a total of $5.15 million to the affected families and survivors as a compensation for loss of income, medical and allied care as well as rehabilitation, to the victims of the fire. The compensation agreement made reference to the ILO Employment Injury Benefits Convention 121.[44]

Already before an agreement was reached in Pakistan, in March 2015, a lawsuit was filed with the District Court of Dortmund seeking compensation for pain and suffering caused by the fire for all the affected families. The claimants further requested an apology and the promise that KiK, in the future, would act in compliance with the relevant safety regulations at its outsourced clothing production facilities. The Dortmund court in August 2016 accepted jurisdiction and granted legal aid to the claimants.

42 M. Kaufmann, Menschenrechtliche Unternehmensverantwortung in der Liefer- und Wertschöpfungskette: juristische Möglichkeiten, "WISO" 2016, vol. 2, pp. 53-68.

43 P. Wesche, M. Saage-Maaß, Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK, "Human Rights Law Review" 2016, vol. 16, pp. 370-385, 372.

44 See the ILO Press Release of 10 September 2016 at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_521510/lang--en/index.htm (accessed 24.04.2019).

As for the link between KiK and the Pakistani factory the claimants alleged that KiK had controlled factory conditions and assumed responsibility for safety management. According to the claimants KiK regularly intervened in the factory's operations, including by directing and monitoring safety management. KiK´s own code of conduct, which forms part of its supply chain contracts, required suppliers to ensure safe working conditions and allowing KiK to monitor them. KiK admitted it developed correction plans and supervised their implementation.[45] However, later KiK insisted that the fire was caused by an arson attack carried out by a local political party and there were no fire safety issues reported by auditors.[46]

From the procedural perspective the case of Jabir et alii v. KiK illustrates a number of problems which occur in international tort litigations that are carried out before a German court. With regard to the issue of jurisdiction the regulation Brussels I leaves it upon national rules whether jurisdiction shall be assumed in cases concerning jurisdiction over companies located outside the EU. As German law, aside from some very narrow exceptions, does not provide for the jurisdiction of German courts over foreign subsidiaries, the complainants could not bring a lawsuit against the Pakistani factory.[47]

As for the case against German-based KiK, it is clear that the German court, in line with regulation Rome II, has to apply the law of the country where the damage occurred (lex loci damni). At first glance it is hard to say whether the application of lex loci damni constitutes an advantage for the claimants or the defendants. According to Wesche and Saage-Maaß, it would be a mistake to consider the legal systems of developing countries automatically as less developed in terms of human rights protection than the German legal system. If the legal system in developing countries seems to be weak or malfunctioning, this is often due to the poor quality of enforcement rather than the content of the relevant law. Quite surprisingly, Wesche and Saage-Maaß contain that, in the KiK case, the application of Pakistani tort law will benefit the claimants as it provides legal precedent with regard to parent company liability and enables them to claim damages for pain and suffering for loss of life, which do not exist in the German system.[48]

With regard to procedural rules, German law remains applicable irrespective of the material law. One of the basic issues will be how to cope with the asymmetry of relevant information. Most of the evidence that might disclose a violation of security standards and shortcomings in the monitoring procedures lies in the hand

45 P. Wesche, M. Saage-Maaß, Holding Companies Liable…, *op. cit*., p. 373.

46 See a report by the German broadcaster Deutsche Welle (DW) of 9 February 2017 (https://www.dw.com/en/german-retailer-kik-compensates-pakistans-industrial-9-11-families/a-37470138, accessed 24.04.2019).

47 P. Wesche, M. Saage-Maaß, Holding Companies Liable…, *op. cit*., pp. 373-374.

48 P. Wesche, M. Saage-Maaß, Holding Companies Liable…, *op. cit*., p. 375.

of the defendant company. In this respect we may note that an attractive feature of common law jurisdictions is the disclosure or discovery procedure. This means that documents related to the facts of the case must be submitted to the court and the other party prior to the trial.[49] However, the German Code of Civil Procedure does not provide for such tool. Therefore, for the claimant it is hard to decide on whether it is worth investing further resources. Whenever the claimant, with reference to § 421 ZPO, asks the German court to order the defendant to disclose documents, he has to describe the document, explain the details of the facts which shall be proven, provide an accurate description of the contents of the documents and explain why the defendant is in possession of the document. It seems clear that such tool is of limited help.[50]

In August 2018 the district court in Dortmund granted legal aid to the claimants,[51] a fact which some authors have interpreted as promising.[52]

### 4.3. Czech Republic

#### 4.3.1. General considerations

The situation in the Czech Republic differs from the one in Germany where many business entities operating abroad are hosted. There are not many private entities based in the Czech Republic which develop their business globally. However, within the Czech Republic, there is evidence of cases where employees, frequently foreign nationals employed through temporary employment agencies, found themselves in a highly vulnerable position and their rights have been abused by business corporations. From a Czech perspective, it is therefore more appropriate to examine the cases of human rights abuses of foreign nationals that have occurred.

Even though Czech private companies have been able to catch up with the wider trend of paying attention to corporate social responsibility,[53] the level of acceptance of the UN Guiding Principles remains rather low, so far.[54] It is the ambition of the Czech National Action Plan to raise awareness of the concept of business and human rights so that businesses are able to avoid mistakes born of ignorance and negligence.

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49 C. Van Dam, Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights, "JETL" 2011, vol. 3, pp. 221-254, 230.

50 P. Wesche, M. Saage-Maaß, Holding Companies Liable…, *op. cit*., pp. 380-381.

51 LG Dortmund, 29.08.2016 – 7 O 95/15.

52 J. Salminen, From National Product Liability to Transnational Production Liability: Conceptualizing the Relationship of Law and Global Supply Chains, Turku 2017, p. 200.

53 V. Hermanová, H. Smekal, Implementation of the UN Guiding Principles: The Case of the Czech Republic, Masarykova univerzita 2013, p. 18.

54 Centre for Human Rights and Democratization, Business and Human Rights, Current State in the Czech Republic and Implementation of the UN Guiding Principles on Business and Human Rights, Analysis for the MFA of the Czech Republic, Brno 2015.

When introducing the concept, the Government built on both existing legislation and voluntary corporate commitments.

In general, human rights in the Czech Republic are legally protected and enforceable; anyone who feels that his rights have been violated may seek judicial protection. However, lawsuits tend to be lengthy and arduous for someone who does not speak the language. For example, the number of labour law disputes gradually decreases (both in absolute and relative numbers). Also the expected costs of the proceedings have a deterrent effect on victims of human rights abuses.[55] In criminal proceedings, victims may be represented by an agent, such as a non-profit organisation. There are certain cases under Czech law where Czech citizens and nationals, as well as legal persons established in the Czech Republic, can be prosecuted for violations of human rights abroad.[56] These include the criminal law tenets of personality and universality.[57] A legal person can be liable for all crimes other than a narrow group of acts expressly precluded by law.[58]

4.3.2. Most serious infringements of working conditions

Whereas minor cases of labour law violations are subject to checks by labour inspection bodies, more serious cases can be prosecuted as crimes.[59] This is also the case of hidden exploitation of migrant workers where civil law proceedings do not represent a suitable solution.

In 2008, an organized group was detected that had been recruiting farmworkers abroad. These farmworkers, coming from Romania and working in asparagus fields or in meat factories, were sometimes working up to 12 or 18 hours a day and were paid only a fraction of the wages they had been promised. A judgement of the Supreme Court was given in March 2014.[60] The Supreme Court was examining the crime of trafficking in human beings and especially its elements of forced labour and other forms of exploitation, committed in an organized group (Section 232a 2) c) of Act No 40/2009, the Criminal Code). In its judgement, the Supreme Court requested the respective regional court to reconsider the legal qualification of the act and to take into account its reasoning which contains extensive deliberation on the element of forced labour.

Another case was heard by the Supreme Court in 2013.[61] Between 2007 and 2009, at least 22 construction workers – homeless persons or foreign nationals – were held enslaved. They were working under severe conditions. Sometimes they

55 M. Štefko, Alternativní řešení pracovních sporů, výhled do budoucna (forthcoming).
56 Czech National Action Plan on Business and Human Rights, 2017, pp. 6-7.
57 Sections 6, 7 and 8 of Act No 40/2009, the Criminal Code.
58 Act No 418/2011 on the criminal liability of and proceedings against legal persons.
59 Czech National Action Plan on Business and Human Rights, 2017, p. 16.
60 Judgment of the Supreme Court 7 Tdo 1261/2013 of 12 March 2014.
61 Judgment of the Supreme Court 4 Tdo 366/2013 of 14 May 2013.

were physically attacked and were not paid the promised wage. Also in this case, the Supreme Court examined the crime of trafficking in human beings but with a special focus on the element of the benefits gained by the offender who was abusing the difficult financial and social situation of the victims. The Supreme Court refused the objections of the offender.

Between 2009 and 2011, there were several cases of large-scale labour exploitation involving up to several hundred workers in the forestry sector. These cases were heard by the Constitutional Court of the Czech Republic. A finding of the Constitutional Court was given in 2016[62] in the case of Vietnamese forest workers who had not been paid their wage even though they had been working up to 12–14 hours a day, 7 days per week, under severe conditions. The Constitutional Court cancelled the decisions of the Police and the Office of the Prosecutor which had qualified the act as a fraud. The Constitutional Court requested the respective authorities to reconsider the case while taking into account the crime of trafficking in human beings. Another finding of the Constitutional Court[63] was given in 2015 in the case of 66 Vietnamese, Romanian and Slovak forest workers who had been working under undignified working conditions and had not been paid their wage. The Constitutional Court cancelled the decisions of the Police and the Office of the Prosecutor which had qualified the respective act as a fraud due to the violation of the right to effective investigation.

To prevent these modern-day unfair practices, there needs to be a coordinated cooperation between several state bodies and social partners. A law is being drawn up that should tighten conditions for the establishment and operation of temporary employment agencies and the Government was tasked to raise foreign nationals´ awareness of their labour rights and obligations.[64]

## 5. Conclusions

The United Nations Guiding Principles are supported by significant consensus. States, businesses and other actors have launched implementation initiatives with the aim to prevent and redress business related human rights abuses. On the other hand, supporters of a binding international treaty on business and human rights question the value of the Guiding Principles and their regulatory sequelae.[65] The national

62 Finding of the Constitutional Court II ÚS 3436/14 of 19 January 2016.

63 Finding of the Constitutional Court II ÚS 3626/14 of 16 December 2015.

64 Czech National Action Plan on Business and Human Rights, 2017, pp. 17-18.

65 C. Metheven O'Brien, Experimentalist Global Governance and the case for a Framework Convention based on the UN Guiding Principles on Business and Human Rights, (in:) M. Mullen et al., Navigating a New Era of Business and Human Rights: Challenges and Opportunities under the UNGPs, 2019 (forthcoming), p. 1.

action plans implementing the Guiding Principles reveal the different domestic ambitions and efforts. It is true that the business and human rights agenda penetrates almost every area of public and corporate law and, given the different regional and national circumstances, government measures vary from state to state.

Human rights due diligence represents one of the main substantive elements of the Guiding Principles. It is obvious that there is a need for greater clarity about the relationship between the exercise of human rights due diligence and corporate legal liability. Businesses should not wait for governments to come up with legal regimes requiring human rights due diligence as the corporate responsibility to respect human rights exists over and above compliance with national laws and regulations.[66] A key goal must be the encouragement of meaningful human rights due diligence by companies in the spirit of the Guiding Principles.[67]

Another major principle of the Guiding Principles deals with better access of victims to legal remedies. In the third part of this study we have analyzed relevant German and Czech cases which have shown that judicial mechanisms addressing the responsibility of business entities for human rights abuses are sometimes lengthy and not always effective. In Germany, a private lawsuit before the competent court of first instance has the potential to become the leading case under German private law. As in the Czech Republic access to private litigation is complicated in procedural terms, human rights abuses are mainly treated by the instruments of national criminal law.

As a first step in order to improve the situation we can see attempts to introduce class actions into Czech law. In 2017 the Czech Ministry of Justice presented a draft reflecting the EU Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. As the draft is supposed to introduce a completely new element into Czech procedural law, which is based on individual actions, several issues like the burden of proof and the level of proving a claim will need to be clarified before such act may be adopted.

We have seen that the Guiding Principles, so far, have had only little influence on national regulations concerning jurisdiction, procedural and material law in liability cases. We may expect that the implementation of the Guiding Principles, sooner or later, will lead to a reform of national procedural regulations. But it seems that there is still a long way to go in order to reach a solution which will be satisfactory in the light of international standards.

66 Commentary to the Guiding Principle 11, UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

67 OHCHR, Improving accountability…, *op. cit.*, p. 5.

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# Social Dialogue of Employer and Employees in Poland

**Abstract:** The aim of this paper is to investigate the (potential) impact of social dialogue on the operation of enterprises, mainly on the basis of legal provisions accompanied by practical evidence drawn from case law. This publication starts with the general context of social dialogue in the Polish legal culture. In this regard, it shows how social dialogue is defined and, in addition, it provides an overview of legal bases for social dialogue under the national rules and regulations. The remainder of the paper is structured as follows. It continues with the presentation of legal solutions regarding complex relations between various representatives of employees. In short, it explains certain aspects of the right to freedom of association. Furthermore, the article presents the special protection of employment relationship durability of employees' representatives (as it has become a recognised field of research and scholarly enquiry) and the challenges in this area. The paper concludes with a short summary.
**Keywords:** dialogue between employer and employees, dialogue between social partners, social dialogue

## 1. Introduction

The point of departure for the research presented in our paper is the assumption that the practice of management of enterprises based on the "not more than profit" approach and considered as one of the most important causes of the outbreak of the financial crisis of 2008/09 – with its effects still felt by populations today – is incorrect. Previous negative experiences in this respect may be perceived to have contributed to a recent worldwide trend towards growing interest in the management model in which employees are empowered to participate in the operation of an enterprise. The

aim of this paper is to investigate and check out in case law whether legal provisions on social dialogue generate problems in the practical operation of enterprises and, if so, what these problems are. This is going to be done mainly on the basis of Polish legal provisions accompanied by practical evidence of the operation of enterprises in the market drawn from national case law. This publication will also refer to some of the most important Polish legal writings on the analysed topic. We will use a dogmatic method as a basis for legal analysis. Within the framework of this paper, firstly, we will investigate legal provisions and case law concerning complex relationships between various representatives of employees. Secondly, certain aspects of the right to freedom of association will be involved in one of the components of this publication. Further, the specific legal protection of employment relationships of employees' representatives will be explored.

## 2. Conceptual framework

Social dialogue can exist and develop properly if certain conditions of a systemic nature are met, such as the existence of a democratic system in which human rights and freedoms are respected, including the right to freedom of association, as well as the existence of market economy and the labour market in which social partners operate.[1]

The respect for fundamental rights is a distinctive feature of the European Union (EU). One of the main pillars of the EU's protection of fundamental rights is the Charter of Fundamental Rights of the European Union, formally proclaimed by the leaders of the institutions of the EU on 7 December 2000 in Nice.[2] The Charter ideally combines fundamental principles for the protection of workers' rights. First, the Charter has adopted an open approach to the right to organise, declaring, in its Article 12(1), that everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. By the way, it is worth paying attention that Article 2 of the 1948 Convention No. 87 of the International Labour Organisation concerning freedom of association and protection of the right to organise states that workers and employers, without distinction whatsoever, shall have the right to establish and,

1 See, M. Pliszkiewicz, Warunki trójstronnego dialogu społecznego, (in:) Z. Hajn, D. Skupień (eds), Przyszłość prawa pracy. Liber Amicorum. W pięćdziesięciolecie pracy naukowej Profesora Michała Seweryńskiego, Łódź 2015, pp. 472-473.

2 OJ C 326, 26.10.2012, p. 391.

subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.[3]

Second, the Charter details the rights of collective bargaining and collective action, including strike action, and workers' rights to information and consultation within the undertaking as fundamental rights (Articles 28, and 27, respectively).[4]

In Poland, these rights are inherently inscribed in dialogue and cooperation between employers and employees' representatives, even though empirical evidence based on the analysis of collective agreements, press reports and internal union reports, as well as interviews with labour union representatives, proves that while public sector unions are capable of affecting the collective bargaining outcomes and welfare policies, in the private sectors, the course of changes is set mainly by the employers and there is little input from the side of the employee and/or state.[5] It must be emphasised that the Poland's turbulent political history resulted in the fact that attempts to establish and institutionalise actual social dialogue were not enabled until the fall of communism.[6]

In Polish legal literature there are numerous proposals of definitions of social dialogue (Pol. *dialog społeczny*). Frequently, communication between particular social groups (social actors or social partners) is combined with the state's participation therein as a partner to the dialogue (trialogue?) or with the state inspiring or guaranteeing the role.[7] Definitions emphasise *inter alia* that social dialogue has the

3 Journal of Laws 1958 No. 29, item 125. In English available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 (accessed 04.03.2019).

4 Dialogue between social partners at the EU level referred to in Articles 152-155 of the Treaty on the functioning of the European Union is outside the scope of this paper; thereon see, W. Sanetra, Social Dialogue as an Element of Polish Socio-Political System in the Light of the Constitution of the Republic of Poland, "Studia Iuridica" 2016, vol. 60, pp. 188-189.

5 M. Bernaciak, A. Duman, V. Scepanovic, Employee welfare and collective bargaining in exposed and protected sectors: Evidence from Poland and Serbia, "Working Papers on the Reconciliation of Work and Welfare in Europe" 2010, No. 4, p. 7. See also, M. Pliszkiewicz, Warunki trójstronnego dialogu…, *op. cit.*, pp. 476.

6 On the developments of social dialogue in post-socialist Poland see, J. Gardawski, 20 Years of Social Dialogue in Poland, "Studia Iuridica" 2016, vol. 60, pp. 57-74; A. Ogonowski, Rada Dialogu Społecznego jako instytucja realizująca konstytucyjną zasadę "solidarności, dialogu i współpracy partnerów społecznych", (in:) A. Łabno (ed.), Państwo solidarne, Warszawa 2018, pp. 47-50; M. Szymański, Rada Dialogu Społecznego – w przededniu zmian?, "Praca i Zabezpieczenie Społeczne" 2017, vol. 7, pp. 23-24.

7 See L. Gilejko, Dialog społeczny jako czynnik rozwoju, (in:) D. Zalewski (ed.), Dialog społeczny na poziomie regionalnym. Ocena szans rozwoju, Warszawa 2005, p. 13; S.L. Stadniczeńko, Konstytucjonalizacja dialogu społecznego, "Studia Iuridica Lublinensia" 2014, vol. 22, p. 321, 331; M. Gładoch, Rada Dialogu Społecznego – nowe regulacje w zakresie trójpartnerstwa, "Monitor Prawa Pracy" 2016, vol. 11, p. 567; M. Mazuryk, Dialog społeczny w Polsce *sensu stricto* i *sensu largo*, "Ius Novum" 2009, vol. 4, pp. 99-100.

potential or is likely to lead to compromise solutions that allow to avoid open social conflicts.[8]

Social dialogue is classified as:

– classical social dialogue (social dialogue *stricto sensu*) comprising only relations of public authorities and representatives of labour and capital, and
– social dialogue *lato (largo) sensu* being a result of the development of civil society and democratic structures of the state, which highlights that employees' representatives are not the only social partners of the state.[9]

Dialogue between social partners (Pol. *dialog partnerów społecznych*) is understood as either social dialogue *stricto sensu*[10] or dialogue only between employer and employees, as neither the government nor the state apparatus may be regarded as a social partner.[11]

Social dialogue *lato sensu* is considered to comprise social dialogue *stricto sensu* and corporate dialogue,[12] religious dialogue[13] and, in particular, civic dialogue (Pol. *dialog obywatelski*),[14] which in general are outside the scope of this paper. The social dialogue in the field of labour/economic relations (social dialogue *stricto sensu*) may be compared to civic dialogue as open and flexible dialogue in other areas of social life,[15] but there are things in favour of the former. The social dialogue *stricto sensu* is accompanied by a range of legal and institutional solutions whereas civic dialogue seems just a paper declaration rather than reality;[16] currently, the only institution that enables the institutionalised civic dialogue is the Council for Public Benefit

8 S.L. Stadniczeńko, Konstytucjonalizacja…, *op. cit.*, p. 329; R. Słoniec, Pracowniczy dialog społeczny jako ochronna funkcja prawa pracy oraz skuteczna metoda zarządcza we współczesnym przedsiębiorstwie, (in:) M. Bosak (ed.), Funkcja ochronna prawa pracy a wyzwania współczesności, Warszawa 2014, s. 155; S. Sternal, Konstytucyjna aksjologia zasady dialogu społecznego, (in:) M. Grzybowski, B. Naleziński (eds), Państwo demokratyczne, prawne i socjalne. Studia historyczno-prawne i ustrojowo-porównawcze. Tom 2. Księga jubileuszowa dedykowana Profesorowi Zbigniewowi Antoniemu Maciągowi, Kraków 2014, s. 495; A. Krzywoń, Economic policy: social market economy, (in:) J. Szymanek (ed.), Polish political system. An introduction, Warszawa 2018, p. 400.

9 M. Mazuryk, Dialog społeczny…, *op. cit.*, p. 99.

10 S.L. Stadniczeńko, Konstytucjonalizacja…, *op. cit.*, pp. 329-330.

11 W. Sanetra, Social Dialogue…, *op. cit.*, p. 198; but see, A. Ogonowski, Ewolucja…, *op. cit.*, pp. 60-66.

12 See i.a. Article 163 of the Constitution of the Republic of Poland of 2 April 1997.

13 See Article 25 of the Constitution of the Republic of Poland of 2 April 1997.

14 M. Mazuryk, Dialog społeczny…, *op. cit.*, p. 102-104.

15 See, S.L. Stadniczeńko, Konstytucjonalizacja…, *op. cit.*, p. 330. See also, A. Ogonowski, Ewolucja instytucji dialogu społecznego w Polsce po 1989 roku. Studium ustrojowe, Warszawa 2018, pp. 70-71.

16 Including public consultations. See, S.L. Stadniczeńko, Konstytucjonalizacja…, *op. cit.*, p. 330.

Organisations functioning at the Ministry of Family, Labour and Social Policy.[17] To the contrary, the importance of social dialogue *stricto sensu* in the field of labour relations is unquestionable.

In Poland, social dialogue is a normative concept translated into positive law and seen by legal rules, legal language and in legal provisions, first and foremost in the Constitution of the Republic of Poland of 2 April 1997,[18] whereas the constitutionalisation of social dialogue is not common in European countries.[19] So, under Polish law, social dialogue has a special constitutional legitimacy. It can also be stated that social dialogue is encouraged by the Polish Constitution, so as to become a vital part of civil society and a more transparent state. First, social dialogue (*lato sensu*)[20] is listed in the preamble among values that the Constitution as the basic law of the Republic of Poland is based on (together with respect for freedom and justice, cooperation between the public powers, as well as the principle of subsidiarity in the strengthening the powers of citizens and their communities). However, it is uncertain whether provisions of the preamble are of a normative nature.

Second, the economic system of Poland is based on a social market economy which, in turn, is based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners (Article 20). It is therefore necessary to clarify and explore some of the issues surrounding the principle of dialogue between social partners as a constitutional principle fundamental for the economic system of Poland.

The principle of dialogue between social partners is aimed at "the common good" provided for in Article 1 of the Constitution,[21] viewed as a semantic addition to Article 20, and, therefore, dialogue is aimed at the protection of human dignity.[22] The latter, according to Article 30 sentence 1 of the Constitution, constitutes a source of all the freedoms and rights of persons and citizens. The Constitution creates the social partners' duty to act in a way that respects solidarity, dialogue and cooperation between social partners. At the same time, the Constitution obliges the state (public authorities) to build a legal infrastructure for the proper implementation of these three values.[23]

17 M. Mazuryk, Dialog społeczny…, *op. cit.*, p. 103. But see, R. Słoniec, Pracowniczy dialog społeczny…, *op. cit.*, p. 156.

18 Journal of Laws 1997 No. 78, item 483 as amended.

19 See, S.L. Stadniczeńko, Konstytucjonalizacja…, *op. cit.*, p. 322.

20 Ibid, p. 329.

21 "The Republic of Poland shall be the common good of all its citizens".

22 S. Sternal, Konstytucyjna aksjologia…, *op. cit.*, s. 494.

23 See also, S.L. Stadniczeńko, Problematyka dialogowości w społeczeństwie obywatelskim, (in:) A. Łabno (ed)., Idea solidaryzmu we współczesnym prawie konstytucyjnym. Doświadczenia polskie i międzynarodowe, Warszawa 2015, p. 105; A. Ogonowski, Ewolucja…, *op. cit.*, pp. 59, 71.

In economic relations, the meaning of the said principle is strengthened by the constitutional principle of a democratic state ruled by law (Article 2 of the Constitution) and implementing the principles of social justice,[24] along with another constitutional principle guaranteeing that "work shall be protected by the Republic of Poland" (Article 24 sentence 1 of the Constitution). Last but not least, Article 59(2) of the Constitution is in essence a more detailed manifestation of the principle of dialogue between social partners and endows trade unions, employers and their organizations with a joint right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements. The scope *ratione personae* of this literally interpreted right on the employees' side ("trade unions") is narrower than the scope of the concept of "social partners" that includes also other organisational forms and structures established within any enterprise for the purpose of expressing the will, interests and demands of its employees (non-union enterprise-level employee bodies); however, it is considered that the Constitution does not prohibit the legislature to endow the latter with rights equivalent to those provided for in Article 59(2) of the Constitution.[25]

Traditionally, the Polish concept of social dialogue has belonged mainly to collective labour law.[26] However, in 2015 the Council of Social Dialogue was established.[27] It differs from its predecessor, the Tripartite Commission for Socio-Economic Affairs,[28] in its goals. The main goal of the Tripartite Commission was in securing peace in the labour context, whereas the Council of Social Dialogue: (1) conducts a dialogue to ensure conditions for socio-economic development and increase the competitiveness of the Polish economy and social cohesion, (2) acts to implement the principle of social participation and solidarity in the field of employment relations, (3) works to improve the quality of formulation and implementation of socio-economic policies and strategies, as well as to build a social understanding around them by conducting a transparent, substantive and regular dialogue between employees' and employers' organisations and the government side;

24 See point III.4 of the judgment of the Constitutional Tribunal of the Republic of Poland of 30 January 2001, Case K 17/00, Journal of Laws 2001 No. 11, item 90.

25 W. Sanetra, Social Dialogue…, *op. cit.*, pp. 188-189. See also, A. Ogonowski, Ewolucja…, *op. cit.*, pp. 46-49.

26 J. Wratny, Rada Dialogu Społecznego. Czy jeszcze instytucja zbiorowego prawa pracy?, "Praca i Zabezpieczenie Społeczne" 2016, vol. 10, p. 4. See also, M. Pliszkiewicz, Warunki trójstronnego dialogu…, *op. cit.*, pp. 192-193; W. Sanetra, Social Dialogue…, *op. cit.*, p. 194; S.L. Stadniczeńko, Dialog społeczny jako zinstytucjonalizowana forma współpracy podmiotów prawa w społeczeństwie obywatelskim, (in:) A. Łabno (ed.), Państwo solidarne, Warszawa 2018, p. 17; A. Ogonowski, Ewolucja…, *op. cit.*, pp. 26, 71.

27 Act of 24 July 2015 on the Council for Social Dialogue and other social dialogue institutions (consolidated text Journal of Laws 2018 item 2232 as amended).

28 Act of 6 July 2001 on the Tripartite Commission for Socio-Economic Affairs (Journal of Laws 2001 No. 100, item 1080 as amended).

(4) supports social dialogue at all levels of local government.[29] Social and economic goals have complemented goals relating to employment relationships, while the latter have ceased to be the foreground category of goals of social dialogue.[30] Therefore, it is considered that this new redefined formula of social dialogue amounts to weakening its connections with collective labour law and strengthening its connections with constitutional law.[31]

The constitutional principle of social dialogue is, however, still institutionalised, concretised and manifested to a certain extent in detailed provisions of collective labour law. These provisions confer specific rights and obligations on representatives of an employer and employees turning the constitutional principle that involves a high degree of abstraction into a source of specific legal consequences.

The Polish legal provisions relating to social dialogue are heavily influenced by rules, provisions and policies of the European Union; little changes here without the EU initiative. Pursuant to these provisions, social dialogue operates at two basic levels. One of them is the company/workplace level (micro-level) and the other is the macro-level (national, sectoral, regional level, etc.). However, depending on the internal and external conditions of the enterprise, these provisions may result in problems of various kinds. Therefore, Polish courts and the Constitutional Tribunal have repeatedly ruled on the issues relating to various aspects of social dialogue. They include organisations (freedom of association in trade unions and employers' organisations, trade unions' rights, equality and representativeness of trade unions), non-union employees' representation as a form of employees' involvement in the operation of enterprises (in particular, consultation rights and the right to obtain information), collective disputes, collective labour agreements and other specific sources of labour law. From the perspective of fundamental rights in business, the significant issue is certainly the legally defined scope of the forms of employees' involvement in the operation of enterprises and principles of their application. This paper reviews case law in the most interesting and/or important aspects of social dialogue *stricto sensu* that are reflected in Polish and/or EU legal provisions.

## 3. Relations between employees' representatives

The scope *ratione personae* of social dialogue refers to entities being social partners who are properly organized and representable for particular social groups.[32]

29 Article 1(2)-(5) of the Act of on the Council for Social Dialogue and other social dialogue institutions.

30 See also, M. Szymański, Rada…, *op. cit.*, p. 28.

31 J. Wratny, Rada…, *op. cit.*, p. 6.

32 P. Skuczyński, Instytucjonalizacja dialogu społecznego w sądownictwie i zawodach prawniczych, "IUSTITIA" 2014, No 1, p. 25.

The legal bases for collective representations of employees' rights and interests have been evolving in the EU law.[33] As a result, the term "employees' representation" is not defined and Member States are entitled to freely determine which entities are granted this status.

It is important to stress that at the present legal status quo, both in the EU and in Poland, we deal with a rich variety of entities representing employees and employers.[34]

The variety of collective entities on the part of employees undoubtedly aims at providing employees with a possibility to be involved in the economic affairs of the enterprise to a higher degree than before. The differentiation in employees' representation occurs not only at the micro-level (company level) but also at the macro-level (supracompany level).

According to the Polish law, on the employees' part, there may be trade unions, as well as employees' councils operating in state enterprises[35] and employees' councils appointed on the basis of the Act of 7 April 2006 on informing employees and consulting them.[36] At the supracompany level the employees' involvement in the affairs of the enterprise may occur through European Works Councils,[37] special negotiating teams in a European company,[38] a European co-operative[39] as well as in a company created as a result of a cross-border merger.[40] Moreover, employees are entitled to be members of boards of trustees of the companies created as a result of commercialization.[41] The aforementioned extensive catalogue of entities representing employees appeared in the Polish law largely due to the implementation of the EU law.

33 For more see: M. Tomaszewska, Przedstawicielstwo pracownicze w prawie europejskim, (in:) A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (eds.), Zbiorowe prawo pracy w XXI wieku, Gdańsk 2010, p. 291 et seq.

34 For more see: G. Goździewicz, Pozycja prawna podmiotów w zbiorowym prawie pracy, (in:) A.M. Świątkowski (ed.), Ochrona praw człowieka w świetle przepisów prawa pracy i zabezpieczenia społecznego. Referaty i wystąpienia zgłoszone na XVII Zjazd Katedr/Zakładów Prawa Pracy i Zabezpieczenia Społecznego, Kraków 7-9 maja 2009 r., Warszawa 2009, p. 225 et seq.

35 Act of 25 September 1981 on workers' self-management of the crew of a state undertaking, consolidated text Journal of Laws 2015, item 1543 as amended.

36 Journal of Laws 2006 No. 79, item 550 as amended.

37 Act of 5 April 2002 on European works councils, consolidated text Journal of Laws 2018, item 1247 as amended.

38 Act of 4 March 2005 on European grouping of interests and the European company, consolidated text Journal of Laws 2018, item 2036 as amended.

39 Act of 22 July 2006 on the European Cooperative Society, consolidated text Journal of Laws 2018, item 2043 as amended

40 Act of 25 April 2008 on the participation of employees in a company being a result of a cross-border merger of companies, Journal of Laws 2008 No. 86, item 525.

41 Act of 30 August 1996 on commercialization and certain employee rights, consolidated text Journal of Laws 2018, item 2170.

One of the key problems emerging in the context of the entities of social dialogue, which is decided on in Polish case law, is the relation between particular representative bodies of employees.[42]

Before Poland entered the European Union, trade unions were monopolists as regards the representation of employees before the employer. The transfer of representation rights towards other entities occurred because of the necessity to implement many EU legal provisions, which provide for cooperation with representatives of employers and not with trade unions.[43] In practice this change of approach in Poland proved to be somewhat disquieting.

A very important judicial decision for the shape of social dialogue in Poland was the judgment of the Constitutional Tribunal of 1 July 2008,[44] questioning the legality of provisions determining the procedure of appointing a representation of employees on the basis of the Act on informing employees and consulting them.[45] It is the only ruling of the Constitutional Tribunal regarding the procedure of appointing a non-union representation of employees. It has been discussed in detail in the literature.[46]

In its original wording (in force as of 8 July 2009) the Act transferred the right to elect members of employee councils to representative union organizations. If these organizations failed to achieve an agreement, the members of employee councils were elected by the employees from candidates proposed by trade unions. Moreover, the Act provided that the council elected by employees would be dissolved, and the term of its members would expire after 6 months from the day on which the employer, at whose enterprise a union organization had yet to become active, was informed about being subject to the scope of activity of a representative union organization.

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42 See i.a. K.W. Baran, Komentarz do ustawy z dnia 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji, (in:) K.W. Baran, Zbiorowe prawo pracy. Komentarz, Warszawa 2007, pp. 43-44; K.W. Baran, Ogólna charakterystyka ustawodawstwa antykryzysowego na tle funkcji prawa pracy, "Praca i Zabezpieczenie Społeczne" 2009, No. 9, p. 19; M. Gładoch, Ustawa o informowaniu pracowników i przeprowadzaniu z nimi konsultacji. Komentarz, Toruń 2007, p. 57; G. Goździewicz, Pozycja rady pracowników w stosunku do związków zawodowych, (in:) A. Sobczyk (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy, Kraków 2008, pp. 93-102; M. Wojewódka, Kompetencje rady pracowników a uprawnienia innych reprezentacji pracowników w zakładzie pracy, "Praca i Zabezpieczenie Społeczne" 2007, No. 10, p. 21 et seq.

43 K. Walczak, Równość czy równowaga w zbiorowych stosunkach pracy, (in:) A.M. Świątkowski (ed.), Ochrona praw…, *op. cit.*, p. 254.

44 K 23/07, Journal of Laws No. 120, item 778.

45 With this Act, Poland implemented Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ EU L 80, 23.03.2002, p. 29.

46 See. i.a. A. Sobczyk, Zmiany w ustawie o radach pracowników, "Monitor Prawa Pracy" 2009, No. 9, p. 459 et seq.; K. Walczak, Nowy model zbiorowych stosunków pracy w Polsce w kontekście wyroku TK z 1.7.2008 r., "Monitor Prawa Pracy" 2008, No. 8, p. 398 et seq.; J. Wratny, Glosa do wyroku TK z 1.07.2008 r. K 23/07, "Praca i Zabezpieczenie Społeczne" 2008, No. 10, pp. 32-36.

The Constitutional Tribunal observed that the aforementioned procedure of appointing an employee council, resulting in a privileged status of representative union organizations, contradicts the principle of negative union freedom provided for in Article 59(1) of the Constitution of the Republic of Poland. This provision indicates a fundamental human and civil right, to which every person is entitled, which is the use of the right to association in a trade union. The questioned provision causes employees who do not belong to a union organization to be deprived of the right to elect and dismiss members of employee councils, which in practice means excluding those employees from the possibility to influence the council's actions. In this way, according to the Tribunal, there occurs an "indirect" limitation of the voluntary nature of their association.

The Tribunal also decided that the rule of equal treatment and indiscrimination expressed in Article 32 of the Constitution was infringed because unequal treatment occurs between employees belonging to representative union organizations and those who don't. Non-union employees remain in a worse situation because they bear the consequences of consultations conducted with the employer by the entity concerned, over which they have no influence.

As a result of the Tribunal's judgment, the employees' council is currently elected by the employees from among candidates proposed by groups of employees, as the Tribunal decided that the Act is addressed to employees and employers, and not to trade unions.

The problem which still needs solving is determining the influence of the Tribunal's judgment referred to above on the current legal status quo in Poland referring to a European company, a European cooperative society, a company created as a result of a cross-border merger, as well as European works councils. Polish statutes referring to the aforementioned economic entities still introduce a mixed procedure of electing employees' representative bodies, providing for the participation of both trade unions and the workers. At the same time representative union organizations in the company are still in a privileged situation. It is important to stress that this is in compliance with European standards. The directives referring to a European company, a European cooperative society, a company created as a result of a cross-border merger, as well as works councils in Community-scale undertakings inform about the procedure of electing or appointing representatives of the employees. The legal framework in the directives results in the EU legislature clearly allowing employees to either elect or appoint representatives to establish a particular representative entity.

Under Polish law it is still important to ask if the Polish statutes implementing EU directives are in compliance with the Constitution of the Republic of Poland. Polish literature on the subject lacks an unambiguous answer to this question. Specific deliberations often note the difference between national dialogue and cross-border dialogue. It is pointed out that the fundamental issue, still unsolved, is whether

we should promote dialogue as such, or dialogue with trade unions in collective cross-border work relations.[47] The literature usually stresses positive sides of each initiative leading to establishing collective relations between the employer and the employees, especially in large undertakings.[48] What is also observed is a positive impact of these relations on stabilizing the situation of employees as well as in resolving problems during economic crisis (within the framework of corporate social responsibility).

## 4. Freedom of association

One of fundamental human rights provided for by international treaties is freedom of association of persons in organizations established in order to protect rights and represent professional, economic and social interests. Hence the right to establish and join trade unions is inseparably connected with the aim of joining this type of organization; to protect interests. It is implemented through, for example, conducting a collective dispute with the employer by virtue of negotiations, mediations, arbitration and, as a last resort, taking strike action.

The problem visible, among other things, in the context of the Polish Act on solving collective disputes[49] constitutes determining an entity entitled to exercise the freedom of association in trade unions.

According to Article 59(1) of the Constitution, this entity is the employee. However, the Constitution does not define the term "employee". Furthermore, Article 2 of the Labour Code[50] states that an employee is a person with whom an employment relationship was established on the basis of an employment contract, choice, nomination, appointment and cooperative employment contract.

The question arises if the term "employee" in the Constitution should be defined in the same way as in Article 2 of the Labour Code. In this context the judgment of the Constitutional Tribunal of 2 June 2015 is the only such ruling, albeit one that is very fundamental in terms of Polish collective labour law. Therein, the Constitutional Tribunal stated the incompatibility of Article 59(1) 1 of the Constitution in conjunction with Article 12 of the Constitution, Article 2(1) of the Act of 23 May

47 S. Adamczyk, B. Surdykowska, Rokowania zbiorowe w Unii Europejskiej: trudne czasy, niejasna przyszłość, (in:) J. Czarzasty (ed.), Rokowania zbiorowe w cieniu globalizacji. Rola i miejsce związków zawodowych w korporacjach ponadnarodowych, Warszawa 2014, p. 494.

48 A. Boguska, Europejskie porozumienia ramowe na poziomie przedsiębiorstwa – w poszukiwaniu ram prawnych. Zarys problematyki, (in:) Z. Hajn, M. Kurzynoga (eds), Demokracja w zakładzie pracy. Zagadnienia prawne, Warszawa 2017, p. 494.

49 Act of 23 May 1991 on solving collective disputes, consolidated text Journal of Laws 2018 item 399.

50 Act of 26 June 1974 The Labour Code, consolidated text Journal of Laws 2018 item 917 as amended.

1991 on trade unions,[51] within their scope the aforementioned regulations limit the freedom of establishing and joining trade unions by persons who pursue profit-gaining work but who are not employees in the meaning of Article 2 of the Labour Code.[52] According to the Tribunal, the status of an employee should be, constitutionally, evaluated through reference to the criterion of profit-gaining work. In this context the Tribunal pointed at three premises determining the legal frames of the constitutional understanding of the term "employee" used in Article 59(1) of the Constitution. The term includes all persons who, first, pursue a particular profit-gaining work; second, remain in the legal relationship with the entity for whom they provide their work, and, third, have such professional interests connected with performing their work, which may be collectively protected.[53]

The need for the right of association in trade unions to include not only employees with whom an employment relationship was established but also other persons who pursue profit-gaining work, provided for by the Tribunal, has rightly received general approval in legal writings on labour law.[54] In our opinion, it seems convincing that the Tribunal is inspired by the EU law; based on it, the concept of an employee is interpreted by the Court of Justice of the European Union 'filtering' it not through the type of legal relationship between employee and employer, but through criteria such as pursuing work for another person and under the direction of the employer and for remuneration. Furthermore, a similar broad understanding of the term "employee" is adopted under Article 2 of the 1948 Convention No. 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise.[55] It is widely accepted in the literature that the term "workers" (Fr. *travailleurs*) used in the Convention means not only employees in the legal sense of the word (*stricto sensu*), but also any persons who work

51 Journal of Laws 2015, item 1881 as amended.

52 K 1/13, Journal of Laws 2015, item 791.

53 A.M. Świątkowski, Prawo do wolności zrzeszania się i uprawnień pokrewnych, „"Monitor Prawa Pracy" 2015, No. 9, p. 457.

54 See i.a. J. Unterschütz, Podmiotowy zakres swobody koalicji – uwagi na marginesie wyroku TK w sprawie K 1/13, "Monitor Prawa Pracy" 2016, No. 3, p. 130 and literature quoted therein. A few critical remarks have concerned the concept of the constitutional definition of an employee. According to A.M. Świątkowski, there cannot be two different legal definitions of an employee in the legal provisions, i.e. the long-established definition in Article 2 of the Labour Code and the alternative one presented by the Tribunal in relation to Article 59 of the Constitution. Cf. A. M. Świątkowski, Konstytucyjna koncepcja pracownika, "Monitor Prawa Pracy" 2016, No. 1, p. 14.

55 Journal of Laws 1958 No. 29, item 125. In English see https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 (accessed 04.03.2019).

professionally.[56] The discussion between commentators of labour law in Poland,[57] also inspired by the Tribunal judgment, has resulted in amendments in the Act on trade unions. The changes have come into force on 1 January 2019. They are revolutionary amendments, because trade unions can be established and those that already exist can be joined not only by employees tied to an employment relationship in the meaning of Article 2 of the Labour Code but also persons working on the basis of civil law agreements, such as fee-for-task agreements or contracts for specific work. This also means broadening the circle of employed persons who are entitled to take strike action.

## 5. Special protection of the employment relationship durability of employees' representatives

A social dialogue *ratione materiae* extends to forming work relations, work conditions, payments, social benefits, as well as other issues of an economic nature, which are the subject of interest and competence of all parties along with relations between the partners and their mutual obligations. Thus, the subject matter of social dialogue may also include the rights and freedoms of employees' representatives.

Reviewing the case law on the right to social dialogue, it is worth noting the problems of the protection of employment relationship durability of employees' representatives. This issue is one of the key problems faced by entrepreneurs throughout the European Union. Hence the mechanisms of this protection may be found in EU directives implemented in Polish law.

Those who are entitled to the protection of employment relationship and work conditions are, among other persons, representatives of trade unions, members of employees' councils, members of European works councils and special negotiating teams, representatives of employees in a European company, a European cooperative society as well as in a company created as the result of a cross-border merger.

56 See i.a. Z. Hajn, Prawo zrzeszania się w związkach zawodowych – prawo pracowników czy prawo ludzi pracy?, (in:) A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (eds.), Zbiorowe prawo pracy w XXI wieku, Gdańsk 2010, p. 177, 178; E. Podgórska-Rakiel, Rekomendacje MOP dotyczące wolności koalicji związkowej i ochrony działaczy, "Monitor Prawa Pracy" 2013, No. 2, p. 68 et seq.

57 See i.a. E. Podgórska-Rakiel, Konieczność nowelizacji prawa polskiego w kwestii wolności związkowych z perspektywy Międzynarodowej Organizacji Pracy, "Monitor Prawa Pracy" 2014, No. 10, pp. 510–514; M. Seweryński, Problemy statusu prawnego związków zawodowych, (in:) G. Goździewicz (ed.) Zbiorowe prawo pracy w społecznej gospodarce rynkowej, Toruń 2000, pp. 110-112; J. Unterschütz, Wybrane problemy ograniczenia swobody koalicji w świetle prawa międzynarodowego i Konstytucji RP, "Praca i Zabezpieczenie Społeczne" 2013, No. 10, pp. 21-26.

The Polish legal framework for the protection of employees' representatives was usually interpreted by the judiciary in relation to representatives of trade unions.[58] Presenting rulings related to this group is justified also by the fact that the provisions concerning the other representatives of employees are mostly based on the model of protecting union activists. This results in the fact that the following rulings referring to the protection of employment relationship durability of a union activist may be *mutatis mutandis* also referred to the remaining representatives of the employees. This also concerns employees' representatives in European economic entities, such as Community-scale entrepreneurs and groups of entrepreneurs, a European company, European cooperative society and a company created as the result of a cross-border merger.

The aim of protecting employees' representatives is to secure employment stability for persons, who, because of their representative positions are exposed to conflicts with the employing entity. Normative safeguards for the durability of the employment relationship of employees' representatives is necessary so as to enable these persons to be independent in exercising the activities required of their position.[59]

The protection of a union activist consists in the employer being forbidden to dissolve the employment relationship during the term of office. The protection also includes a prohibition of terminating work and payment conditions during the employment relationship. These prohibitions are of relative nature because they may be lifted by consent from the management of the union organization in the enterprise.

An infringement of the prohibition of dissolving an employment agreement of a union activist entitles them to file a claim in the labour court. As the Supreme Court has ruled, the provisions determining the scope of the protection are of the nature of specific provisions and must be strictly interpreted.[60] This means that union activity cannot be a pretext for the special treatment of an employee in areas which are not related to their position.[61] This leads to the conclusion that the protection of the employment relationship durability of a trade union activist is not absolute. Every case of infringement of the protection of a trade union activist's employment relationship needs to be examined individually, including the circumstances of a particular situation.

58 See i.a. J. Stelina, Przywrócenie do pracy działacza związkowego w orzecznictwie Sądu Najwyższego, "Praca i Zabezpieczenie Społeczne" 2005, No. 1, p. 30 et seq.

59 M. Madej, Nadużycie prawa ochrony trwałości stosunku pracy działacza związkowego, (in:) Z. Hajn (ed.), Związkowe przedstawicielstwo pracowników zakładu pracy, Warszawa 2012, p. 553.

60 The judgment of the Supreme Court of 26.11.2003, I PK 616/2002, "Prawo pracy" 2004, No. 6, p. 34.

61 Judgments of the Supreme Court of: 19.09.2018, II PK 242/17, Legalis; 27.02.1997, I PKN 17/97, OSNP 1997, No. 21, item 416; 11.09.2001, I PKN 619/00, OSNAP 2003, No. 16, item 376.

This results in that the question of reinstating a dismissed union activist has to be resolved by Polish labour courts and the number of court rulings in this regard, serves to indicate that this frequently occurs in practice. It is also worth noting that in the rulings presented below, the issue of protection of a trade union activist has been subject to comprehensive assessment.

Polish literature critically assesses the extensive scope of protection afforded to persons representing employees. Here, doubts are expressed especially in cases involving the dismissal of an employee without notice due to a breach of employment conditions. Where this occurs, it is important to note the special nature of the premises for dissolving the employment relationship, which has no bearing on the representative position (for example, where a serious infringement of fundamental employment obligations has taken place, Article 52 of the Labour Code).[62] In this situation another problem to arise is that of an employees' representative treating the protection from dismissal as an instrument to further their own interests.

Polish courts establish the limits of using the protection of the employment relationship durability of a union activist through the clause of socio-economic purpose of law as well as the rules of social coexistence, regulated in Article 8 of the Labour Code. According to this provision, one cannot make use of their right in a way that would contradict the socio-economic purpose of such right or the rules of social coexistence. In its resolution of 30 March 1994, the Supreme Court decided that the clause useful for the evaluation of whether the union activist's claim for reinstatement is unjustified, is primarily the one which expresses contradiction with the socio-economic purpose of the right.[63] The Supreme Court assumed that the socio-economic purpose of the right to reinstatement contradicts the restitution of employment in cases where dismissal was obviously justified.

62 See, for example, K.W. Baran, O ochronie trwałości stosunku zatrudnienia związkowców na poziomie zakładowym – uwagi de lege ferenda, "Monitor Prawa Pracy" 2018, No. 4, p. 8; K. W. Baran, Normatywne gwarancje stabilizacji zatrudnienia działaczy związkowych, "Monitor Prawa Pracy" 2004, No. 3; A. Dral, Problem liberalizacji, deregulacji i uelastycznienia ochrony trwałości stosunku pracy w polskim prawie pracy, "Praca i Zabezpieczenie Społeczne" 2009, No. 5, p. 16; M. Majchrzak, Rozwiązywanie stosunku pracy z członkami międzyzakładowej organizacji związkowej, "Monitor Prawa Pracy" 2008, No. 4; M. Latos-Miłkowska, Szczególna ochrona trwałości stosunku pracy a ochrona interesu pracodawcy, (in:) G. Goździewicz (ed.), Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej, Warszawa 2010, p. 249; B. Rutkowska, Szczególna ochrona trwałości stosunku pracy przedstawicieli pracowników – uwagi *de lege ferenda*, (in:) G. Goździewicz (ed.), Ochrona…, *op. cit.*, p. 268; H. Szewczyk, Dyskryminacja w zatrudnieniu ze względu na przynależność związkową, "Praca i Zabezpieczenie Społeczne" 2013, No. 4, pp. 21 i 22; G. Wolak, Szczególna ochrona trwałości stosunku pracy działaczy związkowych a klauzule generalne z art. 8 k.p., "Monitor Prawa Pracy" 2015, No. 3, p. 132.

63 I PZP 40/93, Legalis.

However, it is important to stress that the application by the court of the construction of the abuse of a right is acceptable in exceptional situations only and must be, in accordance with the established case-law and commentators' standpoint, justified in detail.[64] This justification has to demonstrate that in the particular, individual and concrete situation, a typical behavior of the entity exercising their right determined by the legal rules in force is unacceptable for moral reasons which establish the rules of social coexistence, because in certain "untypical" circumstances it might threaten fundamental values on which the social order is based and to which the law should be seen to serve.[65]

There is no doubt that the practical verification of the accuracy of the adopted scope *ratione materiae* of the special protection depends on the objectivity of the entity making a decision on consent to dissolve the employment relationship.[66] As case law demonstrates, instances where the aforementioned entity defends the employees' representative who is undeserving of protection given the circumstances involved, are not isolated. This shows that the legal regulation of special protection is imperfect and requires legislative changes.[67]

## 6. Conclusions

This article has attempted to map the existing "state of the art" of Polish case law directions within the field of social dialogue. The substantial experience of Polish courts in the field of social dialogue shows that legal provisions are somewhat distant from being totally comprehensive and offering no room for different interpretations.

The application of legal provisions protecting social peace lies in the interest of employers. Abandoning the model of negotiations between social partners might negatively affect the level of investment, hinder establishing and developing enterprises and, as a result, negatively influence the shape the nation's economy. Therefore, the parties engaged in social dialogue should act within the standards of law introduced by the legislature.

64 Judgments of the Supreme Court of: 18.01.1996, I PRN 103/95, OSNAPiUS 1996 No. 15, item 210; z 27.02.1997, I PKN 17/97, OSNAPiUS 1997 No 21, item 416; 20.08.1997, I PKN 225/97, OSNAPiUS 1998 No 10, item 305; 17.09. 1997, I PKN 273/97, OSNAPiUS 1998 No 13, item 394; 26.03.1998, I PKN 571/97, OSNAPiUS 1999 No 5, item 168; 16.01.1998, I PKN 475/97, Legalis; 15.10.1999, I PKN 306/99, OSNAPiUS 2001 No 5, item 146; 2.08.2000, I PKN 755/99, OSNP 2002, No 4, item 88; 6.04.2006, III PK 12/06, Legalis; 20.01.2011, I PK 112/10, Legalis and 10.03.2011, II PK 241/10, Legalis; 4.02.2015, III PK 68/14, Legalis; 3.08.2016 , I PK 227/15, Legalis.

65 The judgment of the Supreme Court of 7.06.2018 , II PK 90/17, Legalis.

66 W. Sanetra, Dylematy ochrony działaczy związkowych przed zwolnieniem z pracy, "Praca i Zabezpieczenie Społeczne" 1993, No. 3, p. 34.

67 B. Cudowski, Zgoda na rozwiązanie stosunku pracy z działaczem związkowym, "Przegląd Sądowy" 1998, No. 7-8, p. 168.

A review of Polish case law demonstrates, however, that they cannot be established in a way which limits the scope of negotiations. Thus, there are doubts caused by the regulations which allow only one type of employees' representatives in the social dialogue. In this context, it is doubtful whether the Polish statutes implementing EU directives concerning a European company, a European cooperative society, a company created as a result of a cross-border merger, as well as European works councils, are in compliance with the Constitution of the Republic of Poland.

Achieving the above goal also requires that the right to exercise the freedom of association and related rights resulting from this freedom, is vested in all employed persons and not just those employees falling within the meaning of Article 2 of the Labour Code. The Polish legislature proved responsive to this drawback of Polish law and launched a legislative effort to broaden the scope *ratione personae* of this freedom resulting in the amendments that are in force as of 1 January 2019.

Another important consideration is that in order to guarantee benefits for both employees and employers, it is essential to establish mutual trust among the social partners involved. Therefore, the legislation providing too extensive protection of employees' representatives from the dissolution of the employment relationship requires to be relaxed. It may seem a bit quirky that the amendments broadening the circle of the employed persons entitled to the freedom of association do not coincide with any attempts to relax the protection of employees' representatives.

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# High Tech Monitoring Versus Privacy in the Workplace in the Law and Case Law of the Czech Republic

**Abstract:** Modern technologies ask anew the old question about how employees can be checked during working hours so that legitimate interests of their employers are safeguarded. The answer cannot be solely technological, as the employees right to privacy, even in the workplace, is protected at the highest constitutional as well as international levels. Employers when defending their rights and interest are therefore far from free to use the potential of available technological devices in full and without limits. To strike the right balance between legitimate interests and fundamental rights is by no means easy, as the present text tries to demonstrate by summarizing and analyzing the existing Czech approach to the issue. On the one hand, Czech law on the protection of privacy of employees in the workplace, as well as the authorities applying it, are principally in line with generally accepted European standards. On the other hand, however, this basic consensus on values and their substantive and procedural legal safeguards does not mean that Czech law currently answers all questions and leads employers safely outside the restricted zone of prohibited ways of employee monitoring. The focus of the text is thus directed at those provisions of legal acts, decisions of the highest courts, opinions of supervisory authorities and arguments of commentators that influence the way in which the aforementioned rights and interest are balanced in the current Czech legal practice.
**Keywords:** privacy in the workplace, monitoring of employees, information technologies, tracking and recording, Labor Code, proportionality, fundamental rights

## 1. Introduction

Technological advances have a huge impact on the definition of privacy and on different aspects of its protection. In connection with this, they influence also the solution to the old question of how to combine the interests and rights of the employer

with the interests and rights of its employees.[1] On the one side, new technologies permit the supervision of employees with an unprecedented easiness. Every touch of a keyboard, every change in expression of a human face, simply every move of each employee can be monitored. Hired staff can thus be checked and disciplined during working hours much more effectively but also much more intrusively in terms of their privacy. On the other hand, the same information technologies make it also easier for employees to communicate in their private interests during working hours, which means abuse of the equipment provided by their employer (PCs, smartphones, cars, scanners, copy machines etc.) or even to collect and share electronic data to the detriment of the employer.

Abuse of sophisticated information technologies can therefore infringe both legitimate interests and fundamental rights on each side of the employment relationship. Employers have rights to control performance of their employees and to protect their ownership against the abusive behavior of employees. The latter from their side have a legitimate interest and right not to give away their personal privacy and data that may easily fall victim to invasive techniques of monitoring and control put in place by their employers. In short, the subject matter here is the employer´s ownership versus the employee's privacy[2] in our epoch of digital economy. Neither of these highly protected values can be plainly sacrificed to the other and the constant careful balancing of opposite legitimate interests and fundamental rights is therefore necessary.

To strike the right balance is, however, by no means easy, as will be demonstrated in the following text that tries to summarize and analyze the recent Czech approach to the issue. To familiarize the reader with a prevailing situation, it can be noted that in the year 2017 the State Labor Inspectorate (hereinafter SUIP) found a violation of the law in the monitoring of employees by cameras in 80% of the companies controlled. Of the 75 inspections in total, 58 were positive in that there was an inadmissible interference with employee privacy.[3] There is obviously room for improvement, at least in the everyday practice of employer - employee relationships. The present analysis wants to contribute to this goal by showing how the balance between the employer´s ownership and the employee's privacy right is perceived in Czech law,

1 The statement that "The history of privacy is deeply intertwinned with the history of technology" is a truism, whose validity is well proven by the facts of history. The right to privacy as such was first formulated in the US at the end of the 19th century as a reaction to the rise of tabloids and instantaneous photography. No wonder that ICTs and their penetration of our everyday life have opened new perspectives on the issue. See U. Grasser, Law, Privacy & Technology. Commentary series, "Harvard Law Review Forum" 2016, vol. 130(2), pp. 61-62.

2 L. Ticháčková, Vlastnictví zaměstnavatele versus soukromí zaměstnance, "EPRAVO.CZ magazine" 2016, No. 1.

3 K. Kolářová, Většina stížností na nepřiměřené sledování v práci je oprávněná, "Česká pozice", 8.12.2017.

by Czech legal commentators, and most of all, in the decisions of the Czech courts, namely the highest judicial institutions of the country.

For this purpose, the content of the relevant legislation will be analyzed first, then the focus will turn to the key concepts such as privacy, proportionality of intervention, consent to monitoring etc., and in the last part attention will be paid to specific monitoring methods (checking of emails, telephone calls etc.) and their legal consequences. As the Czech courts have not yet had the occasion to interpret all aspects of the issue, the view of experts on what is permissible in the workplace will be added to this (kind of in-country) report. A summary of the findings will be then provided in the conclusion.

## 2. The applicable legislation

There is no need to stress that the Czech Republic, due to its international engagements and memberships, has to follow the guidance provided by the UN[4] and Council of Europe conventions[5], the European Court of Human Rights' decisions[6] and the European Union standards of fundamental rights and personal data protection.[7] However, as this outer framework is constantly evolving with each new case decision or piece of legislation (recently the GDPR) and as new controversial moments keep emerging from everyday practice, there is undoubtedly a space for a country specific search for answers in a number of situations. This study will therefore not discuss every legal provision that may become relevant when employee privacy rights clash with the employer´s property rights but will focus on the key pieces of Czech legislation and the case law that interpret them.

The constitutional order of the country, namely its Charter of Fundamental Rights and Freedoms,[8] quite naturally provides for the protection of basic rights of both employers and employees. Property rights of owners are enshrined in Article 11. Article 7 guarantees the inviolability of the person and their privacy. Article 10 protects everyone from any unauthorized intrusion into his or her private and family

4 The International Covenant on Civil and Political Rights, Article 17(1).

5 The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter Convetion), Article 8.

6 See for details: European Court of Human Rights, Guide on article 8 of the European Conventipon of Human Rights – Right to respect for private and family life, home and correspondence. Council of Europe, August 2018. https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (accessed 31.10.2018).

7 EU Charter of Fundamental Rights Arts. 7, 8. For the overview of the EU secondary law in the area see Online Privacy Law: European Union. Library of Congress, report updated on 29. 05. 2018. https://www.loc.gov/law/help/online-privacy-law/2017/eu.php (accessed 31.10.2018).

8 Constitutional act No. 2/1993 Coll. as amended by constitutional act No. 162/1998 Coll. For English translation see https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf (accessed 31.10.2018).

life as well as from the unauthorized misuse of personal data. Finally, Article 13 protects the confidentiality of letters and communications sent by telephone, telegraph, or by other similar devices. The law of the highest legal force thus protects the rights on both sides of the potential conflict. However Articles 7, 11 and 13 of the Charter permit that rights protected by them are in practice limited "in the cases and in the manner designated by law".

This specific law is not a *lex specialis* in the sense of legislation governing, for example, the use of CCTV systems or other specific means of interfering with privacy, or, as the case may be, of specific regulations concerning the direct intervention of employers in the privacy of employees. Such specialized regulations do not exist in the Czech Republic. Concrete legislation should therefore be sought in the provisions governing private law, labor relations and (where employees data are processed) the protection of personal data in general.

The key private law act, the Civil Code (Act No. 89/2012 Coll.) affects all relations of a private nature, including labor-law affairs, and its Division 6 regulates the "personality rights of an individual" (namely in Sections 81-90). Regarding the protection of privacy in the workplace the Civil Code however is of a subsidiarity use, being merely a *lex generalis* to the Labor Code (Act No. 262/2006 Coll.).[9] Chapter VIII of Labor Code, dedicated to the "protection of an employer's property interests and protection of an employee's personal rights", contains just one Section (§ 316). This Section will be thoroughly analyzed in the following pages as it is the provision that shapes the relationship between the protection of employer´s ownership and the employee's privacy.

In the overview of statutory acts affecting the "monitoring at the workplace" cases, one cannot forget the public law *lex specialis*, which up to 25 May 2018 was primarily the Personal Data Protection Act (Act No. 101/2000 Coll.). It has been replaced by the EU´s GDPR[10] together with the local Personal Data Processing Act (not yet approved in November 2018) which is to accompany the GDPR into practice in the Czech Republic. This piece of regulation establishes and governs operations of the Office for Personal Data Protection (UOOU), the administrative body that regulates the rights and obligations in processing of personal data, i.e. when employees are monitored with recordings, which are then stored, categorized, transferred etc. Finally, yet importantly, there is also the Czech Criminal Code (Act No. 40/2009 Coll.) which in its Section 182 sanctions the breach of secrecy of correspondence (which includes not

9 Labor Code No. 262/2006 Coll., as amended. For English translation see https://www.mpsv.cz/files/clanky/3221/Labour_Code_2012.pdf (accessed 31.10.2018).

10 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (O.J. L 119, 4.05.2016, pp. 1-88).

only letters, but also data, text, voice, audio or visual messages sent by the means of a network of electronic communication and computer systems) with imprisonment for up to two years or with prohibition of activity.

Thus, the above-mentioned monitoring of employees in the workplace may fall under the two key laws, namely the Labor Code (hereinafter LC) and, at the same time, GDPR plus the future Personal Data Processing Act (and *ultima ratio* also the Criminal Code). The case may be, however, that only one of the two regulations would be applicable. There may exist two different sets of cases, one of which involves only interference with privacy (if it occurs without data processing enabling the identification of a particular natural person) and the other contains only the processing of personal data (if they can be obtained without interfering with the privacy of an employee). However, both sets of cases would in practice rather overlap - data allowing the identification of a natural person are often obtained by the intervention into privacy and are then usually stored, sorted, evaluated, etc. Due to the ongoing expansion of the concepts of "privacy" and "personal data", it is thus inevitable that the same case of monitoring often leads to application of the two regulations and is then subject to supervision (and eventually to sanction) by two administrative authorities. The Labor Inspection Office (SUIP) deals with violation of employee privacy, while the failure to fulfill the obligations related to the processing of personal data is supervised by the Office for Personal Data Protection (UOOU).[11] In addition, brutal breaches of correspondence secrecy should naturally be seized upon by the competent authorities involved in criminal proceedings (however this option will be left aside in the following analysis).

This double regulation in practice poses considerable problems, as it is evidenced by online discussions and instructions on numerous internet sites trying to explain to stakeholders how the rights should be protected and obligations complied with.[12] Employers must be mindful of the fact that, for example, the system of registering entry to and exit from the workplace would entail the processing of personal data, but not, as a matter of principle, a violation of privacy. On the other hand, an installation of CCTV cameras in the workplace, with no recordings, would amount to a privacy

11 SUIP states on its official website the following: "Control of the above mentioned (i.e. monitoring of employees in the workplace using a camera based surveillance system – added by author) falls within the competence of labor inspectorates. If a breach of Section 316(2) of the Labor Code is detected in connection with the processing of personal data of employees (i.e. when camera recordings would be archived and would allow for the identification of employees), the findings will also be transmitted to the Office for Personal Data Protection"; http://www.suip.cz/otazky-a-odpovedi/pracovnepravni-vztahy/ochrana-majetkovych-zajmu-zamestnavatele-a-ochrana-osobnich-prav-zamestnance/monitorovani-zamestnancu-na-pracovisti-kamerovym-systemem/ (accessed 31.10.2018).

12 See for instance in E. Janečková, V. Bartík, Ochrana osobních údajů v pracovním právu (Otázky a odpovědi), Wolters Kluwer, Praha 2016, pp. 128, 131.

breach, but not to the processing of personal data. Since the aim of the study is to analyze the legal aspect of the protection of privacy in the workplace in the Czech Republic, the issues discussed below will be viewed primarily through the lenses of the Labor Code and its Section 316. Only where privacy issues cross with personal data protection and such situation would cause interpretive or application ambiguity will related data protection requirements be given attention.

## 3. Section 316 of Labor Code – a guidance or a puzzle?

The fact that Chapter VIII LC titled "Protection of an employer's property interests and protection of an employee's personal rights" contains just one section, Section 316, might suggest that it is a unified and coherent set of rules. In reality, however, this Section regulates different situations that for the sake of clarity would be better split into separate sections. Paragraphs 1-3 really focus on the checks conducted by the employer in the workplace.[13] Paragraph 4, on the other hand, prohibits employers to require from their employees information that does not "directly relate to work performance and basic labor relationship" (e.g. to question them about pregnancy, sexual orientation, political adherence etc.). However, even within paras 1-3 of the Section, the difference between paragraph 1 (which allows the employer to check that employees do not misuse his "means of production or service" without due consent and for their own purposes) and paragraphs 2 and 3 (which prohibit the employer from encroaching upon his employees' privacy without a serious cause) should be duly noted.

Paragraph 1 does not mention employee privacy and uses the term "to check" in order to empower the employer to oversee that his means of production or service etc. are not misused by employees. A proportionate way of conducting such a check is required, but the law sets no specific conditions for that. On the other hand, paragraphs 2 and 3 deal with the employee's right to privacy that may be encroached upon by employer´s surveillance (monitoring), interception (recording) of telephone

13 Section 316 (translation taken from *op.cit*. n. 9): (1) Without their employer's consent, employees may not use the employer's means of production or service and other means necessary for performance of their work, including computers and telecommunication technology for their personal needs. The employer is authorized to check compliance with the prohibition laid down in the first sentence in an appropriate way. (2) Without a serious cause deriving from the nature of the employer's activity, the employer may not encroach upon employees' privacy at workplaces and in the employer's common premises by open or concealed surveillance (monitoring) of employees, interception (including recording) of their telephone calls, checking their electronic mail or postal consignments addressed to a certain employee. (3) Where there is a serious cause on the employer's side consisting in the nature of his activity which justifies the introduction of surveillance (monitoring) under subsection (2), the employer shall directly inform the employees of the scope and methods of its implementation.

calls, checking of electronic mail etc. An employer can do this only if he has a serious cause deriving from the nature of his activity and if he has directly informed employees of the scope and methods of his monitoring, checking etc.

Even though the terms "to check", "to survey", "to monitor" used in these paragraphs may sound like synonyms, they are not in the context of Section 316 LC. Otherwise, it would be difficult to tell how an ordinary employer may routinely have use of paragraph 1, without being prohibited from doing so by the condition set in paragraph 2, which authorizes the monitoring of employees only if a non-ordinary nature of activity provides a serious cause for it. The commentary literature has therefore shown the senselessness of understanding paragraphs 1, 2, and 3 of Section 316 as rules regulating the same situation. If there were one rule expressed in 3 paragraphs, the right to check employees would only be given to an employer carrying out a particularly dangerous or threatening activity.[14] To avoid that, both parts of Section 316 need to be read separately. More precisely, paragraphs 2-3 need to be understood as setting the rules for special situations (interference with the privacy of employees if a specific cause so requires), whereas ordinary control by the employer takes place in accordance with paragraph 1.[15] In the existing wording, however, Section 316 LC remains rather "incomprehensible and meaningless, especially for the employer, whose legal certainty it undermines".[16] Unfortunately, even the Czech courts and administrative authorities do not produce in their decisions and statements any clear and easy-to-understand guidelines.

The Czech Supreme Court (hereinafter SC) and the Czech Supreme Administrative Court (hereinafter SAC)[17] standardly interpret the distinction between paragraph 1 and paragraphs 2-3 of Section 316 LC so that paragraph 1 is devoted to the protection of the employer's property while paragraphs 2-3 are dedicated to the protection of the privacy of the employee.[18] Under paragraph 1, every employer is entitled, to the extent of what is necessary and proportionate, to check his employees. It must be done without any interference with privacy greater than that given by the relationship of subordination between the employer and the

14 See for instance M. Štefko, Soukromí zaměstnanců pod ochranou inspelce práce, "Acta Universitatis Brunensis Iuridica" 2018, vol. 604; also M. Hromanda, Ochrana osobnosti zaměstnance při elektronické komunikaci, (in:) H. Barancová, A. Olšovská (eds.), Pracovné parvo v digitálnej dobe, Leges, Praha 2017, p. 166.

15 Judgment of the Supreme Administrative Court on the case 5 As 158/2012 – 52 (23.03.2013). The Court stated: "The employer has the right to proportionate control according to the provisions of Section 316 (1) of the Labor Code while the provisions of Section 316 (2) of the Labor Code are corrective of possible ways of performing such control".

16 J. Morávek, Kontrola a sledování zaměstnanců, "Právní rozhledy" 2017, No. 12.

17 The Supreme Court is the last instance for disputes between employees and employers, the Supreme Administrative Court for disputes of employers with supervisory state authorities.

18 Judgment of the Supreme Court on the case 2 Cdo 747/2013 (7.08.2014); Judgment of the Supreme Administrative Court on the case 5 As 158/2012 – 52 (23.03.2013).

employee and by the fact that each manager has to supervise his subordinates (which naturally limits the extension of their privacy). Without need to comply with other conditions, each employer is thus authorized to check whether his employees use the entrusted means of production or service solely to perform the entrusted work, properly manage them, guard and protect them from damage, loss, destruction or misuse and do not act in contradiction with the legitimate interests of the employer. Therefore, the "checking" under paragraph 1 is fundamentally and qualitatively different from "monitoring or surveillance" according to paragraphs 2-3 of the same Section: it can be carried out under all circumstances and, if appropriate, it is not subject to the restrictions contained in paras 2-3 because it does not intervene into employees' privacy. It looks as if Section 316(1) LC creates a safe harbor for Czech employers and the only question that must be answered is how to stay safely within its limits.

On this issue, the SC ruled in 2012 in the most cited Czech case of an employer´s control over the activity of an employee on the Internet.[19] The employer found that his employee had spent 102.97 hours out of 168 working hours in a single month by viewing non-job-related content on the Internet (always using a work PC). As a result, the employment relationship was immediately terminated for a particularly gross breach of duty because the employer did not consent to the use of his equipment for the private purposes of the employee. A series of litigation followed, as the evidence, in the form of a list of web pages with non-work content visited by the employee, was produced without the employee's consent and knowledge. Czech courts, including the SC, and ultimately also the Constitutional Court,[20] found that in this case, there had been no unacceptable interference with privacy of the employee and hence no act of the employer that exceeded the authorization given to him under Section 316(1) LC.

According to the SC, the employer with his checking did not fall under Section 316 (2-3) LC, as the degree of interference with the complainant's privacy was, in the opinion of the judges, totally negligible (if any at all). The fact that the employer's control fell exclusively within the scope of the authorization given in Section 316 (1) LC was explained by the SC as follows:

– first, the Court found that the employer had not proceeded "completely arbitrarily (in terms of scope, length, thoroughness, etc.)" and checked in a proportionate way, because the content of the websites visited (and what exactly the employee was searching for, watched, etc.) was not detected. The employer only ascertained whether the pages visited were job related;

19 Judgment of the Supreme Court on the case 21 Cdo 1771/2011 (16.08.2012).

20 Resolution of the Constitutional Court no. I. ÚS 3933/12 (7.11.2012) stated that the constituional complaint of the employee was manifestly unfounded.

– second, the SC considered it essential that the employer did not use wiretapping, telephone call logging, e-mail monitoring, or mail order inspection (the forms of employee monitoring explicitly mentioned in Section 316(2-3) LC), but he reviewed only a statement of the PC's activity conducted with the employee's login.[21]

The fulfillment of these two conditions: a) the limitation of the length and reach of the control, and exclusion of the content of visited web pages from its scope; b) the non-use of employee tracking means specifically listed in Section 316(2) LC, was sufficient for the SC to admit that the object (target) of the employer´s control was not to intervene into the employee privacy but only to determine whether the employee violated the absolute statutory prohibition of abuse of the employer's equipment for personal purposes.

However, it was not convincingly explained by the SC why tracking only the kind, but not the content of the web pages visited by the employee did not mean encroachment upon his privacy. It can be argued that the information needed to determine whether a certain web page is job-related or not is information about the personal preferences and hobbies of the employee concerned (one can guess whether he is fond of shopping, lifestyle, sports, sex etc.). The SC surprisingly did not even address the question of whether the criterion of proportionality would not be better satisfied by blocking websites that are often abused for out-of-work activities than by an ex-post control of the employee's PC activity.[22] Nevertheless, the SC decided very similarly on the inspection of a list of telephone calls made by an employee from the workplace.[23] Although it can be argued that inspecting traces of the employee's usage

21 *Verbatim* the Supreme Court stated (author´s translation): "Control of compliance with this prohibition, however, may not be exercised by the employer in an arbitrary manner (in terms of scope, length, thoroughness, etc.), as the employer is entitled to do so in an appropriate manner only…. In particular, the court will take into account, whether it was an interim or a follow-up check, its duration, its scope, whether it did at all (or to what extent) limit the employee in his activities and also whether and to what extent did it interfere with the employee's right to privacy etc. Of course, the subject matter of a check can only be to find out if the employee has violated the statutory absolute prohibition (or taking into account to what extent did the employer consent to mitigate such prohibition) to use his equipment, including his PCs and telephones for the employee´s personal purposes. It must always only be a check on non-compliance with those obligations which have not been expelled or reduced by the employer. Only such a control can be considered as reasonable (proportionate) and therefore legal (in accordance with the authorization under the provisions of Section 316 (1) LC)".

22 For reservations against the Supreme Court decision see for instance J. Vobořil, Nejvyšší soud k možnostem utajeného sledování zaměstnanců, "Zpravodaj Gender Studies" 2012, No. 12, 30.10.2012, http://zpravodaj.genderstudies.cz/cz/clanek/nejvyssi-soud-k-moznostem-utajeneho-sledovani-zamestnancu (accessed 31.10.2018).

23 In the case of abuse of a service phone for unauthorized private calls, the Supreme Court decided in 2014 in conformity with its earlier decision regarding the inspection of websites visited by the

of facilities from PC activity or telephone call logs is also a certain type of monitoring or surveillance, the SC drew a dividing line between the targeted *ad hoc* collection of such "footprints" and the continuous monitoring of the employee's activity (all the more so if it includes interference with the secrecy of messages transmitted by him etc.).

The SC's emphasis on the non-use of the means and methods of control listed explicitly in Section 316(2) LC, i.e. open or concealed surveillance (monitoring) of employees, interception (including recording) of their telephone calls, checking their electronic mail or postal consignments addressed to a certain employee, can be understood as their qualitative differentiation from all other means of control, including the acquisition of electronic statements of employee activities at corporate facilities (PCs, printers, copy machines, telephones).

Morávek, one of the frequently publishing experts on the issue, explained such a recommendation made by the SC as follows (author´s translation):

"*Pursuant to Section 316 (1) exclusively, those cases are handled, regardless of the means of control chosen, where it is probable (or de facto certain) that no encroachment upon the employee's privacy can take place. Furthermore Section 316(1) is applicable, even if there is interference with the privacy of an employee, if a different form of control is chosen other than that enumerated by Section 316 (2) (surveillance (monitoring) of employees, interception (including recording) of their telephone calls, checking their electronic mail or postal consignments addressed to a certain employee), it can be for instance an inspection of a service vehicle's usage log or other random checks performed in real-time for ad hoc cases.*"[24]

It can be seen here that adding the value of an exhaustive enumeration to the list of monitoring methods expressly mentioned in Section 316 (2) LC one may draw the conclusion that, if the employer finds other methods, he may interfere with the privacy of his employees. It is very dubious whether the SC really meant that, because such an interpretation would deny the logical construction of Section 316, built on the assertion that when acting within the limits of its paragraph 1, no violation of employee privacy occurs. Abandoning this approach would blur the aforementioned distinction between paragraph 1 and paragraphs 2-3 of this Section with all negative consequences for legal certainty. The fact that, unfortunately, there is such confusion in the current Czech debate, can be illustrated by two opinions issued by supervisory authorities in 2014, i.e. two years after the above cited judgment of the SC.

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employee. If the content of the employee's telephone calls was not detected and the check was focused only on the employee respects for the private use prohibition of the service telephone (by review of the telephone numbers called), it was not an employer's intervention into employee privacy but an inspection falling under Section 316 (1) LC. See the Judgment of the Supreme Court on the case 21 Cdo 747/2013 (7.08.2014).

24 J. Morávek, Kontrola a sledování zaměstnanců…, *op. cit*. n. 16, p. 573.

The UOOU maintains in its statement that every check of an employee's internet activity falls under the paras 2-3 and not para 1 of Section 316 LC:

*"It is not possible to monitor the use of the Internet by employees for the purposes of the employer, unless the statutory conditions are met, i.e. the employer has a serious reason rooted in the specific nature of his activity … Neither the statistical monitoring of the use of Internet access, such as the time spent by an employee "surfing" the Internet is not in line with the new Labor Code, unless the conditions set out above are met".*[25]

Contrary to that, the SUIP in its information brochure defended the possibility for employers to stay within the limits of para 1 of Section 316 LC:

*"Monitoring of an employee's activity on the Internet – when it comes to controlling the use of the employer's means by an employee during his/her working hours, must always stay within reasonable (proportionate) limits, e.g. if the employee visits a "personal page", such as electronic banking, its content cannot be traced".*[26]

As can be seen, the same activity called "tracking employee activity on the Internet" falls under paras 2-3 of Section 316 according to one supervisory body, while the other admits that an appropriate and targeted control of private misuse, not disclosing the content of the sites visited, would still be at hand to any employer. For greater approximation to what kind of monitoring of employees is always permitted under Section 316 LC and what can be used under certain conditions only, or rather not allowed at all, the further analysis will focus on the individual criteria which influence it.

## 4. Section 316(1) of Labor Code and the proportionality issue

Paragraph 1 of Section 316(1) requires that checking must be conducted by an employer in an *appropriate* or *reasonable* or *proportionate* way (depending on the translation).[27] The proportionality of the employer's checking is underlined by commentators[28] as well as by supervisory bodies in their instructions for general

25 UOOU Opinion Nr. 2/2009 updated in February 2014, https://www.uoou.cz/stanovisko-c-2-2009-ochrana-soukromi-zamestnancu-se-zvlastnim-zretelem-k-monitoringu-pracoviste/d-1511 (accessed 30.10.2018). The UOOU is not, strictly speaking, in a position to give an authoritative interpretation of the Labor Code or to supervise employers´ compliance with its provisions. However, any recording or monitoring of the employee becomes a processing of the employee´s personal data. Therefore, the UOOU opinion cannot thus be easily dismissed as irrelevant.

26 SUIP, Ochrana osobních práv zaměstnanců a ochrana majetkových zájmů zaměstnavatele (Protection of employees' personal rights and protection of the employer's property interests), květen (May) 2014, http://www.suip.cz/otazky-a-odpovedi/pracovnepravni-vztahy/ochrana-majetkovych-zajmu-zamestnavatele-a-ochrana-osobnich-prav-zamestnance (accessed 31.10.2018).

27 "Přiměřeným způsobem" in the Czech original, which can be translated by each of the expressions used above, however, the term "proportionate way" seems to be the most literal translation.

28 J. Morávek, Kontrola a sledování zaměstnanců…, *op. cit*. n. 16.

public.[29] However, in view of the structure of Section 316, it must be emphasized that we encounter here the dual meaning or use of the concept of proportionality.

Under para 1 of this Section, the fulfillment of the proportionality requirement means that the employer's checking would not encroach upon his employees privacy at all or in such an insignificant way that paras 2-3 of the same Section would not be activated. In this first paragraph, therefore, the proportionality is important as a backstop, which ensures that the employer when protecting his ownership does not interfere with the employee's fundamental right to privacy.

Only when the employer's control is not proportionate in the sense of para 1 and affects the privacy of employees, the requirement of proportionality gains importance of the constitutional test of the same name. It means that the employer's control must be tested whether it is really suitable, necessary and proportionate (in a narrow sense of balancing between clashing constitutional right and values). Unfortunately, the proportionality in this meaning, which is relevant for the understanding and application of paragraphs 2-3 of Section 316 LC, is not mentioned at all in its statutory provisions. Its relevance and importance must be inferred from standards of constitutionality review conducted by the Czech Constitutional Court (hereinafter CC) and after this court by the ordinary courts of the Czech Republic. An employer without legal training in this field of law, however, would not learn about any proportionality requirement from the wording of paragraphs 2-3 of the Section.

The definition of proportionality in the first sense, i.e. as a backstop which should keep the employer's control within the safe harbor of paragraph 1 of Section 316 LC, was, as a matter of fact, already discussed in the previous chapter on the basis of analysis of the SC decision from 2012 regarding the monitoring of employee activities on the Internet.[30] It can only be added that the SC stressed *expressis verbis* on account of proportionality that (author´s translation):

*"As the law fails to specify what is the most proportionate way of control, it is a legal norm with a relatively indefinite (abstract) hypothesis, i.e. a legal norm whose hypothesis is not directly prescribed by law, thus leaving it to the court to define in each individual case, from a wide, unlimited range of circumstances, what specifically would be the hypothesis of the legal norm"*.

If we want to escape from this general reference to circumstances of each individual case, it can be specified, based on the abovementioned decisions of the SC, that "proportionate" in the sense of Section 316(1) LC would be the control that would remain rather limited in scope, that would be better focused on an ex-post check of whether the ban on using the employer's equipment for employees' private purposes has been respected. It is thus possible to check the "footprint" that the employee leaves behind that can be ex-post reviewed through a record or statement

29 UOOU Opinion no 2/2009, *op. cit.* n. 25, SUIP, *op. cit.* n. 26.

30 Judgment of the Supreme Court on the case 21 Cdo 1771/2011 (16.08.2012).

of PC, telephone or service vehicle use etc. Such a record may cover even a longer period of the employee's activity, such as one full month, as in the abovementioned SC case. The purpose of such tracking, however, must never be the discovery of content of private internet browsing, of sent and received correspondence, of telephone calls or privately printed copies or employee monitoring in general.[31]

For practical purposes, it can be added, first, that if the ban on using the employer´s equipment for private purposes remains absolute, it would always be easier to control it as any trace of misuse would signal an employee's inappropriate behavior. If, on the other hand, the ban has been mitigated by the employer's consent to limited private use of his equipment, there must be clearly stated (and to all employees explained) a boundary between authorized and non-authorized use. This can logically lead to misunderstandings and consequent problems. Second, it is of no relevance, if the employee "footprint" was recorded by a high-tech or by a more traditional means of control as all that is important whether or not the conditions of the safe harbor set by Section 316(1) LC were fulfilled. However, as will be shown further, some of the available technical means are more problematic in terms of their suitability, because they are rather tools for continuous and intrusive monitoring (like on-site cameras) than of an ex-post and limited control.

Undoubtedly, it remains a shortcoming in the wording used in Section 316 LC, if there is not stated clearly enough, that an appropriate checking in the sense of paragraph 1 is qualitatively different from "monitoring" or "surveillance" mentioned in paragraphs 2-3 of this Section. If an ex-post, *ad hoc* control is not unambiguously differentiated from real-time and systematic monitoring – reaching beyond the need to verify whether an employee is abusing the employer's equipment – then, in practice, both the courts and the supervisory authorities keep speaking about "monitoring", regardless of whether they mean control under paragraph 1 or monitoring encroaching upon employees' privacy in the sense of paragraphs 2-3. For example, if we concede that in the statements quoted in the previous chapter, the UOOU had in mind the "monitoring" that is systematic and extensive, affecting the privacy of employees, while the SUIP referred to "monitoring" proportionate by its scope and methods, there may be no contradiction between the advice they each give addressed to employers. The confusion here is once more caused by the use of the same term to "monitor" activities on the Internet.

31 In the following part of this paper, the decision of the Municipal Court in Prague from 2017 is mentioned, in which the court assessed the GPS tracking of the Czech Post deliverers, i.e. all of their movement throughout working hours. Although it was also carried out for "statistical" purposes only, there was a significant difference from a survey of the employee's use of the employer's equipment. GPS tracking of all movement allowed to reconstruct the whole day of the employee, not just the inappropriate manipulation of the means entrusted, and that is why it interfered with his privacy.

## 5. Section 316(2) of Labor Code and the proportionality issue

In cases where the employer interferes with the privacy of the employee, the requirement of proportionality in the second meaning comes under the spotlight, i.e. the requirement to interfere with the fundamental right in a way that is suitable, necessary and proportionate (in a narrow sense). Regarding this second proportionality there is a more developed jurisprudence in the Czech Republic due to the fact that the majority of litigations having monitoring of employees as their subject matter fell under paragraphs 2-3 of Section 316 LC, as the methods used had an appreciable impact on employee privacy. It can logically be expected that when deploying modern technologies to monitor employees, it becomes very easy to "let them run" without restrictions, as opposed to the complexity of their needful and precise targeting within a strictly limited time frame.

Virtually since the beginning of the existence of the Czech Republic, the Czech CC has applied the aforementioned proportionality test to cases of interference with fundamental rights in the public interest, as well as in the event of collision of two fundamental rights.[32] According to the CC, fundamental rights also have effects in horizontal relations, and the State has the duty to protect them, even if they are interfered with by individuals, for example in relations between employees and employers.[33] The precedence of one fundamental right over another is not and cannot be given once and for all, so the proportionality test must always be carried out again for each particular case, taking into account its unique circumstances.

In its application of the proportionality test the CC follows the European Court of Human Rights and the European Court of Justice, and on the theoretical level, it refers itself to the understanding of proportionality developed by the German theorist R. Alexy.[34] The CC, however, has not been dogmatic to apply the test all the time in a standardized way and in every detail. It has replaced, on case-by-case basis, the universal three-tier proportionality test by the requirement of reasonableness of the method of enforcement of one party's fundamental right, and by the requirement to avoid extreme disproportionality in the possibility of exercising the fundamental right of the other party.[35] Courts dealing with civil and administrative disputes follow this approach in deciding cases of employee privacy breaches by the employers' monitoring, that is, those covered by Section 316 (2-3) LC.

32 Decision of the Constitutional Court on the case Pl. ÚS 4/94 (12. 10. 1994). See also D. Kosař, M. Antoš., Z. Kühn, L. Vyhnánek, Ústavní právo. Casebook, Wolters Kluwer, Praha 2014, pp. 362-366.

33 Decision of the Constitutional Court on the case IV ÚS 1735/07 (21.10.2008).

34 Z. Červínek, Standardy přezkumu ústavnosti v judikatuře Ústavního soudu, "Jurisprudence" 2015, No. 4, pp. 21-29.

35 D. Kosař, M. Antoš., Z. Kühn, L. Vyhnánek, Ústavní právo… *op. cit*. n. 32, pp. 374-375.

The ruling of the CC from 2014 may be considered symptomatic in this regard.[36] The case involved a conflict of the right to privacy of an employer against the right to fair process of an employee, as in the core of the dispute was a hidden record of an employer taken by an employee who opposed the termination of his work contract because of redundancy. The CC first stated that the proportionality test is the method used to assess the collision of two fundamental rights and recalled the standard three steps of the test. However, in the practical application of the test, the CC was satisfied with the first step when it found that the hidden record was the only possible (and therefore suitable) way in which the weaker party (i.e. employee in relation to employer) could prove its claim about the real motive for dismissal. The other two steps of the proportionality test were not carried out by the CC and its conclusion was that ordinary courts had erred in not recognizing as admissible evidence the recording of the employers' arguments secretly acquired by the employee. The courts thus violated the employee's right to a fair trial and the constitutional principle of weaker party protection.

The SAC follows the CC and considers the proportionality test as a standard step of procedure that has to be taken when it comes to the choice of one of the two fundamental rights guaranteed by the Constitution. In the Court's decision-making in matters of employee monitoring, there are cases in which the SAC consistently carried out the three-step proportionality test, as well as those where it was satisfied with the reasonable balance between the target and the means of its achievement.[37] An example of a rigorous application of the proportionality test was the case of camera monitoring of drivers and stewards of long-distance buses decided by the SAC in 2015.[38] The employer claimed the protection of lives and safety of the transported persons as well as of his own property (bus and fare). The possibility to add an inspector to each bus was rejected by him as difficult and inefficient. He therefore defended the camera crew watching during the entire duration of the shift (capturing image, not sound) as perfectly justified.

His intention to introduce such type of monitoring was notified to the UOOU, this supervisory body however, disagreed as it deemed the measure to be disproportionate. The UOOU itself has examined the notified method of monitoring for suitability (found that it could not achieve the declared goals, e.g. better safety of passengers), then for necessity (there would be less problematic methods of achieving the purpose, as for instance the testimony of passengers) and finally also for proportionality in the narrow sense. In this respect, the UOOU held that the employees' right to privacy would be violated and the provisions of Section 316(2) LC breached as filming the entire crew of a bus for the entire duration of the journey

36 Decision of the Constitutional Court on the case II ÚS 1774/14 (9.12.2014).

37 Judgment of the Supreme Administrative Court on the case 5 AS 158/2012– 52 (23.03.2013).

38 Judgment of the Supreme Administrative Court on the case 10 As 245/2016 – 41 (20.12.2015).

amounts to deprivation of privacy as such. Conversely, for example, the scanning of the driver's cabin space only for the time when cash is handled, would be for the UOOU a more acceptable form of monitoring. The Municipal Court in Prague, hearing the employer's action against the UOOU, fully confirmed the correctness of the proportionality test carried out by the UOOU and concluded that "camera monitoring of the driver and the steward and of their immediate surroundings is an unjustified and disproportionate interference with privacy of the employees concerned".[39]

The SAC, ruling on the employer's cassation complaint against the decision of the Municipal Court, also applied the proportionality test. Its judges (as opposed to the UOOU and the Municipal Court opinions) concluded that the measure envisaged by the employer could fulfill the criterion of suitability, as it could act preventively. However, the criterion of necessity was no longer fulfilled because the employer did not prove the inefficiency of less intrusive means of checking that could not prevent real-life damage and threats that occur during the bus operation. The SAC then dropped the third step of the proportionality test, because non-fulfillment of the second criterion made further testing pointless.

In the argumentation of the SAC, it is necessary to emphasize a.o. the following: if there are no proofs of employees' misbehavior, which should be prevented by their monitoring, then an open intervention into their privacy is unjustified and thus will not stand the proportionality test. This could mean that the employer's ordinary, non-intrusive protective measures should first be overcome by inappropriate employees' acts, and only then could the employer resort to a more sophisticated method of tracking them. Without proof of the employer's negative experience, or at least, without reasonable suspicion that employees breach statutory rules and legitimate requirements, it is more than probable that interference with employee privacy would be deemed disproportionate.

Such conclusion is supported and further developed by another SAC judgment[40] concerning camera systems, in which the Court stated (author´s translation):

*"The Supreme Administrative Court considers it necessary to emphasize that the installation of camera systems, having regard to their nature and interference with the personal integrity of persons, can only be achieved if all less invasive devices have failed or would not be able to fulfill the intended purpose of monitoring".*

This reasoning implies the idea of a certain range of means of control, from the least to most intrusive, from which the employer should first select those less intrusive. Only in the case of their failure, or an a priori manifest inadequacy, can the employer consider switching to more invasive means of monitoring employees. Systematic camera scanning throughout the entire workday is of course the most

39 Judgment of the Municipal Court in Prague on the case 5A 107/2013 (18.10.2016).

40 Judgment of the Supreme Administrative Court on the case 5 As 1/2011 – 156 (28.06.2013).

intrusive in terms of employee privacy. Conversely, capturing only certain "sensitive" moments of an employee's work, like cash handling, access to certain protected areas (box office, server room etc.), are naturally far more appropriate. The commentary literature, based on analysis of the aforementioned case law, rightly emphasized that "if any aspect of monitoring cannot be considered as strictly necessary, it is necessary to say goodbye to it".[41]

In this regard, the second step of the proportionality test, consisting of seeking an equally effective but less intrusive means of control, coincides in both the UOOU decision and in subsequent judgments, with the third step of this test. The latter consists in the assessment of proportionality of interference with privacy in the narrow sense (i.e. the search of an acceptable imbalance of rights where one of them, for good reason, temporarily wins but the other is not at the same time totally denied). In the above-mentioned cases, however, the extensive camera surveillance of employees (almost) fully suppressed privacy in the workplace. It was, therefore, natural to conclude that the proportionality test was failed when the monitoring was affecting the entire workplace throughout working hours. This conclusion is confirmed by decisions of the Municipal Court in Prague in two other cases of employee monitoring.

In the first case, the Municipal Court in Prague carried out the test of proportionality of a measure by which the Czech Post monitored 7770 of its mail delivery staff for one whole year. All had to carry a GPS locator each day throughout their working hours.[42] The employer justified the deployment of GPS trackers by the need to accelerate and improve services provided within the framework of the legally defined service of general interest consisting in proper delivery of consignments and other values to recipients. At the same time, the Czech Post claimed to be interested in mere statistical data without linking them to employee personal data. However, the identification of offline data collected with individual deliverers was, of course, technically possible. The Court therefore agreed with the UOOU that the interference with the privacy of the employees was inappropriate because the method of monitoring was not a suitable means of verifying that a consignment had actually been delivered. This was not a necessary measure either, because in order to achieve the declared objectives, it would have been sufficient to verify whether the delivery person actually visited the places to which consignments were to be delivered. Regarding the proportionality in the narrow sense, the Court stated that the employer did not assess all various possibilities of monitoring and did not choose the one that had the least effect on the privacy of delivery staff, e.g. not recording all movement only the information on time of visit at the place of delivery.

41 J. Tomšej, J. Metelka, Ochana soukromí nad zlato? "EPRAVO.CZ", 16.09.2013 https://www.epravo.cz/top/clanky/ochrana-soukromi-nad-zlato-92358.html (accessed 31.10.2018).

42 Judgment of the Municipal Court in Prague on the case 6 A 42/2013 – 48.183 (5.05.2017).

In the second decision of the Municipal Court, the dispute was about camera surveillance in PC games stores.[43] A substantial part of these stores were continuously monitored, including employees behind the cash counter. The Court found that if one of the essential purposes of such monitoring was to prevent employees from offering discounts to fictitious customers (as really happened in practice), the cameras had to monitor the area in front of the counter in order to verify whether a customer was present at the time of working with the cash. It was therefore unnecessary to deprive employees of their privacy by capturing the space behind the counter where they were standing most of the time. In both cases it was thus confirmed that only by deploying the least intrusive means of control, however good enough to achieve the legitimate goal, the monitoring would be kept within proportionate limits.

Even though other case law findings regarding cameras in the workplace could have been cited, they would not change the following conclusion regarding the proportionality of means used to monitor employees in the sense of Section 316 (2-3) LC:

a) employee is under labor contract with employer always as a dependent, a weaker party whose privacy in the workplace is therefore by definition a weakened one. However, he should never be completely deprived of his privacy and therefore any means of control, that does so, can only in very exceptional cases pass the test of proportionality;
b) appropriate means of control must be *suitable* to attain the legitimate aim, i.e. only those that directly and genuinely lead to that aim would be acceptable. *Necessary* will only be those means that still lead to the goal but are the least intrusive of the set of suitable means. Such are the means that target only certain risk moments of the employee's behavior, not all of his behavior at work;
c) employer should initially apply "minimal monitoring" (narrowly focused, limited in scope and time) and only when this fails and it becomes clear that the protection of legitimate interests and rights, or fulfillment of legal obligations of the employer, would not be secured, it is possible to move to more extensive and intrusive means of monitoring.

## 6. Scope of employee privacy

The statement that an employee has the right to protection of his/her privacy in the workplace requires at least a brief outline as to where such privacy in the workplace extends.

43 Judgment of the Municipal Court in Prague on the case 8 A 182/2010-69.77 (2.09.2014).

The right to privacy has a relatively long and fascinating history, in which privacy in the workplace is one of the newer chapters whose content is not yet closed. In this respect, the European Court of Human Rights (ECtHR) is the most influential promoter within Europe. The authorities of the Czech Republic followed the guidance of ECtHR already in the 1990s, as evidenced by the 1998 decision of the SC[44] pointing to the inadmissibility of the secret recording of an employee's call as evidence in a labor dispute. The SC referred to the ECtHR case law in *Halford v. UK* and *Klopp v. Switzerland*, that telephone calls made from the workplace may be covered by the protection of privacy and inviolability of correspondence within the meaning of Article 8(1) of the ECHR. Although the SC originally tried to draw a certain dividing line between professional, commercial and public communication on the one hand and speeches of a personal nature on the other,[45] it is under the influence of the ECtHR jurisprudence that the SC currently holds the opinion that privacy may have a place even where communication is of a professional nature. No definite conclusions, therefore, can be drawn regarding this or that type of recording of a particular act and it is always necessary to proceed in the light of the circumstances of each individual case.[46]

Commentators also agree with the fact that even in the workplace the rights of employees to private and family life must remain real and effective.[47] They justify this in line with the ECtHR and the Czech authorities' statements, stressing that every individual has the right to create and maintain relationships with other human beings and thus to develop his private life including in the workplace.[48] Only rarely, a rejection of this extensive construction of privacy occurs, pointing to the fact that if an employer does not allow employees to use his equipment for their private purposes, the content of all corporate PCs, servers and mailboxes can be controlled without limitation because the employer can logically assume that no private items will be found there.[49] However, such voices remain exceptional and without influence on the decision-making of supervisory bodies and courts. Actually, there is no dispute in Czech law that even in the workplace an employee has always the right to a private

44 Judgment of the Supreme Court on the case 21 Cdo 1009/98 (21 10.1998).

45 Judgment of the Supreme Court on the case 30 Cdo 64/2004 (11.05.2005)

46 Judgment of the Supreme Court on the case 30 Cdo 1585/2012 (27.03.2013).

47 P. Molek, Základní práva. Svazek 1. Důstojnost, Wolters Kluwer, Praha 2017, p. 335. Likewise M. Štefko, Ochrana soukromí zaměstnanců ve světle čl. 8 Úmluvy o ochraně lidských práv a základních svobod. "Jurisprudence" 2012, No. 7, p. 17.

48 Judgment of the European Court of Human Rights of 12 December 1992 on the case Niemietz v. Germany, application No. 13710/88 and UOOU Opinion No. 6/2009.

49 L. Ticháčková, Vlastnictví zaměstnavatele versus soukromí zaměstnance…, *op. cit.* n. 2. The UOOU, for instance, in its Opinion No. 1/2003 emphasizes that for the existence of the employee's right to privacy it is irrelevant that the employee uses communications or other facilities of the employer. The location and ownership of an electronic device cannot exclude the right to confidentiality of its communications and correspondence.

sphere, be it in an office or in any different kind of workplace (including in company vehicles etc.).[50] As one commentator rightly explained, it is an employee's space in which, although for a limited time and perhaps only partially, he can stop playing his social roles or can change them.[51] It also implies that in the workplace there are areas with different degrees of privacy, from those where monitoring is justified and basically foreseen (access to workplaces, risk areas, etc.), to those in which any intrusive monitoring will always be inadequate and illegal. These are especially the places reserved for hygiene (showers, toilets) and employee rest areas, as the SAC has repeatedly emphasized in its decisions.[52]

The approach of the Czech supervisory and judicial authorities follows the ECtHR's case law also in the rejection of attempts to give to the concept of privacy an always valid exhaustive definition. Privacy is in Czech law a "fuzzy" term as to its scope and content and its exact meaning must be found in each individual case.[53] The SAC has literally stated in one of its abundantly quoted decisions[54] that, in following the ECtHR, it does not intend to bind the concept of private life, understood in a broad sense, to any exhaustive definition. It is not always possible to distinguish clearly what constitutes the work of an individual and what constitutes his private life. The decision of the SAC concerned the audiovisual recording of a taxi driver inside his car, acquired by the staff of the control body, i.e. the Lord Mayor of Prague Office. The case therefore differed from private law disputes between employees and employers, but it is significant for the present analysis that the Prague Municipal Court first found that such a recording did not catch anything private and the taxi driver's right to private life was not affected.[55] The SAC, however, took an opposite view. The taxi driver spends most of his working day in the vehicle, communicates with customers during journeys and thus develops his contacts with the outside world, which implies that the public authority has prima facie affected the right to private life of a taxi driver within the meaning of Article 8 ECHR.

Referring to the previous analysis (relating to the interpretation of Section 316(1) LC), it is worth recalling that the extent of the private sphere of an employee in the workplace is, *a contrario*, defined by those options of employee checking that, although implemented through sophisticated technological devices, are not considered as an interference with privacy. The private sphere of an employee, as we have seen, does

50 E. Janečková, V. Bartík, Ochrana osobních údajů v pracovním právu…, *op. cit*. n. 12, p. 132.

51 J. Morávek, Kontrola a sledování zaměstnanců…, *op. cit*. n. 16, p. 573.

52 For instance, in the Judgment of the Supreme Admnistrative Court on teh case 5 As 158/2012 – 49 (23.08.2013) it was stated that: "Monitoring must be directed at the employer's property, not the employee's person (camera direction), and must be done at the workplace, not in the hygienic or resting places".

53 J. Morávek, Kontrola a sledování zaměstnanců…, *op. cit*. n. 16, p. 573.

54 Judgment of the Supreme Administrative Court on the case 1 AFs 60/2009 (5.11.2009).

55 Judgment of the Municipal Court in Prague on the case 10 Ca 99/2007 (22.01.2009).

not go so far as to prevent the employer from registering the employee´s access to the Internet at the workplace. However, if an employer controls also the content of websites visited, the legal border will already be exceeded.[56] Similarly, an employer does not interfere with employee privacy by tracking the number of emails received and sent, and with whom they are exchanged.[57] Likewise, Czech commentators concede that GPS monitoring of a service vehicles location is also outside the privacy of an employee, because in this case it is indeed about protection of the employer's property (and there is a qualitative difference from the tracking of employees as such - by which Czech Post violated their privacy in the above-mentioned case).[58]

## 7. The nature of activity justifying intrusion into privacy

If under the Section 316(2) LC, a proportionate encroachment upon employee privacy may be justified by "a serious cause consisting in the employer's nature of activity", every employer would certainly wonder whether activities carried out by his company are of such a sensitive nature. At the same time, it is unlikely that anyone will be surprised that the law or subordinate regulations (or the explanatory memorandum to the Labor Code) contain no list of such activities, and again everything is defined case-by-case, within the reasonable discretion of judicial and administrative decision-makers.

Here, again, the above-mentioned recommendation to distinguish control, from surveillance or monitoring of employees, makes sense. This is because every employer can check whether employees are abusing his resources, whether they effectively use working time, produce good results etc., but only if he does not interfere with their privacy.[59] On the contrary, to survey or monitor employees, i.e. to interfere with their

56 Judgment of the Supreme Court on the case 21 Cdo 1771/2011 (16.08.2012). Likewise in H. Zemanová Šimonová, Právní prostředky ochrany osobnosti zaměstnance, "Buletin advokacie" 31.10.2016, http://www.bulletin-advokacie.cz/pravni-prostredky-ochrany-osobnosti-zamestnance?browser=mobi (accessed 31.10.2018)

57 UOOU Opinion no. 2/2009 confirms that assessment especially "if there is suspicion of misuse of the means of work".

58 J. Metelka, GPS na pranýři aneb sledování zaměstnanců, "Právní prostor", 15.04.2014, https://www.pravniprostor.cz/clanky/pracovni-pravo/gps-na-pranyri-aneb-sledovani-zamestnancu (accessed 31.10.2018). This author emphasizes that if an employer allows employees to use a service vehicle for private use, its GPS monitor unit must give the possibility to switch between private and service régime of the car, in order to avoid tracking while the employee is using the car privately. Likewise see in S. Bednář, Metelka J., GPS monitoring zaměstnanců podruhé, "EPRAVO.CZ", 18.07.2017, https://www.epravo.cz/top/clanky/gps-monitoring-zamestnancu-podruhe-106141.html (accessed 31.10.2018).

59 According to H. Zemanová Šimonová, Právní prostředky ochrany osobnosti zaměstnance…, *op. cit*. n. 56, these reasons are generally in the interest of each employer and therefore are not specific enough to represent serious cause. Nonetheless, in the instructions posted on the Internet,

privacy in a proportionate way, can only be introduced by an employer who has serious cause to do so. This cause usually does not exist, according to the SUIP, in the production of ordinary products or the provision of routine services.[60] However, such a simple answer is not a sufficient guide to practice, although it can be deduced from it that the protection of the employer's property in general is not, in any circumstances, a legitimate reason for limiting the fundamental right of employees to privacy.

Both the commentary literature and the UOOU in their statements suggest that a better guideline as to whether there is an increased or extraordinary need for oversight at the workplace can be provided by a kind of "situational analysis", made from the position of an objective, impartial observer. The serious cause for such monitoring is thus given when:

- important sums of cash are handled (e.g. international bank transfers[61]);
- the workplace is subject to a special regime (e.g. prisoners' work,[62] classified information[63]);
- there is an increased risk of injury, explosion etc.[64] (chemical plants, nuclear power plants[65]);
- there is a prevailing reason for the protection of intellectual and industrial property rights or very valuable know-how, personal data of third parties,[66] equal treatment and non-discrimination, if these rights are reasonably endangered.[67]

confusing enumerations of reasons that should justify employee monitoring which include not only the protection of life and health in the workplace, but also the control of employee performance. See for instance D. Řezníček, T. Černický, Problematika kamerového systému na pracovišti, "EPRAVO.CZ", 27.07.2018, https://www.epravo.cz/top/clanky/problematika-kameroveho -systemu-na-pracovisti-107905.html (accessed 31.10.2018). However, in the case of high-tech monitoring, it is not possible to agree with such suggestions.

60 See the web of SUIP http://www.suip.cz/otazky-a-odpovedi/pracovnepravni-vztahy/ochrana-majetkovych-zajmu-zamestnavatele-a-ochrana-osobnich-prav-zamestnance/monitorovani-zamestnancu-na-pracovisti-kamerovym-systemem/ (accessed 31.10.2018).

61 UOOU opinion No. 2/2009, *op. cit.* n. 25.

62 *Ibidem*.

63 See for instance in H. Zemanová Šimonová, Právní prostředky ochrany osobnosti zaměstnance…, *op. cit.* n. 56.

64 E. Janečková, V. Bartík, Ochrana osobních údajů v pracovním právu…, *op. cit.* n. 12, p. 132.

65 J. Vych, Navrhovaná změna v oblasti ochray soukromí zaměstnanců, "EPRAVO.CZ", 4.09.2015, https://www.epravo.cz/top/clanky/navrhovana-zmena-v-oblasti-ochrany-soukromi-zamestnancu-98803.html (accessed 31.10.2018).

66 L. Jouza, Ochrana osobnosti zaměstnance v pracovněprávních vztazích, "EPRAVO.CZ", 9.10.2017, https://www.epravo.cz/top/clanky/ochrana-osobnosti-zamestnance-v-pracovnepravnich-vztazich-106434.html (accessed 31.10.2018); K. Valentová, Jak legálně sledovat zaměstnance, "Právní rádce", 8.07.2016, http://www.vilmkovadudak.cz/Media.aspx?id=534 (accessed 31.10.2018).

67 P. Molek, Základní práva… *op. cit.* n. 47, p. 339.

Of course, such enterprise as the State Printer of Valuables (*Státní tiskárna cenin*) would be included in this enumeration, but only in a situation where it actually prints banknotes, stamps or state bonds. Camera surveillance of employees (and subsequent processing of the filmed material without their consent) done at the moment when less sensitive products, such as meal vouchers and tickets were being printed, was found to be unjustified by the UOOU and then by the Municipal Court in Prague.[68] The use of sophisticated tracking techniques must be proportionate to the seriousness of the cause. In the above-mentioned cases, the camera surveillance of bus crews and the GPS tracking of Czech Post delivery staff during their entire work period could not be justified by the nature of their activity and by the risks it may cause. Similarly, the SAC has stated in the case of cameras designed to ensure the safety and protection of guests and hotel staff that the luxury category of the hotel was not in itself sufficient justifiable reason for such an intense encroachment upon privacy.[69]

A logical question of every employer operating a shop would be whether the work with cash (of what volume?) justifies the monitoring of sales staff and cashiers. Even in these cases, the monitoring of employees at work is usually very disproportionate, especially when it is a pre-emptive measure to prevent possible cases of fraud. The use of (most often) cameras must be based on reasonable suspicion and should be focused on cash movements, discount coupons, etc., not on employees at work.[70] This follows both from the aforementioned case law of Czech Courts (tracking the fares collected by a bus crew,[71] or discounts provision in a PC game shop[72]) and from the ECtHR case law. The Strasbourg Court found in *Köpke v. Germany* (2010)[73] that a time-limited video surveillance aimed exclusively at persons reasonably suspected of theft was permissible, while in the case *Lopez Ribalda and others v. Spain* (2018)[74] it outlawed the extensive camera surveillance of cashiers in a supermarket, even though it had led to five of them being convicted of theft.

The amount of cash or values in general handled by an employee, which would justify a "serious cause" for monitoring, is nowhere precisely defined. A reasonable consideration suggests that the value concerned must not be negligible. Sounds like

68 Judgment of the Municipal Court in Prague on the case 6 Ca 227/2008 (27.09.2011).

69 Judgment of the Supreme Administrative Court on the case 5 As 158/2012 (23.08.2013).

70 The commentators also stress the condition that "the threat must be real", see in P. Molek, Základní práva…, *op. cit.* n. 47, p. 339, or that "frequent thefts" occur, see B. Jarošová, Co je a není protiprávní, když vás šéf sleduje nejen kamerou, "Idnes.cz", 5.05.2017, https://finance.idnes.cz/legislativa-kamery-na-pracovisti-kontrola-aut-e-mailu-a-telefonu-phf-/podnikani.aspx?c=A170427_2321709_podnikani_kho (accessed 31.10.2019).

71 Judgment of the Supreme Administrative Court on the case 10 As 245/2016 – 41 (20.12.2017).

72 Judgment of the Municipal Court in Prague on the case 8 A 182/2010- 69.77 (2.09.2014).

73 Judgment of the European Court of Human Rights of 5 October 2010 on the case Köpke v. Germany, application No. 420/07.

74 Judgment of the European Court of Human Rights of 9 January 2018 on the case Lopez Ribalda and others v. Spain, application No. 1874/13 and 8567/13.

an anecdote in this regard, a case where the ÚOOÚ had to deal with the deployment of cameras in a kitchen of an office building, which was to prevent the theft of yogurts from a fridge.[75] The cases mentioned above, however, show that even "normal" operating amount of cash collected by the cash register does not constitute a sufficient reason for continuous camera monitoring. For the difficulty of determining what cash at the cash register is already a reason to monitor, it is always preferable to give priority to an agreement on employees' responsibility for the amount entrusted, which relieves the employer of the obligation to prove fault of employees in the event of loss or deficit.

## 8. Information or consent, open or covert monitoring

It is probably the least obvious to Czech employers, also to their advisers and legal commentators, whether and when it is possible to monitor employees in secret, or vice versa, whether it is always necessary to inform them or even to obtain their consent. It is perhaps not surprising that the prevailing uncertainty and diverging opinions are due to the unclear wording of legal provisions on the one hand, and case law that is sometimes inadequate and sometimes difficult to interpret on the other.

Section 316(2) LC speaks of "open or concealed surveillance (monitoring) of employees" and it can therefore be construed that both forms of monitoring are, as the case may be, permissible. Para 3 of the same Section however requires, that in case of any surveillance in the sense of para 2, the employer shall directly inform employees about the scope and methods of his control. To conciliate the concealed or covert surveillance mentioned in para 2 with the obligation to keep employees informed about it, is possible if such information is given only ex-post, after the monitoring was carried out. However, such an interpretation of obligation set by law seems superfluous or even redundant as in any subsequent conflict between the employer and the employee, the latter would always learn that the former gathered evidence about his or her misbehavior through surveillance in the workplace. On the other hand, preliminary information given to an employee that "starting from tomorrow cameras will monitor your activity" would hardly meet with the consent of that employee and is most unlikely to catch him doing something wrong. What then is the correct conduct, which would not infringe the law and still be efficient in securing protection of the employer´s rights and legitimate interests?

Relatively simple is the answer to the question of whether or not the employer needs the employee's consent. Section 316 LC does not provide for such consent and it is assumed that obtaining approval from an employee to interfere with his privacy would be unlawful and void. With such approval, an individual in the position of

75 A. Vejvodová, Šéf není velký bratr. Za šmírování zaměstnanců hrozí firmám nově milionová pokuta, "Právní rádce", 4.10.2017.

a weaker party would give up his or her fundamental right in favor of the stronger party. Such is the unambiguous position of Working Party 29 at the EU level,[76] as well as of the Czech UOOU[77] and of local commentators.[78] Section 316 is formulated as a mandatory provision of law, and the employer must assume that his monitoring is either legal under the Labor Code or is not. The employee's approval cannot change anything there, and certainly cannot legalize an intervention into privacy that does not meet the requirements of paras 2-3 of Section 316 LC.

Also, an employer can partly be confused by the wording of Section 86 of the Civil Code, according to which "it is not possible to disrupt privacy without the consent of the person concerned". Every employer, however, must remember that for the monitoring of employees there is a *lex specialis* to this provision of the Civil Code, and that is Section 316 LC. Only if, vice versa, the employer were to be tapped by an employee, as in the case discussed above[79] (that ended with the Constitutional Court decision), the general provisions of the Civil Code (Sections 86-88) would apply. If the defense of fundamental rights of the weaker party were depending on it, the secret recording of an employer by an employee (and its subsequent use as evidence in a labor dispute) would be admissible.

An employer's uncertainty may also derive from the provisions of Article 6(1) of the GDPR, i.e. from the personal data protection requirements. This provision allows for the processing of personal data when the data subject has given consent to it for one or more specific purposes (Art 6(1)a GDPR), or also when such processing is necessary for the legitimate interests pursued by a controller or by a third party, except where such interests are overridden by interests or fundamental rights and freedoms of the data (Art 6(1)f GDPR). Here, the employer must consider once more that if he wants to make a record of a particular employee's behavior and further process it, he must stay within the limits of proportionality. In view of all that has been said so far, it is (almost) certain that any wider and systematic monitoring of employees at the workplace will not fit into the option provided by Art 6(1)f GDPR. And since the consent of employees with such monitoring under Art 6(1)a GDRP would violate the provisions of Section 316 LC, the employer should not be even tempted to seek to acquire it.

76 WP 29 was established as an independent advisory body to Article 29 of (now no longer valid) the Data Protection Directive. On the issues of obtaining the consent of the employee it took a position in its Opinion No. 2/2017, p. 4.

77 See for instance D. Dostál, GDPR ovlivní také kamerové systémy ve firmách. Na co si podniky musí dát pozor? "BusinessInfo.cz", 9.01.2018, http://www.businessinfo.cz/cs/clanky/gdpr-ovlivni-take-kamerove-systemy-ve-firmach-na-co-si-podniky-musi-dat-pozor-99784.html (accessed 31.10.2018).

78 E. Janečková, V. Bartík, Ochrana osobních údajů v pracovním právu…, *op. cit.* n. 12, p. 132.

79 Decision of the Constitutional Court on th case II. ÚS 1774/14 (9.12.2014).

Information to employees, however, is not the same as their consent and the real puzzle for employers, therefore, is whether and when employees can be monitored in the sense of paras 2-3 of Section 316 LC without their knowledge. Although paragraph 2 refers to the possibility of employee concealed (or covert) monitoring, a clear answer to the question of whether and when it is possible is missing in Czech law. Section 316(3) LC specifically requires employers to inform employees directly but does not say to do so beforehand.

On the one hand, there is the SAC judgment from 2013,[80] in which the Court for the interpretation of Section 316 clearly states (author's translation):

*"Monitoring of employees is only possible on prior notice and only where it is necessary to protect the health of the person or property of the employer ... The information to the employee before the start of monitoring should also explain the scope and method of carrying out such control".*

The SAC in this statement, unfortunately, also mixes the terms "control" and "monitoring", which could lead to uncertainty as to whether the employer proceeds according to para 1 or para 2 of Section 316 LC. From the circumstances of the case (the permanent camera surveillance of hotel premises) and from the content of the SAC judgment, it can be safely inferred that this was about monitoring within the meaning of para 2 of this Section. For these types of employee tracking, the SAC requires prior notification. In connection with this, some commentators urge employers to forget about hidden monitoring of employees. They recommend them to include the possibility of monitoring to the company´s internal regulations, to discuss it in advance with employees' representatives and to post relative information on notice boards in the company's premises.[81] Such approach ultimately points to the priority of prevention over intrusion into privacy. An employer warning his employees about the possibility of monitoring in the workplace can practically reduce the risk of their inappropriate behavior without risking violation of the Labor Code.

Nevertheless, opinions can also be found which, for particularly serious reasons, and thus exceptionally, allow the covert monitoring of employees.[82] Logically, these are not cases which fall under Section 316(1) LC, within which the employer, through his control without warning, does not interfere with the privacy of employees. Here, it is about those exceptional cases where the employer's tracking technology will interfere

80 Judgment of the Supreme Administrative Court on the case 5 As 158/2012 – 49 (23.12.2013).

81 M. Štefko, K problému sledování vlastních zaměstnanců, "Právo a zaměstnání" 2005, No. 1; M. Štefko, Soukromí zaměstnanců pod ochranou inspelce práce…, *op. cit.* n. 14; T. Kadlecová, Monitoring zaměstnanců, "Praktická personalistika" 2015, No. 11-12, p. 27; J. Zahradníček, Sledování elektronických komunikací na pracovišti, "Právní rádce" 2016, No. 11; M. Hromanda, Ochrana osobnosti zaměstnance při elektronické komunikaci… *op. cit.* n. 14.

82 J. Morávek, Kontrola a sledování zaměstnanců…, *op. cit.* n. 16; Kalvoda A., Ochrana majetkových zájmů zaměstnavatele, ochrana osobních práv zaměstnance a inspekce práce, "Práce a mzda", 2018, No. 6.

with the privacy of employees without their knowledge, and yet it will be legal. The SC had the opportunity to comment on the issue in 2017 when a GPS monitoring device was installed in a service vehicle used by an employee and the employee concerned learned about it only during the use of the vehicle.[83] Unfortunately, due to a procedural error of the complainant-employee (when submitting an extraordinary remedy he changed his objections and arguments in comparison with the previous court proceedings), the SC rejected his appeal without assessing the merits of the case. The guideline can thus be found only in the existing case law of the ECtHR, which the Czech courts usually follow.

The ECtHR in the *Köpke v. Germany* case from 2010, found no breach of the Convention in the way the German courts approved the covert video surveillance of employees in one supermarket department operated by a hired detective agency. Surveillance was based on suspicion and the Court took it as being relatively targeted, and also proportionate in terms of time-span, even though all employees of the department were monitored over several weeks. To what extent the result of this case can be generalized, however, is a matter of debate.[84] Given that Section 316 LC does not contain an explicit ban on covert monitoring, the domestic situation is not unlike the conditions in Germany that played a role in the given case. Everything would probably depend on the proportionality test that the Czech courts would apply in similar cases. On the other hand, in the newer decision of 2017, in the case *Bărbulescu v. Romania*,[85] where the e-mail communication of an employee was monitored (i.e. not only the privacy but also the secrecy of correspondence was violated), the Grand Chamber of the ECtHR stressed that "for the measures to be deemed compatible with the requirements of Article 8 of the Convention, the notification should be clear about the nature of the monitoring and be given in advance."[86]

If a Czech employer wants to be sure that he will not enter into conflict with the law, he should (also for the sake of compliance with the requirements of personal data protection) indicate the possibility of monitoring in his work regulations and inform about it to every employee before an employment contract is signed.[87] And

83 Judgment of the Supreme Court on the case 21 Cdo 817/2017 (7.06.2017).

84 See especially the above mentioned ECtHR descision in *Lopez Ribalda v. Spain* from 2018. Unlike the *Köpke v. Germany* case, the camera filming here was contrary to the Convention because it was focused enough, it was not based on suspicion of specific employees, and the Spanish law explicitly required preliminaryinformation about such monitoring.

85 Judgment of the European Court of Human Rights on the case of 5 September 2017 on the case Bărbulescu v. Romania, application No. 61496/08.

86 The European Court of Human Rights, Q & A Grand Chamber judgment in the case of *Bărbulescu v. Romania* (application No. 61496/08), Press Unit, Strasbourg 5.09.2017.

87 UOOU in its Opinion No. 2/2009 emphasizes that this information duty is not fullfilled by a mere placement of signboard with the words "camera surveillance", but only by providing full information about who is the data controller, where he/she can be contacted, as well as the details on how the collected data are processed.

then only, if there is a reasonable suspicion that such precautionary warning has not been enough and employees are seriously damaging the employer´s rights and legitimate interests, threatening health and safety in the workplace, he could then risk a very targeted and short-term deployment of sophisticated techniques to monitor them. Under such circumstances, this can be done without warning them again, that precisely on them and from tomorrow on, this monitoring will be used. Even in this case, as highlighted above, the monitoring should target the protected values (cash, keys, servers, access to special objects, hazardous handling of chemicals, etc.) rather than people in the workplace. Of course, the best assurance that could be given to Czech employers is by the Czech legislators if they would clarify the wording of paras 2-3 of Section 316 LC so as not to raise doubts as to whether the mention of concealed (covert) surveillance means its admissibility or not and whether direct information means advanced information or not.

## 9. Notes on individual methods of employee monitoring

Notwithstanding the extent of the previous analysis, it has not been possible to present all information that can be gained from the existing practice of the Czech administrative and judicial authorities regarding the legality of using various tracking tools that may cause different types of interference with employees' privacy. Therefore, this sub-chapter briefly summarizes the findings on different types of modern technologies that are usually used for tracking of employees.

Regarding *cameras in the workplace*, which has been given overwhelming attention so far, there should be no doubt that nowadays they represent one of the most obvious violations of employee privacy. As mentioned in the Introduction, control by the SUIP recently discovered that employers' abuse of camera monitoring featured in 80% of cases inspected by this authority. Camera surveillance of the workplace itself (i.e. not of entry to the company premises, or in lifts and corridors) must always be the last option for safeguarding property and health, during specific activities that justify such monitoring in the sense of Section 316(2) LC. Therefore, it can never be used to monitor the efficiency of employees' performance. To keep within the limits of proportionality, cameras should be aimed at the employer's sensitive equipment or facility rather than on the staff. Cameras should be totally excluded in places where the employee is changing and performing hygiene. For example, an employer may use a photo trap on a sensitive device or a camera to monitor empty premises after termination of working hours.[88] In these justified and reasonable cases of camera monitoring there should not even be the problem of having to inform everyone in

88 V. Odrobinová, Narušení soukromí zaměstnanců může nově trestat i inspektorát práce. Firmám hrozí až milionová pokuta. post on https://www.vox.cz/naruseni-soukromi-zamestnancu-muze-nove-trestat-i-inspektorat-prace.html (accessed 31.10.2018).

the workplace. However, in the case law of the Czech courts, so far there has not been a single case where camera surveillance of employees in the workplace has been found suitable, necessary and proportionate.

*GPS trackers* are most commonly used in service vehicles, where such method of tracking may be fully proportionate. Service vehicles are the property of the employer and should be protected correspondingly. It is however difficult to justify the deployment of GPS trackers only by better traffic safety, because these devices cannot avert traffic accidents. In the case of a company car intended both to commute to work and to visit clients, the GPS device should operate (be switched on) only during "work related" journeys. Therefore, the use of a GPS tracker is more appropriate if the employer does not permit the use of the vehicle for private purposes. When a vehicle is assigned to a particular employee, the processing of GPS data always means the processing of his personal data. The employee does not have to agree to GPS tracking of the vehicle (see art. 6(1) f GDPR) but should be informed about it. The employer is also legally entitled, even required, to record usage data for the vehicle in a log book of journeys made and mileage accrued (for accounting and tax purposes).[89] A completely different case would be a GPS tracking of employees as individuals during working hours. For that, justification could only be found in extraordinary situations, such as the movement of rescue workers in a burning factory, but not, for example, to track the accuracy and efficiency of mail delivery personnel.[90]

*The biometric identification* of employees is in some way close to GPS tracking, although it is most often used to record their time of arrival to and departure from the workplace. The UOOU considers that the use of these systems for routine recording is a disproportionate collection of personal data and hence an interference with employee privacy if the biometric data are stored in a device in a form that permits their further processing.[91] In some cases, however, biometric identification can be used to control access (in the case of nuclear installations it is even mandatory in the Czech Republic[92]), respectively, to monitor whether there are only authorized employees in the workplace, or also other persons. For these authentication/verification purposes, it may not be necessary to retain the collected personal data in any stable database. Therefore, certain uses of biometric identification may be both proportionate and legal. The UOOU itself, however, points to a contradiction with Section 316 LC in the use of biometric identification beyond the records of employee presence in the workplace, e.g. to control employee movements within the premises

89 S. Bednář, J. Metelka, GPS monitoring zaměstnanců podruhé…, *op. cit.* n. 58, with reference to the practice of the UOOU, state that an electronic book of journeys is considered by this supervisory body much more leniently than direct employee monitoring.

90 Judgment of the Municipal Court in Prague on the case 6 A 42/2013 – 48.183 (5.05.2017).

91 UOOU Opinion No. 1/2017, https://www.uoou.cz/stanovisko-c-1-2017-biometricka-identifikace-nebo-autentizace-zamestnancu/d-23849/p1=3569 (accessed 31.10.2018).

92 Decree No. 144/1997 Coll., on physical protection of nuclear materials and facilities.

(collection and processing of data on individuals resulting from traces left by such movements, etc.). In essence, if GPS and biometric tracking would become similar to a chip implanted under the skin of an employee, it will always be disproportionate and therefore prohibited for the overwhelming majority of employers.[93]

*E-mail monitoring* is also a very sensitive issue, because of the possibility to violate the secrecy of correspondence, which is explicitly protected at both international and constitutional levels, (beyond the scope of general privacy protection). However, according to the SUIP, this type of monitoring is currently the most frequent case of privacy violation in the Czech Republic.[94] In previous chapters, the difference was explained between, on the one hand, the employer's control over whether an employee does not abuse a work PC for unauthorized private communication, which can be achieved by a random check of number of emails received and sent to non-job-related addresses and, on the other hand, the invasion of employee privacy and secrecy of communications.[95] The employer can access the content of an E-mail sent to the address containing the name of an employee (even if the domain is a company name) but only in very exceptional cases where it is necessary for the performance of work tasks, the negligence of which would seriously harm the employer´s business. This can happen, for example, in the case of a sudden illness or injury of an employee and only during the period of time taken to redirect all of his business communications to another employee.[96] Even here of course, the employer is not permitted to read E-mails whose content is obviously not connected to the employee's business activity. The described limitations do not apply to E-mails addressed to the company address such as info@company.cz.

*The monitoring of employee activity on PCs and social networks* is again a question of the proportionality of the protected purpose and the chosen means of control. It was shown above that the SC did not consider as a violation of privacy the control of number of hours spent by an employee on a company PC and the internet viewing web pages unrelated to company business.[97] The proportionality threshold here, as in the case of E-mails, was to abstain from inspecting the content of web pages visited or files downloaded by the employee concerned. Very interesting in this context is

93 P. Molek, Základní práva…, *op. cit.* n. 47, p. 340.

94 K. Kolářová, Většina stížností na nepřiměřené sledování v práci je oprávněná…, *op. cit.* n. 3.

95 The UOOU requires that if the employer steadily monitors and evaluates only the volume of e-mails and whether they are directed to work-related addresses, then the employees must be informed about the implementation of the tracking tools. See web UOOU https://www.uoou.cz/zamestnavatele/ds-5057/archiv=0&p1=2611 (accessed 31.10.2018). This should be done even when monitoring may be necessary, for instance to prevent employees from contravening Act No. 127/2005 Coll. about electronic communications by disseminating spam from the company's E-mail address. Likewise J. Mikulecký, Monitorování zaměstnanců je legální!, "DSM" 2010, No. 3.

96 A. Kubíčková, V. Patáková, Ochrana osobních údajů zaměstnanců od A (přes GDPR) do Z, "Práce a mzda" 2017, No. 11.

97 Judgment of the Supreme Court on the case 21 Cdo 1771/2011 (16.08.2012).

the recent ECtHR case law, *Libert v. France*, from 2018[98]. In it, the Court allowed the possibility of checking the PC content of a redundant employee (without his knowledge), in which pornographic material was discovered in a folder labeled "personal". The peculiarity of this decision is the fact that had the employee placed these files in a folder marked "private", the employer would not have been allowed to perform such control without the former employee's knowledge and presence (as limited use of the PC for "private" purposes was authorized). Despite some formalism of the decision, there is a consistency with the recommendation of the Working Party (hereinafter WP) 29 (reflected in the opinions of Czech supervisory bodies as well as in the literature), that on the company's server or cloud service, each employee should have a designated space (appropriately labeled) to which other employees and the employer cannot enter.[99]

A clearly disproportionate interference with privacy is found when an employer tries to covertly monitor employees' personal profiles on social network sites such as Facebook or Twitter. WP29, as well as Czech commentators, however, believe that in exceptional cases and with the awareness of the employees concerned, such targeted and unsystematic monitoring could be lawful, if for instance a valuable business secret is to be protected.[100] Finally, it is beyond doubt that the employer has the right to check whether employees install illegal software on a company PC or do not connect to it devices that could endanger the protection of company data, since in these cases of protection of property the content of files created by employees would not be disclosed.

*Telephone call recording* is quite common in call centers where it is used to control the quality of client requests´ processing. In these cases, undoubtedly service calls from a dedicated service line and equipment are made, and both parties are warned from the outset that their conversation may be monitored.[101] In other cases, where an employer is interested in whether and to what extent employees use his facilities and working time to deal with their private matters, the analogy with E-mails and with the abuse of company PCs is fully applicable. Pursuant to Section 316 (1) LC,

98 Judgment of the European Court of Human Rights of 22 February 2018 on the case Libert v. France, application No. 588/13.

99 WP 29 Opinion No. 2/2017.

100 *Ibidem*; see also E. Škorničková, Důvěřuj, ale prověřuj? GDPR zpřísňuje monitoring zaměstnanců, "GDPR.cz", 6.03.2018, https://www.gdpr.cz/blog/monitoring-zamestnancu/ (accessed 31.10.2018); M. Nulíček, K. Kovaříková, J. Tomíšek, O. Švolík, GDPR v otázkách a odpovědích, "Buletin Advokacie", 3.11.2017, http://www.bulletin-advokacie.cz/gdpr-v-otazkach-a-odpovedich (accessed 31.10.2018).

101 The UOOU warns that the recording of such a call and other related work with it is always the processing of the personal data of the employees of the call center and if the caller can be identified, then also of the company's client. It acknowledges that such processing may have a legitimate purpose consisitng in performance or change of contract, improvement of customer service etc. See UOOU Opinion No. 5/2013.

the employer is authorized to check the numbers dialed and the time spent handling out-of-work calls. As long as he does not try to detect the contents of the calls, there is no interference with the privacy of employees.[102] An employee's consent to the monitoring of his telephone activities is legally irrelevant. Preliminary information to employees that compliance with the ban on use of company phones for private purposes can be checked, is unanimously recommended by the literature since any case of more extensive and systematic monitoring of phone calls may fall under both Section 316 (2) LC and personal data protection.

*The use of spyware, keyloggers and other high-tech means* in the workplace would be, for reasons that have now been repeated several times, mostly very inappropriate and therefore unlawful. These high-tech means represent a far more systematic and less controllable invasion into employee privacy and their personal data than most of the above-mentioned methods and devices.[103] However, even here, the legal literature does not exclude exceptional cases where the protection of extraordinary know-how, the prevention of increased health and safety risks (i.e. access and work with a sensitive database, access and use of a particularly hazardous equipment) may justify protection against unauthorized entry and dangerous manipulation by an instantaneous identification of users and their following of a standard operating procedure. Preventive measures focusing on the employer's assets, not on the employees at work, should always be preferred and all deployed measures should be communicated to all the employees concerned.[104]

## 10. Conclusion

Czech law on the protection of privacy of employees in the workplace, as well as the authorities applying it, are principally in line with generally accepted European standards. There is no doubt that the employee in the workplace has the right to privacy and that the content, extent and degree of protection of this fundamental right are understood and protected in the Czech Republic in accordance with the ECtHR. However, this basic consensus on values, and their substantive and procedural legal safeguards, does not mean that Czech law currently answers all questions and leads employers safely outside the restricted zone of prohibited ways of employee monitoring.

Possible ways of using high-tech devices in the control and monitoring of employees are regulated in the Czech Republic, in particular, by a general regulation

102 Judgment of the Supreme Court on the case 21 Cdo 747/2013 (7.08.2014).

103 P. Mališ, Právní aspekty používání keyloggerů, "PrávoIT.Cz", 9.12.2008, http://www.pravoit.cz/novinka/pravni-aspekty-pouzivani-keyloggeru (accessed 31.10.2018).

104 See for instance M. Štefko, K problému sledování vlastních zaměstnanců, "Právo a zaměstnání" 2005, No. 1.

of labor law. The privacy in the workplace issue enjoys the vivid attention of commentators and the case law of the highest judicial courts is also growing year after year. In general, however, the statutory provisions remain rather unclear, legal advisors sometimes contradict each other and even state authorities do not always provide entirely consistent guidance. Overall, an employer without legal education may find it difficult to stay on the safe side when he gets into more sophisticated monitoring of his employees.

The analysis has shown the main causes of these uncertainties. In addition to the duality of legal regulations affecting workplace monitoring – the Labor Code and the data protection rules – it is primarily the wording of the key Section 316 LC. Certain tracking measures will interfere with the privacy of employees, but not always with the processing of their personal data and vice versa; employee data can be retrieved and processed without interfering with their privacy – which does not mean that those data are not protected. Adoption of one common *lex specialis* defining the employer's duties in the field of employee monitoring and data collection is no longer possible because its application would have directly replaced the existing GDPR, i.e. a directly applicable piece of EU legislation enjoying precedence over any national rule.

On the contrary, the refinement of Section 316 LC would be desirable and is entirely within the purview of the Czech legislator. To emphasize the difference between paragraph 1 and paragraphs 2-3, not to repeat the same terms referring to the employer's control, to underline that acting consistently within the limits of Section 316 (1) LC does not imply an interference with employee privacy (and thus no encroachment upon fundamental rights), whereas falling under Section 316 (2-3) LC already means interference, as well as to determine more clearly whether covert monitoring is possible and when advanced information about employee control is strictly required; all these amendments would remove a great deal of uncertainty on the part of employers. However, even the most sophisticated law cannot precisely set the limits of proportionality once and for all, cannot list all grounds justifying employee monitoring, etc. There would always be the necessity to await judgments in cases that are not factually exclusive and permit to formulate general standards and set more precisely the boundaries between legal and illegal monitoring.

Czech courts have already provided such practical guidelines for cases of monitoring employees' work on PCs, their e-mail communications and telephone calls. Courts took a clearly negative stance in several of the above-cited cases towards deployment of cameras that tracked employees for the whole or most of their working hours. Along with this jurisprudence, as well as with decisions of the ECtHR, the Czech administrative authorities (UOOU and SUIP) and Czech commentary literature, outlined some boundaries between prohibited and conditionally allowed acts of employers. However, the examples given in soft law and Czech lawyers' articles naturally point to cases of obviously exaggerated and therefore forbidden monitoring,

or on the contrary to well-justified cases of employee control which would be logically and legally difficult to challenge. For employers in the field, which is not exceptional by extraordinary risks, by unique know-how or, at least, by numerous operations with high financial amounts, the boundary of conditionally permitted monitoring still remains - a bit unclear.

Czech employers may thus lament that there is still a lack of clarity and perhaps legal certainty on the issue, nevertheless, certain recommendations they should follow are sufficiently obvious. They can also be considered as a brief summary of the case law and the opinions of administrative bodies analyzed above.

Interference with employee privacy can never be justified by the protection of employer's property in general, under any circumstances, or by the need to monitor and evaluate the performance of employees. Certain restrictions on the fundamental right to privacy are permissible only if justified by the need for a higher level of protection (or higher risk of threat) of other legally protected rights and interests. Clear prohibitions and preventive measures to avoid breaching the rules of the workplace (by restricting employee access to certain devices, websites, etc.) are always more appropriate than monitoring what the employees actually do with particular devices or equipment.

Targeted, time-limited tracking, justified by the employer's previous negative experiences or reasoned suspicion, is always more appropriate than a comprehensive, long-term, and only prevention-focused monitoring of employees at work. To focus the tracking device on an equipment, car, cash desk etc. is generally more acceptable than targeting the employees in person and their movement at the workplace. Preliminary information that monitoring can be used, how it will be handled and controlled and who will be responsible for it, is always a more appropriate and secure way of proceeding than any employer's attempt to acquire information about employee's behavior secretly.

Finally, yet importantly, even measures that meet the stated recommendations must pass the proportionality test, i.e. to demonstrate their suitability and necessity to achieve legitimate purpose and compatibility with maintaining of the minimum necessary employee privacy in the workplace. Although grossly disproportionate measures are apparent from the above-mentioned recommendations quite clearly, where precisely the boundary between proportional and non-proportional is situated in a specific case, will always remain difficult to tell in advance.

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# The Implementation of the Rights of Persons with Disabilities to Employment on the Basis of the Convention on the Rights of Persons with Disabilities (CRPD)

**Abstract:** Poland has made considerable progress in the implementation of Article 27 of the CRPD. Professional activity is one of the most important conditions for full inclusion and participation in society. Upon ratifying the Convention in 2012, Poland confirmed that persons with disabilities have the right to fully and equally enjoy all human rights. The level of legal framework is satisfactory in numerous respects. The difficulty in implementing the right to employment lies primarily in the manner of its practical implementation, absence of horizontal employment policy, other support systems affecting the right to work (social benefits and services, health care services, availability of services and benefits, accessibility of transport and technologies). Most Polish employers do not hire persons with disabilities at all. The analysis of the implementation of the right is also hampered by incomplete statistical data on disability in Poland. This paper presents the implementation of the right to employment in the period between ratification of the CRPD by Poland in 2012 until the drafting of this paper at the end 2018.
**Keywords:** the UN Convention on the Rights of Persons with Disabilities (CRPD), Article 27 of the CRPD, the implementation of the right to work in Poland

## 1. Introduction

By October 2018, six years had elapsed since the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities (CRPD).[1] As such, this should formally have marked the second period for Poland to report on the implementation

1 UN Committee on the Rights of Persons with Disabilities (CRPD), Concluding observations on the initial report of Poland, 29 October 2018, CRPD/C/POL/CO/1, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fPOL%2fCO%2f1&Lang=en (accessed 14.12.2018).

of and compliance with the CRPD. However, the process of verifying reports by the Committee on the Rights of Persons with Disabilities (hereinafter the Committee) had taken so long that by September 2018 the Committee was only in the process of considering the initial report of the Polish Government which was submitted two years after the entry into force of the Convention. The next combined report for periods from the second to the fourth reporting period is expected for 2026.[2]

In particular, the first report is a detailed report which, pursuant to Article 35(1) of the CRPD, should specify the measures taken to give effect to the obligations under the Convention. The Committee has prepared detailed guidelines on the content of reports submitted by States Parties to the Convention.[3]

In its report the Polish Government therefore referred to the provisions establishing the freedom to choose and practice a profession and the workplace, in respect of which exceptions may only be provided by law, regulations to ensure equal treatment and anti-discrimination legislation, specific solutions to support the employment of persons with disabilities, starting from support in searching for and maintaining employment, through a quota system, to regulations regarding social clauses in public procurement. The reporting period covered mainly the years 2012-2013 and 2014 (in part only).[4] However, it should be noted in this respect that while the Government's report reflects the existing legislation and positive action during the reporting period, it contains no critical or even thoughtful conclusions about the current regulations and the practice of their application. Such conclusions can be found in the Polish Commissioner of Human Rights report and social reports submitted to the Committee.[5]

## 2. Most important changes in the right of persons with disabilities to employment

To a large extent, the initial report covered solutions that at that time were a permanent element of State policy for persons with disabilities in the labour market. Those which reflected certain progress in shaping the rights of persons with

2 Ibidem.

3 Ibidem.

4 https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fPOL%2f1&Lang=en (accessed 28.12.2018).

5 Realisation of the obligations arising from the UN Convention on the Rights of Persons with Disabilities in Poland – report of the Human Rights Defender 2012-2014, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fIFU%2fPOL%2f30099&Lang=en; Alternative Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, Warsaw 2015; https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fPOL%2f21651&Lang=en (accessed 28.12.2018).

disabilities to employment or, in other words, the adoption of which resulted from the implementation of Article 27 of the CRPD, are particularly worth mentioning. One should undoubtedly mention those of such developments that are conducive to the transition of persons with disabilities to the open labour market. These were primarily the new principles of subsidizing the wages of disabled employees, consisting of placing wage subsidies in the protected and open labour market on an equal footing.[6] The open labour market better promotes the idea of professional fulfilment and offers a greater diversity of jobs. Exceptions include cases of disability that are serious enough to require institutionalized forms of sheltered employment or are such as to prevent a person from taking up employment in any form.

The wage subsidy mechanism, though rightly made equal for employers from open and protected labour markets, still has certain disadvantages.[7] For a number of years, it has not clearly induced a general increase in the employment of persons with disabilities in Poland. Only half of those who are economically active are in subsidized employment or have their social security contributions refunded, or who have social security contributions for farmers refunded on account of the economic or agricultural activities which they pursue. The others are not guaranteed similar support. The mechanism is not adapted to the current employment structure in Poland. It neither contributes to an increase in regular employment nor takes into account the high rate of persons remaining outside regular (subsidized) employment, in other words, mainly persons engaged under civil law contracts. The key solutions for the employment of persons with disabilities focus on maintaining the rate of regular employment and absorb a significant part of the budget of the State Fund for Rehabilitation of Disabled Persons (pol. *Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych*) (over 60% of its financial resources).[8] Studies have also shown that, when applying for funds to support the employment of persons with disabilities, high bureaucratic barriers are an obstacle to employing persons with disabilities, with Poland having a very high proportion of persons employed in SMEs (small and

6 Article 3 of the Act of 8 November 2013 amending certain acts in connection with the implementation of the budget act, Journal of Laws of 2013, item 1645. The change regarding the equalization of wage subsidies was adopted as early as in 2009, but its effective date was repeatedly postponed. Initially, there were plans to increase the amounts of wage subsidies received by employers from the protected labour market. Finally, the abovementioned act struck a balance in respect of subsidies. The change took effect in April 2014 (see Article 68gc of the Act on Vocational and Social Rehabilitation and Employment of Disabled People).

7 K. Roszewska, Środki prawne służące aktywności zawodowej osób z niepełnosprawnościami w obecnej strukturze rynku pracy, "Studia Oeconomica Posnaniensia" 2015, No. 10, pp. 32-34.

8 Report on the implementation of the objective and financial plan relating to PFRON activities for 2017, p. 30, https://bip.pfron.org.pl/pfron/budzet-funduszu/sprawozdanie-z-realizacji-planu-rzeczowo-finansowego-z-dzialalnosci-pfron-za-2017-rok/ (accessed 17.12.2018).

medium-sized enterprises).[9] The same is true for barriers to setting up businesses.[10] Other barriers include a lack of statutory regulation of supported employment, segmentation of employment of persons with disabilities and related shortage of diversified job offers, poor preparation of public employment services, low awareness of the entitlements, training opportunities or more flexible forms of employment (e.g. telework). In Poland, the level of education and professional qualifications of persons with disabilities is inadequate to the needs of the labour market. Employers are concerned about high sanctions for improper spending of public funds while facing complex legislation and a number of obligations (including the obligation to provide health care services). Persons with disabilities themselves at times address the issue of "too favourable treatment" in employment, in particular in the context of shortened working hours (so-called discrimination by favour). However, this view is not taken by the community as a whole. An attempt to amend the provisions on shortened working hours of persons with disabilities has not been approved by the Constitutional Tribunal.[11] The weakness of social economic entities, which should prepare persons, especially those with intellectual disabilities, for an open labour market has also been criticized.[12] For years now persons with disabilities who are willing to take up employment have faced the issue of a benefits trap. Proposals to

9 "Legal, administrative and organizational barriers to the implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at overcoming these barriers" – a synthetic report. Chapter 2 Identified barriers in the areas of implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at their elimination, developed as part of the project entitled "Implementation of the UN Convention on the Rights of Persons with Disabilities – a common cause" (pol. *Wdrażanie Konwencji o Prawach Osób Niepełnosprawnych – Wspólna sprawa*), Warsaw, February 2017, p. 294. These barriers are also confirmed by previous studies which estimated that 44% of employers employing persons with disabilities refrain from applying for wage subsidies due to bureaucratic procedures, see: B. Gąciarz, B. Giermanowska, Zatrudniając niepełnosprawnych. Wiedza, opinie, doświadczenia pracodawców, Warsaw 2009, p. 56.

10 A. Gawska, B. Marcinkowska, A. Waszkielewicz, M. Zima-Parjaszewska, A. Wołowicz-Ruszkowska, M. Żejmis, Pogłębiona analiza kontekstowa badania jakościowego, opracowana w ramach Projektu "Wdrażanie Konwencji o prawach osób niepełnosprawnych – wspólna sprawa", Projekt "Wdrażanie Konwencji o prawach osób niepełnosprawnych – wspólna sprawa", Polish Disability Forum (pol. *Polskie Forum Osób Niepełnosprawnych*), Warsaw 2017, p. 120.

11 Constitutional Tribunal judgment of 13 June 2013, K 17/11, OTK-A 2013/5/58.

12 Legal, administrative and organizational barriers to the implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at overcoming these barriers – a synthetic report. Chapter 2 Identified barriers in the areas of implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at their elimination, developed as part of the project entitled "Implementation of the UN Convention on the Rights of Persons with Disabilities – a common cause", Warsaw, February 2017, pp. 282 et seq.

address this particular issue were submitted during the Third Congress of Persons with Disabilities.[13]

There are also legislative restrictions. The employment of persons with disabilities is regulated by the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities,[14] partly by provisions related to supported employment and provisions of the Act on Employment Promotion and Labour Market Institutions.[15] The provisions of the Labour Code do not apply other than in issues that are not regulated by special provisions. Such a normative solution is applied to separate professional groups (such as teachers, judges, public administration employees). However, excluding persons with disabilities from the application of the Labour Code because of their disability is conducive to their segregation. Employers from the open labour market have negligible knowledge of special regulations compared to that of the Labour Code. Therefore, there are suggestions in the literature to incorporate provisions on employment of persons with disabilities, similar to those relating to the employment of young people or protection of parenthood, in the Labour Code.[16]

There have also been significant changes in access to public services. In this case, as early as in the preparatory period following signature and before ratification of the Convention, it was noticed that the obligations of public authorities towards persons with disabilities had not been duly complied with, primarily for failing to provide those persons with adequate access to public services on the terms set out in Article 60 of the Constitution of the Republic of Poland. A mechanism was therefore put in place to facilitate access of disabled employees to offices in government (civil service and state offices) and local government units. On the terms set out in the provisions on civil service and local government employees,[17] priority has been afforded to candidates with disabilities with respect to employment in those administrative authorities which do not exceed 6% of the statutory employment rate for persons

13 Assumptions underlying bills for the New Support System for persons with disabilities, December 2017, http://konwencja.org/download/zalozenia-dla-projektow-ustaw-dla-nowego-systemu-wsparcia-osob-z-niepelnosprawnosciami-v3-0-2017-12-11/# (accessed 28.12.2018).

14 The Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, i.e. Journal of Laws of 2018, item 511.

15 The Social Employment Act of 13 June 2003, Journal of Laws of 2016, item 1828; the Social Cooperatives Act of 27 April 2006, Journal of Laws of 2018, item 1205; the Act on Employment Promotion and Labour Market Institutions of 20 April 2004, Journal of Laws of 2018, item 1265.

16 K. Roszewska, Aksjologiczne podstawy unormowania zatrudnienia pracowniczego osób z niepełnosprawnościami w Kodeksie pracy, "Praca i Zabezpieczenie Społeczne" 2014, No. 12, pp. 8 et seq.

17 See in particular Article 29a(2) of the Civil Service Act of 21 November 2008, Journal of Laws of 2018, item 1559; Article 3b of the Act on Employees of State Offices of 16 September 1982, Journal of Laws of 2018, item 1915, and Article 13a(2) of the Act on Local Government Employees of 21 November 2008, Journal of Laws of 2018, item 1260. The proposed changes did not cover senior positions in the civil service and managerial positions in local government units.

with disabilities, provided that they meet the eligibility requirements to the same extent as other selected candidates. A number of prior employment practices in civil service and local government establishments were discriminatory in nature. One might go a stage further by suggesting that given their exposure to an earlier segregated education system and a poorer educational offer, hitherto persons with disabilities have in fact been discriminated against in respect of employment in these public institutions.[18]

Following ratification of the CRPD, the change was subject to partial evaluation.[19] The employment of persons with disabilities increased in controlled ministries. However, the number involved was insignificant and none of the ministries achieved the 6% employment rate required. The implementation of access to the civil services was also critically assessed by the Supreme Audit Office on the basis of an audit conducted in 2012, both within the ministries and in selected central offices.[20] Although the rights of persons with disabilities with regard to access to positions in public administration have been strengthened, the percentage of persons with disabilities employed in public administration has virtually remained unchanged. It should be noted, however, that 251 offices have achieved an employment rate exceeding 6%.[21] Increasing the employment rate in budgetary units should be treated as a priority. It is symbolically important. It shows that the "authority" sets upon itself the same obligations it expects other employers to undertake.[22]

For those who are unable to work on the open labour market or who require adequate support, the Rehabilitation Act provides for a multi-stage model of professional activation, which should essentially lead to the transition of as many people as possible from a protected market to an open one. However, it has been observed that this model does not serve its purpose as there are no elements which would encourage entities conducting occupational therapy workshops or vocational rehabilitation facilities operating on the protected market to transition persons with

18 Upon adoption of the CRPD, the employment rate in the civil service stood only at 3.2% see: Chancellery of the Prime Minister, Audit and Supervision Department, Employment of persons with disabilities in the civil service, Warsaw, 6 June 2013, p. 11. In the last two years (2016-2017) it fluctuated at 4.0% and 3.9%, respectively, see: Chancellery of the Prime Minister, The Report of the Head of the Civil Service on the state of the civil service and the implementation of its tasks in 2017, Warsaw, March 2018, p. 24.

19 Details of the results of audit: Chancellery of the Prime Minister, Audit and Supervision Department, Employment of persons with disabilities in the civil service, Warsaw, 6 June 2013.

20 Employment of persons with disabilities in selected ministries, central offices and state organizational units. Details of the audit results. Warsaw, Supreme Audit Office Warsaw, 2013, p. 10.

21 Chancellery of the Prime Minister, Report of the Head of the Civil Service on the state of the civil service and the implementation of its tasks in 2017, Warsaw, March 2018, pp. 10 and 25.

22 Explanatory memorandum to the bill amending the Civil Service Act and the Act on Local Government Employees, print No. 2772, Lower House of Parliament of the 6th term of office, p. 8.

disabilities to the open labour market following a suitable period of rehabilitation.[23] Considerable changes in this respect took place in the spring of 2018.[24] It became possible for participants of workshops to pursue work placement with an employer and concurrently attend club classes. Club classes are a form of rehabilitation which aims at supporting persons with disabilities to achieve self-reliance and independence in both social and vocational life. Such clubs also include active forms of supporting a disabled person in taking up and maintaining employment. Finally, the guarantee of being able to return to a workshop for a person who loses their job, constitutes a significant and welcome change.

## 3. Changes in the right of persons with disabilities to employment under the impact of EU law according to the CRPD

Some legal solutions should be triggered by special needs of persons with disabilities compared to other groups of employees who are disadvantaged and face discrimination. For instance, the opportunity to hire a person responsible for assisting a disabled employee in the workplace came up as early as Poland's accession to the EU.[25] The obligation to provide necessary reasonable accommodation was also imposed on employers by virtue of the act implementing certain European Union provisions with regard to equality,[26] namely Article 5 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[27] These solutions were rolled out prior to the adoption of the Convention, yet they remain consistent with the approach to disability which the Convention presents as an evolving concept, according to which disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. However, one can hardly notice any improvement during the period which followed ratification of the CRPD, which should have prompted a wider use of the two institutions. In 2017, applications were filed for reimbursement of the costs of adapting the premises of the workplace to the needs of a disabled person, in particular the costs incurred in connection with the adaptation of new or existing

23 K. Roszewska, Środki prawne…, *op. cit.*, p. 34.

24 Article 3 of the Act of 15 December 2017 amending the Social Cooperatives Act and certain other acts, Journal of Laws of 2017, item 2494, and Article 1(2), (6) to (7) of the Act of 10 May 2018 amending the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities and certain other acts, Journal of Laws of 2018, item 1076.

25 Act of 20 April 2004 amending and repealing certain acts in connection with the Republic of Poland becoming a Member State of the European Union, Journal of Laws No. 96, item 959.

26 Act of 3 December 2010 implementing certain European Union regulations in respect of equal treatment, Journal of Laws of 2016, item 1219.

27 OJ EU 2000, No. L 303, p. 16.

workplaces, adaptation or purchase of devices facilitating work or functioning in the workplace, purchase and authorization of software to be used by such an employee and technologies supporting or adapted to the needs resulting from disability and the costs of identification of these needs by occupational health advisory services for a total of three workplaces only, with one of the applications being filed by the public finance sector. The number of processed applications for reimbursement of employment costs of 209 employees assisting disabled employees was higher, yet still insignificant in the context of needs. The majority of applications concerned reimbursement of the costs of equipping workstations for employees who are unemployed or who are looking for work and who are not in employment (1033), as well as reimbursement of expenditure on labour market instruments and services for persons with disabilities who are looking for work and who are not in employment (1413).[28]

## 4. Conclusions

Summing up, while the Polish employment regulations guarantee persons with disabilities basic employment rights, the adoption of the CRPD was an incentive for further positive changes. However, it should be borne in mind that the solutions which formally meet international standards are not adjusted to the current situation in the Polish labour market; in certain aspects they do not have the adequate (effective) mechanism for their implementation (e.g. lack of a job coach) or simply are not implemented in practice. Although formally legal solutions ensure equal access to employment and prohibit discrimination at all employment stages, cases of disability discrimination are not in principle reported to control and judicial authorities.[29] With an insignificant proportion of discrimination complaints filed with the National Labour Inspectorate, not one single complaint based on alleged disability discrimination has been recorded.[30] This is attributable, among other things, to low awareness of the rights and limited access to legal assistance.[31] Nor are

28 Report on the implementation of the objective and financial plan relating to PFRON activities in 2017, Warsaw, February 2018, pp. 72-74. Its insignificant decline compared to previous years is attributable to the change in labour supply in general in Poland, including a decline in the unemployment rate for persons with disabilities.

29 Exceptions include the case regarding refusal to hire a person in a wheelchair, Supreme Court judgment of 12 April 2012, file number II PK 218/11, OSNP No. 9-10/2013, item 105.

30 They were based on alleged discrimination on grounds of sex, age, trade union membership and nationality. See complaints from persons with disabilities listed in the 2017 PIP report, Warsaw 2018, pp. 61-62, https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf (accessed 28.12.2018).

31 For more details see part of the Government report devoted to the implementation of Article 5 of the CRPD.

the systems of deciding on the degree of incapacity for work and disability conducive to appropriate adjustment of support in employment. The social policy based on intervention, sometimes compensatory, rather than activating strategies, is too often the predominating form of support.[32]

The Committee undoubtedly expresses concern about the large proportion of persons with disabilities who are unemployed or in low-income employment; the lack of provision of reasonable accommodation in the workplace; the lack of affirmative action measures to promote employment; the non-enforcement of quota systems both in the public and private sector; and prevailing discrimination in the workplace.[33]

In the case of Poland, the Committee prepared a list of issues in relation to the initial report, which is relatively short in terms of employment, but rather cross-cutting in general. It refers to comprehensive data on the employment of persons with disabilities, disaggregated by sex, ethnicity, age, level of qualification, type of employment and level of salary, indicating whether it is public or private sector employment and whether it is in a segregated or an inclusive work environment. The Committee also requested information about specific incentives and measures to facilitate the employment of persons with disabilities in the open labour market. Employment is also addressed in questions regarding the adopted national policy measures to promote the rights of persons with disabilities following the ratification of the Convention. The Committee requested information about the extent to which the Convention had been promoted and mainstreamed across the government and local government units and relevant sectors, including i.a. in employment, and also about the resources allocated to the implementation of these tasks.[34] The Polish Government has not yet addressed the Committee's recommendations, nor is there any mechanism which would make it possible to give effect to them. The recommendations should nevertheless be treated as guidelines for action to be taken by public authorities. The European Commission may have an indirect effect on their implementation in the course of agreeing projects financed from European Union funds.

32 Social alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Poland, Warsaw 2015, p. 50, http://fundacjaksk.pl/dopoczytania/spoleczny_raport_alternatywny.pdf (accessed 28.12.2018).

33 Report of the Committee on the Rights of Persons with Disabilities (from 13th session from 25 March to 17 April 2015 to 16th session from 15 August to 2 September 2016), Supplement No. 55 (A/72/55), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=27 (accessed 28.12.2018).

34 The Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of Poland, CRPD/C/POL/Q/1, 25 April 2018 (accessed 22.06.2018).

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Report on The National Labour Inspectorate's activity in the 2017, Warsaw 2018 https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf (accessed 28.12.2018).

Report of the Committee on the Rights of Persons with Disabilities (from 13th session from 25 March to 17 April 2015 to 16th session from 15 August to 2 September 2016), Supplement No. 55 (A/72/55) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=27, 22.06.2018 (accessed 28.12.2018).

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# International Responsibility of Business for Violation of Human Rights – Customers' Perspective[1]

**Abstract:** This paper deals with possible avenues for enforcement liability of human rights violations that occur in less industrially developed countries. Since food, clothing and other economic goods are often produced in states where the rule of law may not be as effective as elsewhere, it is difficult to both establish and remedy the human rights violations that are frequently seen to occur in such states. Therefore, the paper analyses whether it would be possible to remedy human rights violations from abroad, in other words from within those states where these products are sold to end-users. The paper focuses on selected instruments of international, European and national law in order to establish whether a remedy for such violations is present. It takes the bottom-up principle, i.e. it concentrates on such instruments which might be used by individuals, consumers in particular, rather than by states. The outcome of the contribution is that, in theory, it is possible to hold retailers partially liable for human rights violations as a means of applying remote leverage on the manufacturers.
**Keywords:** human rights violations, UN Guiding Principles on Business and Human Rights, consumer protection, sweatshops, fair-trade, eco-label

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## 1. Introduction

Our world has been driven by globalisation for several decades. During this period we have witnessed the process of "making the world smaller", the process of unification and the process of developing mutual dependences among states. One of the brighter sides of these processes is that the idea of human rights protection is becoming more and more widespread around the world. What was brought about by the Enlightenment in the 18th century as a novelty is now considered to be a standard throughout the continents. Or is it?

From a formal point of view, the protection of human rights has become well established in a plethora of declarations, conventions and acts of national law. The protection has gone so far that not only states are responsible for violations of human rights. The Guiding Principles on business and human rights, a document of the United Nations,[2] clearly requires business enterprises to comply with all applicable laws and, moreover, to respect human rights.

However, how does this legal framework work in practice? Is it really possible to make use of any of the declared rights and obligations?

This paper aims to elaborate on these questions. From the methodological point of view, the paper sets the general framework of the legal environment for addressing human rights violation by business entities. It then overpasses solutions that can be engaged by state authorities and tries to find some solutions from the bottom up, i.e. from the customers' perspective in general.

The paper takes into account European Union (hereinafter EU) law, the protection of consumers in particular, in order to see whether it is possible to hold business enterprises responsible for violations of human rights through the prism of protection of consumers as the end-buyers of products. As EU consumer protection law is, in general, subject to directives, it is necessary to review national law as well. In this regard Slovak law is chosen as an example of national law implementing EU directives. Furthermore, public procurement as a purchasing process having a public authority as a specific buyer, is also analysed.

For the purposes of this paper, the broadest meaning of human rights is taken into account, including working conditions and living environment.

2 Human Rights Council, Resolution adopted by the Human Rights Council 17/4 of 16 July 2011 – Human rights and transnational corporations and other business enterprises (A/HRC/RES/17/4), https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf (31.12.2018); Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises; J. Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf (31.12.2018).

## 2. Responsibility of business entities for human right violations

The responsibility of business entities for human rights violations is broadly discussed in the literature.[3]

Currently there is no international treaty in force which confirms explicitly the duty of business entities to protect human rights or their responsibility for human

3 E.g. H. Van Der Wilt, Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities, "Chinese Journal of International Law" 2013, pp. 43-77; L. Catá Backer, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, "Columbia Human Rights Law Review" 2006, vol. 37(2), pp. 287–390; E. Pariotti, International Soft Law, Human Rights and Non-State Actors: Towards the Accountability of Transnational Corporations?, "Human Rights Review" 2009, vol. 10(2), pp. 139-155, https://doi.org/10.1007/s12142-008-0104-0; J. Nolan, Refining the Rules of the Game : The Corporate Responsibility to Respect Human Rights, "Utrecht Journal of International and European Law" 2014, vol. 30(78), pp. 7-23, https://doi.org/http://dx.doi.org/10.5334/ujiel.ca; D. Lustig, Three Paradigms of Corporate Responsibility in International Law: The Kiobel Moment, "Journal of International Criminal Justice" 2014; J. Letnar Černič, Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises, "Hanse Law Review" 2008, vol. 4(1), pp. 71-100, http://hanselawreview.eu/wp-content/uploads/2016/08/Vol4No1Art05.pdf; J. Letnar Černič, Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, "Miskolc Journal of International Law" 2009, vol. 6(1), pp. 24-34, http://ssrn.com/abstract=1459548; D. Kinley and J. Tadaki, From Walk to Talk: The Emergence of Human Rights Responsibilities of Corporations at International Law, "Virginia Journal of International Law" 2004, vol. 44, pp. 931-1023, https://ssrn.com/abstract=923360; A. Grear and B.H. Weston, The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape, "Human Rights Law Review" 2015, vol. 15(1), pp. 21-44, https://doi.org/10.1093/hrlr/ngu044; K. Buhmann, Regulating Corporate Social and Human Rights Responsibilities at the Un Plane: Institutionalising New Forms of Law and Law-Making Approaches?, "Nordic Journal of International Law" 2009; E. De Brabandere, Non-State Actors, State-Centrism and Human Rights Obligations, "Leiden Journal of International Law" 2009, vol. 22(1), pp. 191-209; A. Clapham and S. Jerbi, Categories of Corporate Complicity in Human Rights Abuses, "Hastings International and Comparative Law Review" 2001, vol. 24, pp. 339-349; E.C. Chaffee, The Origins of Corporate Social Responsibility, "University of Cincinnati Law Review" 2017, vol. 85, pp. 347-373, https://ssrn.com/abstract=2957820; International Commission of Jurists, Corporate Complicity & Legal Accountability: Civil Remedies 2008, vol. 3, p. 72; J.G. Ku, The Limits of Corporate Rights Under International Law, "Chicago Journal of International Law" 2012, vol. 12(2), pp. 729-754, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1627&context=cjil; A. McBeth, Crushed By An Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector, "Yale Human Rights and Development Law Journal" 2014, vol. 11(1), pp. 127–166; S. Michalowski, No Complicity Liability for Funding Gross Human Rights Violations ?, "Berkeley Journal of International Law" 2012, vol. 30(2), pp. 451–524; J. Nolan, Corporate Accountability and Triple Bottom Line Reporting : Determining the Material Issues for Disclosure, "Enhancing Corporate Accountability: Prospects and Challenges" 2006, pp. 181–210; J. Nolan and L. Taylor, Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?, "Journal of Business Ethics" 2009, vol. 87(2), pp. 433–451, https://doi.org/10.1007/s10551-009-0295-6.

rights violations. Arguments in favour of a duty to obey human rights rely on the Universal Declaration of Human Rights of 1948 (hereinafter Declaration). These arguments can be split into two groups: arguments on the direct definition of responsibility and arguments on rights without finding responsible subjects.

First, under the preamble of the Declaration "*THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind*" and here the notion "every organ of society", can be read also as private legal persons, including business entities. Second, the importance of the preamble is stressed since in two provisions the state is mentioned as the addressee of duties (Art. 16 and Art. 22 of the Declaration) which call for specific responsibility. Furthermore, reference to the preamble was used in drafting the principles of responsibility of transnational corporations.[4] Moreover, Art. 29 of the Declaration specifies that "*Everyone has duties to the community in which alone the free and full development of his personality is possible*" and the duty covers state and non-state subjects as well. Finally, Art. 30 stipulates that "*Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein*" and thus accepts that subjects other than states have to follow the declaration.[5]

Secondly, the approach to interpretation of the Universal Declaration of Human Rights considers it a list of the rights of human beings without defining persons responsible for the protection and non-violation of these rights. Hence the declaration endorses rights *erga omnes*. McBeth also sees confirmation of these *erga omnes* effects in the preamble (rights must be respected by every individual, every organ of society).[6]

Since corporations always act through their owners, directors or employees, there are different concepts of how to attribute responsibility for acts of natural persons in relation to legal persons: (1) vicarious liability; (2) alter ego liability; (3) *respondeat superior*; (4) failure of management/control/surveillance.

From the point of view of human rights violations several forms of business involvement can occur: direct violation, indirect violation by direct complicity, indirect complicity, tacit complicity or providing financial assistance. Direct

4 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

5 D. Kinley, J. Tadaki, From Walk to Talk…, *op. cit.*, pp. 948-949.

6 A. McBeth, Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights, "Hamline Journal of Public Law and Policy" 2008, vol. 30(1), p. 42.

violation occurs when the business entity is the main perpetrator of the violation, e.g. looting or exploitation of assets or resources in a war zone or other place of conflict, use of slave labour from or in detention camps. Indirect violation occurs when a direct perpetrator violates human rights and a business entity provides certain support or other benefits, regardless of whether or not the direct perpetrator is deemed liable. Direct complicity covers situations where a business entity provides the means or tools to commit violations (e.g. providing materials to make prohibited chemical weapons, selling software designed to facilitate civil repression). Indirect complicity addresses situations where a business benefits from human rights violations (e.g. via the repression or relocation of local inhabitants to acquire access to raw resources or infrastructure). Tacit complicity is closely linked to corporate governance and makes enterprises liable for "remaining silent" on human rights violations, particularly in host countries. Finally, businesses can be considered complicit by the existence of business links, by providing finance or other assistance to keep a regime in place that is violating human rights, or by buying goods originating from processes related to human rights violations.

The majority of large scale violations reported that are attributable to business entities and which typically involve the abuse of workers' rights and human rights in general via environmental damage, relate to the extraction of mineral resources (i.e. the oil, gas and mining industries).[7]

However, from the consumer's point of view, agriculture and the food industry are the most sensitive areas and grave violations of human rights attributable to food producers[8] has led to consumer boycotts.[9]

Similarly, the mass production of other consumer products, particularly textiles, and the so-called "sweatshops" in which they are produced, have also

7 See e.g. cases John Doe I, et al., v. UNOCAL Corp., et al., 395 F.3d 932 (9 Cir. 2002), Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013), Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010), JOHN DOE I, et al v. EXXON MOBIL CORP, et al, 1:01-cv-01357, No. 455 (D.D.C. Sep. 24, 2014), Doe VIII v. Exxon Mobil Corp, 654 F.3d 11 No. 1:07-cv-01022, No. 1:01-cv-01357, (D.C. Cir. Jul. 8, 2011).

8 See e.g. John Doe I v. Nestle, USA, 10-56739 (9th Cir. 2014).

9 See e.g. K. Sikkink, Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code, "Review Literature and Arts of the Americas" 1986, vol. 40(4), pp. 815–840; W.H. Meyer, Activism and Research on TNCs and Human Rights: Building a New International Normative Regime, (in:) J.G. Frynas and S. Pegg (eds.), Transnational Corporations and Human Rights, Palgrave Macmillan, Houndmills, New York 2003), pp. 33–52; A. Wawryk, Regulating Transnational Corporations through Corporate Codes of Conduct, (in:) J.G. Frynas and S. Pegg (eds.), Transnational Corporations…, *op. cit.*, pp. 53–78.

been targeted by human rights activists, consumers and politicians;[10] more so after the Rana Plaza disaster.[11]

## 3. UN Guiding Principles and current attempts to introduce international accountability of businesses for violation of human rights

The basic avenue for enforcement of human rights in a particular country is via the claims of addressees of these rights to local enforcement bodies (administrative offices and courts). However, this approach cannot be seen to be effective in cases where local governments are not in the least bit focused on human rights protection or are themselves heavily and systematically engaged in such violations. The paper limits itself to such regulatory mechanisms which are reachable by individuals rather than by states. Apart from national and European rules, the UN Guiding Principles on Business and Human Rights 2011[12] (hereinafter Guiding Principles) are analysed. The analysis seeks to answer two questions: first, is there a substantive legal background for a possible challenge? Second, who has legal standing for such challenge?

The Guiding Principles are divided into three pillars. The first pillar deals with the state's duty to protect human rights, the second pillar focuses on corporate responsibility to respect human rights and the third pillar sets out the principles related to access to remedy.

Regarding the first pillar, it is important to see whether there is a principle which would oblige a state to protect against human rights violations which occur outside

10 For further details see e.g. T.A. Hemphill and G.O. White, The World Economic Forum and Nike: Emerging "Shared Responsibility" and Institutional Control Models for Achieving a Socially Responsible Global Supply Chain?, "Business and Human Rights Journal" 2016, vol. 1(2), pp. 307-313, https://doi.org/10.1017/bhj.2016.3; J. Nolan, With Power Comes Responsibility: Human Rights and Corporate Accountability, "University of New South Wales Law Journal" 2005, vol. 28(3), pp. 581-613; J. Nolan and L. Taylor, Corporate Responsibility…, *op. cit.*; B. Dubach and M.T. MacHado, The Importance of Stakeholder Engagement in the Corporate Responsibility to Respect Human Rights, "International Review of the Red Cross" 2012, vol. 94(887), pp. 1047-1068, https://doi.org/10.1017/S1816383113000404; D. Davitti, Refining the Protect, Respect and Remedy Framework for Business and Human Rights and Its Guiding Principles, "Human Rights Law Review" 2016, vol. 16(1), pp. 55-75, https://doi.org/10.1093/hrlr/ngv037; A. Kolk and R. van Tulder, Setting New Global Rules? TNCs and Codes of Conduct, "Transnational Corporations" 2005, vol. 14(3), pp. 1-27, https://doi.org/10.1177/0007650309343407; A. Kolk and R. van Tulder, *International Codes Of Conduct Trends, Sectors, Issues and Effectiveness*, 2002, www.fbk.eur.nl/DPT/VG8.

11 M. Aizawa and S. Tripathi, Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers, "Business and Human Rights Journal" 2016, vol. 1(1), pp. 145-151, https://doi.org/10.1017/bhj.2015.12; J. Nolan, With Power…, *op. cit*.

12 Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J. Ruggie, Guiding Principles…, *op. cit*.

its territory[13] but where the product derived from such violations ends up within it. In the case of a state authority doing business with an enterprise, the state should promote respect for human rights in terms of contracts.[14] However, it would be a rare event for a state to be entering into a contract to buy, say clothes, directly from an enterprise manufacturing them in an Asian country.

The Guiding Principles provide for extra-territorial involvement in cases of abuse of human rights in conflict-affected areas.[15] States should help ensure that business enterprises operating in those contexts are not involved with such abuses. However, as it flows from the commentary to this principle, it applies to transnational corporations, which is a limiting factor, together with the requirement of the place of production being in a conflict zone.

Regarding corporate responsibility pursuant to the Guiding Principles, requirements are mainly towards an enterprise's own behaviour.[16] However, Foundation Principle 13[17] states that enterprises should try to prevent or at least mitigate human rights violations which are directly linked to its operations. It can be derived from this principle that even if an enterprise itself does not breach human

13 UN Guiding Principles, I. The State Duty to Protect Human Rights, Foundation Principle 1. *States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*. However, this principle is not directly addressed to third states.

14 UN Guiding Principles, I. The State Duty to Protect Human Rights, Operational Principle 6. *States should promote respect for human rights by business enterprises with which they conduct commercial transactions*.

15 UN Guiding Principles, I. The State Duty to Protect Human Rights, Operational Principle 7. *Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses*.

16 UN Guiding Principles, I. The corporate responsibility to respect human rights, Foundation Principle 11. *Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved*.

17 UN Guiding Principles, I. The corporate responsibility to respect human rights, Foundation Principle 13. *The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts*.

rights, but they are breached by its business partners, the enterprise should not turn a blind eye to this. The action required from an enterprise depends on its leverage over the entity violating human rights, how crucial the business relationship with that entity is to the enterprise, the severity of the violation and whether terminating the relationship with the entity would generate negative human rights consequences.[18] The enterprise should also verify the effectiveness of the action.[19]

Guiding Principles 16 *et seq*. provides for particular commitments which should be met by enterprises.

Regarding the third pillar, access to remedy, states are obliged to provide judicial and other means in order to secure a remedy.[20] However, this duty to act applies only to the state's territory or jurisdiction.

Moreover, in relation to the real impact of the Guiding Principles, it is important to say that they apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.[21] However, the Guiding Principles are not binding. They are implemented into national legal orders via national action plans. However, many states have thus far not adopted such plans, Slovakia included.[22] The EU has partially implemented the Guiding Principles, for example by the amendment of Directive 2013/34/EU[23] which incorporates an obligation to issue a non-financial statement for undertakings which are public-interest entities having 500 or more employees.[24] Nevertheless, this obligation is still very limited and does not provide a solution to the problem as a whole.

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18 UN Guiding Principles, I. The corporate responsibility to respect human rights, Operational Principle 19, Commentary.

19 UN Guiding Principles, I. The corporate responsibility to respect human rights, Operational Principle 20. *In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should: (a) Be based on appropriate qualitative and quantitative indicators; (b) Draw on feedback from both internal and external sources, including affected stakeholders*.

20 UN Guiding Principles, I. Access to Remedy, Foundation Principle 25. *As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy*.

21 UN Guiding Principles, p. 1.

22 UN Human Rights, Office of the High Commissioner: State national action plans on Business and Human Rights. Available at: https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (27.12.2018).

23 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (hereinafter referred as "Directive 2013/34/EU").

24 A. Yilmaz and R. Chambers, New EU Human Rights Reporting Requirements for Companies: One Step beyond the Current UK Rules, EU Law Analysis, 2014, http://eulawanalysis.blogspot.com/2014/10/new-eu-human-rights-reporting.html.

Therefore, when it comes to the legal standing of individuals, the Guiding Principles do not provide a legal basis for judicial proceedings. The Guiding Principles are merely a soft law instrument[25] and its true impact, especially when it comes to corporate responsibility to respect human rights, remains questionable.[26]

Being aware of the legal weakness of the Guiding Principles, in 2014 the UN Human Rights Council endorsed a resolution establishing a working group to prepare a draft legally binding international treaty dealing with the responsibility of businesses in relation to human rights violation.[27] This approach divided the Human Rights Council[28] itself as well as academia,[29] nevertheless, in July 2018 the "Zero Draft"[30] was submitted to the Human Rights Council for consideration.

Attempts to introduce an international instrument confirming the legal responsibility of businesses for human rights violations is not the only tool developed by the UN to regulate business activities. From the initiative of the then UN Secretary-General Kofi Annan, the UN Global Compact (hereinafter GC) was launched in 2000. Although the GC lists ten principles[31] the legal concept is completely different.

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25 J.G. Ruggie, Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474236 (27.12.2018), p. 6.

26 C.M. O'Brien, S. Dhanarajan, The Corporate Responsibility to Respect Human Rights: A Status Review, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607888 (27.12.2018), pp. 19, 20.

27 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9

28 The resolution was adopted by 20 votes in favour (Algeria, Benin, Burkina Faso, China, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam) 14 members voted against (Austria, Czechia, Estonia, France, Germany, Ireland, Japan, Montenegro, Korea, Romania, FYROM, UK and USA) and 13 members abstained (Argentina, Botswana, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE).

29 See e.g. M.K. Addo, The Reality…, *op. cit.*; J. Ruggie, The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty, Institute for Human Rights and Business, 2014, https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre/?; O. De Schutter, Towards a New Treaty on Business and Human Rights, "Business and Human Rights Journal" 2016, vol. 1(1), pp. 41–67, https://doi.org/10.1017/bhj.2015.5; J. Nolan, The Corporate Responsibility…, *op. cit.*; D. Bilchitz, The Necessity for a Business and Human Rights Treaty, "Business and Human Rights Journal" 2016, vol. 1(2), pp. 203–227, https://doi.org/10.1017/bhj.2016.13.

30 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (30.09.2018).

31 (Principle 1) Businesses should support and respect the protection of internationally proclaimed human rights; and (Principle 2) make sure that they are not complicit in human rights abuses. (Principle 3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; (Principle 4) the elimination of all forms of forced and compulsory labour; (Principle 5) the effective abolition of child labour; and (Principle 6) the elimination of discrimination in respect of employment and occupation. (Principle 7) Businesses

These principles are not authoritatively imposed as rules on business entities, rather they are adopted and adhered to voluntarily. Enterprises that join the initiative are required to incorporate the GC in their business strategy and submit annual reports on its implementation and effect.[32] The so-called "integrity measures" attached to the GC can be considered the initiative's enforcement mechanism which guards against abuse of UN principles in general and the principles of the GC in particular, such as failure in submitting reports and grave or systematic violation of the principles themselves. Where a violation occurs two forms of sanction can be imposed: (1) labelling the business as "non-communicating" or "non-active"; (2) de-listing the business from the GC initiative.[33] It should be noted that this enforcement mechanism is quite active: currently ca. 9,700 businesses participate in the initiative and ca.7,500 entities have thus far been de-listed.[34]

## 4. Voluntary codes and customers' perspective

Adhering to the GC is a form of self-regulation whereby a business entity voluntarily follows certain standards and it is irrelevant as to whether or not such standards are laid down by a public authority. Even accepting the principle of a "code of conduct" can produce a different market effect. The declaration of accepting or respecting a certain code of conduct can be an act of pure altruism but it is also sends an important message to investors,[35] shareholders, business partners, public sector, employees and customers, and thus it produces legal effects.[36] Following certain codes of conduct or standards of social and environmental protection can be required or expected by consumers and can be an important criterion in purchase decisions. On the basis of a Eurobarometer survey, 32% of Europeans (from 70% in Sweden to 12% in Portugal) answered that "ecolabels" play an important role in their decision making, however, on the other hand 39% of Europeans (from 6% in Sweden to 64%

should support a precautionary approach to environmental challenges; (Principle 8) undertake initiatives to promote greater environmental responsibility; and (Principle 9) encourage the development and diffusion of environmentally friendly technologies. (Principle 10) Businesses should work against corruption in all its forms, including extortion and bribery.

32 United Nations, Business Application, https://www.unglobalcompact.org/HowToParticipate/How_to_Apply_Business.html (31.12.2018).

33 United Nations Global Compact, Note on Integrity Measures, 2010, https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf.

34 United Nations Global Compact, Note on Integrity Measures, 2010, https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf.

35 J.J. Janney, G. Dess and V. Forlani, Glass Houses? Market Reactions to Firms Joining the UN Global Compact, "Journal of Business Ethics" 2009, vol. 90(3), p. 407, https://doi.org/10.1007/s10551-009-0052-x.

36 D. Kinley and J. Tadaki, From Walk to Talk…, *op. cit*.

in Portugal) never take notice of labels.[37] Another question related to the reliability of such labels. According the same survey, only 24% of Europeans (from 54% in Cyprus to 9% in France) totally agree that "eco-labelled" products are really eco-friendly, while 54% tended to agree to such effect.[38] As for the survey on the relevance of labels on textile products, labels related to social aspects of their manufacture are less important than environmental issues.[39] 17% of Europeans were prepared pay over 10% more for product produced under adequate working conditions, 24% were prepared to pay up to 10% more and 43% said they would chose "worker-friendly" products but only if the price was the same.[40] However these results did not correspond with the respondents views on "social" labels – only 12% always take them into account, 33% sometimes take them into account and 40% either never take them into account or admitted that working conditions were of no concern to them.[41] The most common reason for this is that consumers rarely encounter labels of this kind even though they would have a preference for social-friendly products (ca. 80%) and up to 40% stated that they did not trust such labels.[42]

As the aforementioned surveys illustrate, ecolabels and social labels play a certain role in the decision making process of consumers even though they are not always trusted. Therefore the analysis which follows focuses on consumer law and, in particular, how labelling or declarations of business to consumers regarding environmental and social policies are considered in relation to protecting consumers against misleading advertisements and information. Furthermore, public bodies as a specific type of consumer will be looked into because, theoretically, it is they who by requiring products to be provided bearing such labels can push businesses to improve ecological and social standards within their respective manufacturing and supply chains.

## 5. EU consumer protection

EU Consumer Protection Law is established in directives and spread in many pieces of legislation, however, for the purposes of this paper it can be summarised as following.

37 European Commission, *Special Eurobarometer 468 Report Attitudes of European Citizens towards the Environment*, 2017, http://ec.europa.eu/commfrontoffice/publicopinion, p. 30.
38 Ibid, p. 31.
39 Matrix Insight, Study of the Need and Options for the Harmonisation of the Labelling of Textile and Clothing Products, 2013, p. 7.
40 Ibid, p. 81.
41 Ibid, p. 82.
42 Ibid.

First, pursuant to Directive 2011/83/EU,[43] consumers are entitled to several rights, particularly the right to information and the right to withdrawal in relation to certain types of contracts. However, the main goal of this Directive is to facilitate trade within the internal market.[44] The right of consumers to have the products they buy manufactured in a way compatible with human rights protection is not among the rights explicitly enumerated in the Directive.

Yet, there are provisions which might be interpreted in such a way as to incorporate information on the compliance of the production procedure with human rights. Article 5 of Directive 2011/83/EU, provides for information requirements for contracts other than distance or off-premises contracts, i.e. for contracts where a consumer buys goods from a brick and mortar store. Article 6 of Directive 2011/83/EU covers information requirements for distance and off-premises contracts. Under both articles, the trader is obliged to provide information on the main characteristics of the goods, to an appropriate extent and in a clear and comprehensible manner.[45] It might be claimed that the production process of say an item of clothing, produced in a manufacturing environment that is respectful of human rights, qualifies as a main characteristics of the goods. Nevertheless, there is no recital to suggest such interpretation.

As to legal standing, Directive 2011/83/EU expressly states that an action under national law before a court or before a competent administrative body may be taken by consumer organisations having a legitimate interest in protecting consumers.[46] The action shall ensure that the national provisions transposing Directive 2011/83/EU are applied.

Second, Directive 2005/29/EC[47] provides for the specification of such contractual provisions which are to be considered as unfair. The aim of Directive 2005/29/EC is again protection of the internal market as well as the protection of consumers.[48]

43 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (hereinafter referred to as: "Directive 2011/83/EU") (OJ L 304, 22.11.2011, pp. 64–88).

44 See, for instance, Directive 2011/83/EU, recital 6.

45 Article 5 para 1 p. a) and Article 6 para 1 p. a) of Directive 2011/83/EU.

46 Article 23 para 2 p. b) and Article 6 para 1 p. a) of Directive 2011/83/EU.

47 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (hereinafter referred as "Directive 2005/29/EC") (OJ L 149, 11.06.2005, pp. 22–39).

48 Directive 2005/29/EC, recital 23, Article 1.

Similarly to Directive 2011/83/EU, there is no explicit right to have products manufactured in a way compatible with human rights protection.

Unfair commercial practices are defined in Article 5 of Directive 2005/29/EC. In essence, in order for commercial practices to be considered unfair, they must meet two requirements: first, they are contrary to the requirements of professional diligence; second, they distort the economic behaviour of average consumers. The two main groups of unfair commercial practices are misleading practices[49] and aggressive practices[50]. We will focus on the former.

Misleading practices can be addressed by Directive 2005/29/EC in cases where traders:

- mislead consumers by falsely claiming that products are manufactured in a human-friendly manner when they are not;[51]
- mislead consumers by falsely claiming that they are committed to the observance of human rights in their business relations when they are not;[52]
- mislead consumers by adopting codes of conduct that require them to observe human rights in their business relations but do not comply with such codes;[53]
- do not provide "*material information*[54] *that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*".[55] Although this does not directly flow from recitals, the provision might be interpreted as to included omission to state whether products they sell were manufactured in compliance with human right standards;

49 A commercial practice is misleading, in essence, if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives, and it causes or is likely to cause consumer to take a transactional decision that he would not have taken otherwise. See Article 6 para 1 of Directive 2005/29/EC.

50 A commercial practice is aggressive, in essence, if by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs the consumer's freedom of choice or and thereby causes him or to take a transactional decision that he would not have taken otherwise. See Article 8 of Directive 2005/29/EC.

51 Such statement might be subsumed under Article 6 para 1 p. a) of Directive 2005/29/EC – the nature of the product.

52 Such statement might be subsumed under Article 6 para 1 p. c) of Directive 2005/29/EC – the extent of the trader's commitments.

53 Such statement might be subsumed under Article 6 para 2 p. b) of Directive 2005/29/EC – non-compliance with codes of conduct. See also Annex I p. 1 of Directive 2005/29/EC. Annex I which enumerates commercial practices which are in all circumstances considered unfair.

54 The enumeration of material information in relation to invitation to purchase is provided by Article 7 para 4 of Directive 2005/29/EC.

55 Article 7 para 1of Directive 2005/29/EC.

– fail to provide clear or timely information described in the previous point.[56]

Regarding legal standing, Article 11 of Directive 2005/29/EC secures the right to take legal action against unfair commercial practices for persons or organisations having a legitimate interest in combating unfair commercial practices, including competitors. Consumers shall be included in this group.

## 6. Slovak consumer protection

As stated above, directives are subject to national implementation. In the Slovak legal order, there are several pieces of legislation which protect consumers. Act No. 250/2007 Coll. (hereinafter Act on consumer protection)[57] enumerates various rights of consumers, among which there is the right to buy products that meet a specific standard of quality.[58] If the quality is not prescribed, traders may sell products of a lesser standard of quality but only if consumers are made clearly aware of the differences before purchase.[59] We assume this right might be interpreted in such a way as to enable consumers to buy products which are manufactured without infringing human rights. However, there is nothing in the Act on consumer protection which would directly require such interpretation.

Apart from enumerated rights, traders are obliged to maintain certain ethical standards. For example, Article 4 (8) of the Act on consumer protection provides that "*The seller must not act contrary to good moral behaviour*, (…) *conduct contrary to such behaviour means, in particular, conduct which is contrary to established traditions and which show obvious signs of discrimination or deviation from the rules of moral integrity recognised in the sale of the product and the provision of the service, or which might* [as a result of misleading information on the part of the seller] *cause harm to the consumer (…)*".[60] Thus, if the sale of goods manufactured in a way that breaches human rights is considered to be contrary to good moral behaviour, pursuant to Article 4 of the Act on consumer protection, such sale would be prohibited. However, nothing in this Act directly indicates that the provision should be triggered in the situation described.

56 Such statement might be subsumed under Article 7 para 2 of Directive 2005/29/EC.

57 Act No. 250/2007 Coll. on protection of consumers, as amended, hereinafter referred as "Act on consumer protection" (Zákon č. 250/2007 Z.z. o ochrane spotrebiteľa a o zmene zákona Slovenskej národnej rady č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov), https://www.slov-lex.sk/static/pdf/2007/250/ZZ_2007_250_20190101.pdf (1.01.2019).

58 Section 3 para 1 of the Act on consumer protection.

59 Section 4 para 1 p. a) of the Act on consumer protection.

60 Section 4 para 8 of the Act on consumer protection.

Unfair commercial practices are regulated in a similar manner as indicated above in relation to Directive 2005/29/EC.[61] Therefore, we referred to the elaboration on misleading practices presented above. The same applies to the obligation to provide information presented in relation to Directive 2011/38/EU.[62]

As far as legal standing is concerned, any consumer may challenge a violation of his or her rights before a court.[63] The same rights are given to legal persons protecting the rights of consumers.[64]

Apart from the Act on consumer protection, consumers are significantly protected by the Civil Code.[65] Section 53 of the Civil Code holds unfair contractual terms null and void, unless they are a derivative of negotiation. If a consumer contract contains a provision which is an unfair contractual term and in conclusion of the contract an unfair commercial practice was used, such contract is *ipso lege* null and void.[66] Section 53 also provides a non-exhaustive list of unfair terms, however, none of these terms is directly applicable to the issue at hand.[67]

None the less, if there is a contractual term that infers, e.g. that the trader is not obliged to explore the process of garment production and its compatibility with human rights, and such contractual term is declared unfair by a court, the trader is obliged not to use such term or a term with similar meaning in dealings with consumers.[68]

As to legal standing, consumers are entitled to lodge an action to a competent court in order to establish that a particular contractual term is unfair. There are no specific procedural provisions within the relevant section of the Civil Code. The litigation process would be governed by the Civil Procedural Code.[69]

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61 For the exact implementation of the relevant provisions from Directive 2005/29/EC, see section 7 et seq. of the Act on consumer protection.

62 For the exact implementation of the relevant provisions from Directive 2011/38/EU, see section10a et seq. of the Act on consumer protection.

63 Section 3 para 5 of the Act on consumer protection.

64 Ibid.

65 Act No. 40/1964 Coll. Civil Code, as amended (Zákon č. 40/1964 Zb. Občiansky zákonník v znení nesjkorších predpisov), hereinafter referred as "Civil Code", https://www.slov-lex.sk/static/pdf/1964/40/ZZ_1964_40_20190130.pdf (30.01.2019). Please kindly note that there are also other Acts of Law which protect consumers, however, they are deliberately omitted from this paper, such as protection of consumers in off-premise sales, or protection of consumers in financial relations.

66 Section 53d of the Civil Code.

67 However, an interpretation for the benefit of consumer is always used when a provision is ambiguous.

68 Section 53a para 1 of the Civil Code.

69 Act No. 160/2015 Coll. Civil Procedural Code, as amended (Zákon č. 160/2015 Z.z. Civilný sporový poriadok v znení neskorších predpisov), https://www.slov-lex.sk/static/pdf/2015/160/ZZ_2015_160_20181212.pdf (12.12.2018).

## 7. Selected examples of consumer protection case law

The case *Kasky v. Nike* was brought by an anti-sweatshop activist against the communication of a transnational corporation on working conditions in its factories.[70] This case was, however settled out of court, and both parties considered denial of *certiorari* by the US Supreme Court as their victory. Although the case started as a consumer protection case based on alleged false information provided by Nike regarding working conditions in its factories and level of wages paid, the crucial legal question taken into consideration by the Supreme Court of California revolved around the extent of institutional freedom of speech.

Although there is no current case law of the Court of Justice of the European Union (hereinafter CJEU) dealing directly with the misuse of labels on the environmental and social aspects of advertising, certain standards of assessment can be identified.

In the *Bankia* case the CJEU[71] stressed that the difference between unfair commercial practices and unfair contractual terms, is that unfair contractual terms are *per se* "not binding on the consumer", while unfair commercial practices are "merely" prohibited.[72] Finding that a commercial practice is unfair has no direct effect on whether the contract is valid.[73] Therefore, even though the court finds that a certain practice was "misleading", i.e. it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, it is only one of the elements involved in evaluating unfairness of a contractual term and nullity of it.[74]

Therefore wrongly stated or abused eco-labels and social labels do not automatically cause nullity of the contract. It must also be reminded that eco-labels as well as social labels do not generally declare the quality of the product, merely the conditions involved in its manufacture. Hence, in this sense, a consumer can hardly claim injury, loss or other damage caused by a falsely labelled or advertised product.

Also in the *Bankia* case the CJEU limited the relevance of codes of conduct: "*the directive does not require the Member States to provide for there to be direct consequences for traders solely on the ground that they have not complied with a code of conduct after subscribing thereto*" and therefore the Member States are not obliged to introduce legislation which "*confer a legally binding nature on a code of conduct*".[75]

70 J. Fisher, Free Speech to Have Sweatshops? How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions, "Boston College Third World Law Journal" 2006, vol. 26(2), pp. 267–310, http://lawdigitalcommons.bc.edu/twlj/.

71 Judgment of 19 September 2018, Bankia, C-109/17, EU:C:2018:735.

72 Ibid, para. 37,41.

73 Ibid, para. 50.

74 Judgment of 15 March 2012, Pereničová and Perenič, C453/10, EU:C:2012:144, para. 46, 47.

75 *Supra* note 70, para. 58, 59.

## 8. Public procurement and environmental and social standards

Directive 2014/24/EU on public procurement (hereinafter Public Sector Directive),[76] included some provisions that enabled measures concerning environmental, social and labour issues to be addressed. First, according to its Article 18(2) "*Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X*". Second, under Article 56(1) "*Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)*". Third, under Article 57(4)(a) "*Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator (...) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)*". Fourth, the Contracting authority shall require explanation of abnormally low tenders, particularly in relation to, inter alia, compliance with obligation referred to in Article 18(2). The difference between these provisions of the Public Sector Directive is apparent: Article 18(2) constitutes a mandatory duty of the Member State; however it does not provide a certain form of transposition of this duty, and Articles 56(1), 57(4)(a) and 69(2)(d) enable contracting authorities to enforce requirements laid down by Article 18(2), however this provision of the directive is optional or merely "enabling".

As case law has shown these provisions do not establish an unlimited eco-friendly and social-friendly framework for public procurement, it only allows some of these features to be considered. These limits were explained in case *Commission v. Netherlands*[77] in which the CJEU declared incompatible with the directive explicit requirements established by the contracting authority that included: a technical specification "requiring that certain products to be supplied were to bear a specific ecolabel, rather than using detailed specifications" and a minimum level of technical ability "that tenderers comply with the 'criteria of sustainable purchasing and socially responsible business' and state how they comply with those criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production'". Further, the court found that the requirements for tenderers to "comply with 'the criteria of sustainable purchasing and socially responsible business' and to state how they comply with those

76 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.03.2014, pp. 65–242).

77 Judgment of 10 May 2012, Commission v. Netherlands, C-368/10, EU:C:2012:284.

criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production'"[78] were insufficiently clear and precise and did not comply with the obligation of transparency provided for in Article 2 of the Directive. Hence the list of international instruments included in Annex X constitutes an exhaustive list of the social standards that can be considered in public procurement.

The CJEU also faced the question of whether a contracting authority may require certain labour standards for the workers of a tenderer. Although the court confirmed that it is permissible to require that an equal wage be paid to all workers employed on a specific contract, in *Rüffert*[79] and in *Bundesdruckerei*,[80] it did not allow to require a minimum wage to be set by collective agreement. However, in *RegioPost* it allowed to require the statutory minimum wage to be paid by contractors as well as subcontractors.[81]

The final part of this chapter will review how the provisions of Directive 2014/24/EU were transposed into the Slovak legal order, i.e. into Act No 343/2015 Coll. on Public Procurement and Amendment of Certain Laws as amended (hereinafter Public Procurement Act).[82] First, a valuable tool is enshrined in this Act in relation to the prequalification requirements for economic operators wishing to participate in public tenders. Under its Article 32(1)g), a prospective tenderer shall fulfil the prequalification criterion if, *inter alia*, within the three year period preceding the call for bids or launch of the procurement procedure the operator "*has not committed a serious breach of obligations in the field of environmental protection, social law or labour law* (…) *for which a sanction has been lawfully imposed which the contracting authority can prove*". Slovak legislation thus joins the enforcement of Article 18(2) of the Public Sector Directive and exclusion criteria and does not refer to an exhaustive list of environmental, social and labour regulations. The Act itself does not explain the notion "serious violation" and the Office for Public Procurement was asked to provide such explanation by way of "methodological guidance". However, in its Methodological Guidance No. 16013-5000/2017 of 6 November 2017,[83] the Office did not provide an explanation which would have defined which labour, environmental and social rules are relevant for exclusion from public procurement. In Decision No. 1838-9000/2014-KR/10 of 3 April 2014 the Council of the Office for Public Procurement (appellate body) confirmed that only a grave violation can establish

78 Judgment of 10 May 2012, Commission v. Netherlands, C-368/10, EU:C:2012:284, operative part.
79 Judgment of 3 April 2008, Rüffert, C-346/06, EU:C:2008:189.
80 Judgment of 18 September 2014, Bundesdruckerei, C-549/13, EU:C:2014:2235.
81 Judgment of 17 November 2015, RegioPost, C-115/14, EU:C:2015:760.
82 Zákon č. 3434/2015 Z.z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov, https://www.slov-lex.sk/static/pdf/2015/343/ZZ_2015_343_20190101.pdf (1.01.2019).
83 Available at: https://www.uvo.gov.sk/metodicke-usmernenia-zakon-c-3432015-z-z/document/428662 (31.12.2018).

reason for exclusion of an operator from public procurement and the gravity of the violation can be derived from the circumstances of the case and its outcome, e.g. the level of fine imposed.[84]

Another tool for reviewing human rights standards is the examination of abnormally low bids. Under Article 53(2)d) of the Public Procurement Act, the commission for evaluation of bids shall ask for an explanation of an abnormally low bid, *inter alia*, from the point of view of the fulfilment of statutory obligations laid down by labour law, in particular with regard to minimum wage entitlements, environmental protection and social rights under special regulations.

Reserved contracts to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, is a tool for protecting the rights of a specific group of workers and is provided for in Article 20 of the Public Sector Directive as well as in Slovak legislation. The Supreme Court of the Slovak Republic in judgment No 4Sžf/67/2015 of 4 November 2015,[85] warned against abuse of this provision. On the one hand it admitted that no economic activity can be excluded *per se* from reserved contracts to sheltered workshops (including construction work). On the other hand, the aim of this legislation is to provide contracts to sheltered workshops and the service is in fact performed by sub-contractors.

## 9. Summary

Environmental damage caused by the extraction of minerals, the exploitation of workers and natural resources in food production, and the presence of sweatshops in under-privileged countries to meet the ever-increasing demand for consumer products in developed nations, is the reality of today's world. Since it is often not possible to prosecute violations of human rights within the countries where they occur, it is worth considering how, if at all, these violations can be remedied from abroad in the countries where the food, clothes or myriad of other goods produced are sold to end-users. It is assumed that if the retailers of these products are liable for the violations, or they at least bear commercial consequences for the violations, such action will force manufacturers to improve the conditions under which those products are produced.

This paper has analysed how currently existent legal instrument could be used in practice in order to deal with the issue at hand. As to the Guiding Principles, it may be concluded that even if the second pillar may be interpreted in a way that obliges retailers to deal with human rights violations, the Guiding Principles do not

84 Available at: https://www.uvo.gov.sk/prehlad-rozhodnuti-podla-zakona-c-252006-z-z/document/-29 (1.01.2019).

85 Judgments of the Supreme Court of the Slovak Republic are published online on www.nsud.sk.

provide legal standing *per se*. In this regard, EU directives provide more explicit rights which might be used, however, their applicability in relation to human rights violations would very much depend on interpretation of the relevant provisions. The same applies to the Slovak acts of law referenced. Thus, even under current legislation it is possible, at least in theory, to hold the retailers of goods liable for violations of human rights incurred during the course of their production. Public procurement rules also provide limited scrutiny over human rights violations although here, the duty of contracting authorities to observe labour, environmental and social rules, is covered by more explicit provisions.

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# Selected Remarks Regarding Equal Treatment in Business Relationships in the European Union on the Example of Issues Concerning the Cross-Border Transfer of Companies Between Member States

**Abstract:** In this paper the author analyzes the free movement of companies between EU Member States, one of the most essential conditions enabling the freedom of business in the European Union. It is obvious that in every European country, the constitution and/or legal order guarantees the basic fundamental rights for the people and settles the exercise of power. In conducting the research it is very important to examine the appearance of the two fundamental freedoms which are the essence of present topic, the *freedom to provide services* and the *freedom of establishment*. Both rights are listed in the basic treaties of the European Union and their nature is explained herein through interpretation of the text of the treaties, and through the jurisdiction, by analyzing case law using the decisions of the Court of Justice of the European Union (CJEU). The research centres on the examination of the practical side of the freedom to provide services and freedom of business. The study is presented through analysis and evaluation of the decisions of the CJEU and the Hungarian national jurisdiction. The goal is to provide a general picture through the jurisdiction of the CJEU and to examine whether the rights mentioned truly emerge in real life. Older decisions have also been taken into consideration in this regard as they were fundamental to the founding principles of the freedoms discussed and their present regulation.
**Keywords:** freedom of establishment, company law, transfer of seat

## 1. Introduction

In the course of the end of the 20th and the beginning of the 21st century we have witnessed the emergence of three key trends in the field of company law. First, is the more detailed regulation of management activity, expertise and control of public limited liability companies, aimed primarily at protecting the interests of investors, minority shareholders and creditors. Second, are the efforts aimed at facilitating and

making it easier for small and medium-sized businesses to operate in the form of limited liability companies. Third, is the free movement of companies across national borders. The purpose of this study is to present the most important features of this third phenomenon, with a description of what legislators and judicial practices have achieved and what they are currently working towards.

The Treaty on the Functioning of the European Union (TFEU) provides regulations for the free establishment and free movement of companies between Member States. Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State is prohibited. Such prohibition also applies to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment includes the right to take up and pursue activities as companies or firms under the conditions laid down for its own nationals by the law of the country where such establishment is effected.[1] Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall be treated in the same way as natural persons who are nationals of Member States. In the usage of this regulation companies or firms mean companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.[2]

## 2. Incorporation and real seat theories

There are two different approaches regarding the international private law of businesses which prevail in the national legislation of Member States: real seat theory and incorporation theory. According to real seat theory a company's legal positions must be judged based on where the actual administration is located, in other words the place from which the company's central and day-to-day administration is conducted.[3] The real seat principle is applied in domestic regulations for example in Austria, Germany, France, Italy, Belgium, Spain, Luxembourg, Greece and Portugal. According to advocates of real seat doctrine the company and its legal positions must be judged based on the law of the state in which the actual activity is carried out, since it is assumed that creditors, shareholders and employees also fall under the law of that state. Critics of the real seat principle argue that it is extremely difficult in today's globalised business world and amidst cross-border frameworks of business

1 Article 49 of TFEU.
2 Article 54 of TFEU.
3 For detailed analysis see T. Szabados, The Transfer of the Company Seat within the European Union, Budapest 2012; E. Wymeersch, The Transfer of the Company's Seat in European Company Law, Law Working Paper No. 08/2003, ECGI Working Paper Series in Law, pp. 3 ff.

relations, to determine where the real seat of a company is. Countries that follow the incorporation theory, such as the United Kingdom, the Netherlands, Denmark, Sweden and Ireland, maintain that a company should be judged based on where it is actually registered. Consequently, if a company is incorporated in a given state, from then on it becomes an existing entity which can carry out its activities in any other country, but company law issues must be examined based on the laws of the country in which it is incorporated. Articles 49 and 54 TFEU declare the right to establishment, and this is extended to include companies as well. At the same time, these rules do not give firm guidance in this context, essentially leaving it to the national laws of Member States to decide which doctrine they adopt.[4]

## 3. The rulings of the Court of Justice of the European Union (CJEU)

Many rulings of the CJEU have dealt with this issue. In the cited cases which follow, the author shows and summarises the *ratio decidendi* of the most important decisions taken.

### 3.1. The *Daily Mail* Case

In the *Daily Mail* case[5] a company registered in the United Kingdom wanted to move its head office to the Netherlands, but was refused permission to do so by the UK tax authority. The High Court of Justice in the UK referred the question to the CJEU and the Court of Justice (ECJ) concluded that this was an issue that could be resolved on the strength of national legislation. Cross-border relocations of company head offices cannot be judged based on EU law, and can only be resolved based on the

4 Cf. the latest additions to the massive amount of literature on this subject: N.K. Erk, The Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real State Doctrine, "European Business Law Review" 2010, vol. 21(3), pp. 345 ff; W.-G. Ringe, Company Law and Free Movement of Capital, "Cambridge Law Journal" 2010, vol. 69(2), pp. 378 ff; R.M. Buxbaum, Is There a Place for a European Delaware in the Corporate Conflict of Laws?, "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2010, vol. 74, pp. 1 ff; J.F. Bron, Niederlassungsfreiheit: Hinzurechnung außergewöhnlicher oder unentgeltlicher Vorteile, die einer auslandsansässigen verflochten Gesellschaft gewährt wurden, zu de Gewinnen der belgischen (Mutter-) Gesellschaft kann gerechtfertigt sein – "SGI", "Europäisches Wirtschafts- und Steuerrecht" 2010, vol. 3, pp. 80 ff; H. Hahn, Von kleinen Aktiengesellschaften, sociétés par actions simplifiées und anderen Raritäten – der Anwendungsbereich der Mutter-Tochter-Richtlinie nach "Gaz de France", "Europäisches Wirtschafts- und Steuerrecht" 2010, vol. 5, pp. 176 ff; U. Altinişik, Free Movement of Companies within the EU, "Ankara Bar Review" 2012, vol. 1, pp. 103 ff; H. Horak, K. Dumančič, Cross-Border Transfer of the Company Seat: One Step Forward, Few Steps Backward, "US-China Law Review" 2017, vol. 14, pp. 711 ff.

5 Case C-81/87, The Queen v H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC (1988).

laws of the country in which it is incorporated and the laws of the country where the new seat is located.

### 3.2. The *Centros* Case

In the *Centros* case[6] a Danish couple wished to set up a small company in Denmark, but did not want to provide the minimum capital for the company required under Danish law; consequently they incorporated the business in the United Kingdom and then applied to register a branch in Denmark. The Danish court rejected the application because the company did not meet the minimum capital requirement. In this case the ECJ found the rejection of the branch registration application to be unlawful as it violated the freedom of establishment rule. The Court stated that in theory four conditions must be fulfilled for a national measure enabling a Member State to prevent a company registered in a different Member State from operating:

- it must not lead to discrimination,
- it must be in the public interest,
- the regulation must be suitable for securing the attainment of the public objective,
- the regulation must only contain objective provisions as required to the achieve the goal.

### 3.3. The *Überseering* Case

In the *Überseering* Case[7] a Dutch-based company acquired a piece of land in Düsseldorf, then two years later it entered into a contract with German firm Nordic Construction Company Baumanagement GmbH (NCC) to refurbish a garage and motel on the property. Überseering refused to accept the fulfilment of the contractual obligations but before taking any legal steps against the contractor, the owners of Überseering transferred all their shares to two German citizens resident in Düsseldorf. Two years later Überseering sued NCC for defective work. NCC alleged that Überseering's claim could not be judged in a German court because although the real seat was in Germany, the incorporation was not based on German law. The ECJ concluded that a German court cannot refuse to recognise the legal capacity of a company just because it was incorporated based on Dutch law and not on German law.

6 Case C-212/97, Centros Ltd. v Erhervsog Selskabsstyrelsen ECR (1999).

7 Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC), ECR (2002) I-9919.

### 3.4. The *Inspire Art* Case

The preamble to the *Inspire Art* case[8] was that a law on formally foreign companies entered into force in the Netherlands on 1 January 1998, which prescribed that companies incorporated based on the laws of another state could only operate in the Netherlands if they were registered in the Dutch company register as a "formally foreign company". In addition, the given company has to comply with disclosure and minimum capital requirements, for which the managing directors are jointly and severally liable. Inspire Art Ltd. was incorporated in the United Kingdom in July 2000 and subsequently established a branch in Amsterdam in August of that year. The branch was registered in the Dutch company register, but not as a "formally foreign company". Consequently the Dutch Court of Registration launched legal action against the company for unlawful incorporation. In its ruling the ECJ concluded that the Dutch law contradicted European Union law since it violates the freedom of establishment.

We should also note that the ruling in the *Inspire Art* case significantly influenced the trend whereby more than 30,000 limited companies incorporated in the United Kingdom between 2003 and 2006 established branches in Germany and began actual operations there. Since 1 pound sterling is sufficient as start-up capital to launch a limited liability company in the United Kingdom, this represented a major advantage for German businesses given that German regulations used to demand EUR 25,000 to set up a GmbH. This is precisely why German entrepreneurs with a lack of capital set up limited companies in the United Kingdom and then established branches in Germany. It needs to be remarked, however, that after a time this solution become less attractive, especially when German legislators introduced a new form of limited liability company *(die Unternehmergesellschaft)* which *inter alia* addressed the startup capital issue.

### 3.5. The *Cartesio* Case

*Cartesio Bt.* is a company incorporated in Hungary which wanted to relocate its central administration to Italy, a request initially rejected by the Court of Company Registration in Hungary saying that this was not permitted under Hungarian law.[9] The opinion of the court was that Cartesio Bt. should first of all be wound up in Hungary by means of solvent liquidation, and then the owners could establish a new company in Italy. The Court of Appeal in Szeged referred the matter to the CJEU for guidance in its preliminary ruling, asking whether the Hungarian regulation violates the freedom of establishment. The ECJ concluded that Member States have a sovereign right to decide whether companies should be able to relocate their head

8 Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd., ECR (2003) I-10155.

9 Case C-210/06, Cartesio Oktató és Szolgáltató Bt (2008).

offices to another Member State. Under current legislation this is only possible if the regulations in both the Member State of the company's head office and in the Member State of the new head office allow the cross-border relocation of head offices.

### 3.6. The *VALE* Case

The *VALE* case[10] is very similar to the Cartesio case. VALE Construzioni Srl was a company established under Italian law and the members of the company decided on the conversion of the company under Hungarian law and transfer the seat of the company to Budapest. The Italian laws allow companies to convert into a company under foreign law, while the Hungarian laws do not.

The most important details of the case were the followings. VALE Costruzioni Srl (a limited liability company governed by Italian law) was established and registered in the Rome commercial register in 2000. In 2006, VALE applied to be removed from that register on the ground that it intended to transfer its seat and its business to Hungary. In accordance with the application, VALE was deleted from the Italian company register. The articles of association of VALE were duly modified to meet the requirements of Hungarian company law. In 2007, a representative of VALE applied to the Budapest Metropolitan Court, acting as company court, to register the company in accordance with Hungarian law. In the application, the representative stated that VALE Costruzioni was the predecessor in law to VALE Építési. The application was rejected. VALE appealed to the Court of Appeal of Budapest, which upheld the order rejecting the registration. The reason for rejection, was that a company which was incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested. VALE brought an appeal on a point of law before the Hungarian Supreme Court, seeking annulment of the order rejecting registration and an order that the company be entered in the commercial register. It submitted that the contested order infringes Articles 49 TFEU and 54 TFEU, which are directly applicable. In that regard, it states that the order fails to recognise the fundamental difference between the international transfer of the seat of a company without changing the national law which governs that company on the one hand and the international conversion of a company on the other. The Court clearly recognised that difference in the Cartesio Case.

The Hungarian Supreme Court required a preliminary ruling and the ECJ decided as follows:

"1. Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.

10 C-378/10, VALE Construzioni Srl (2012).

2. Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from:

– refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and
– refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin."

### 3.7. The *Polbud* Case

The decision in the *Polbud* Case was a mirror image of VALE.[11] Polbud Wynkonawstwo sp. z o.o. was a private limited liability company established in Lącko under Polish law. In 2011, the shareholders of the company decided to transfer the seat of the company to the Grand Duchy of Luxembourg. On the basis of the owners' decision the liquidation procedure in Poland was initiated and in 2013 the shareholders convened a meeting in Luxembourg to implement the transfer of the seat of the company. They decided that Polbud will continue its activity in Luxembourg under the name Consoil Geotechnik Sarl and the company was duly registered in Luxembourg under that name. Meanwhile, Polbud applied for the company to be deleted from the Polish company register with the remark that it had transferred its seat to Luxemburg. However, this was refused. Under Polish law it is not possible to transfer the seat of a company to another company without first liquiditating and deleting the company from the registry in Poland.[12]

### 3.8. Some remarks on the transfer of the seat of companies

As of now the laws of only 12 EU Member States allow the seat of a company to be transferred: Belgium, Cyprus, Denmark, France, Greece, Italy, Luxembourg, Malta, Portugal, Slovakia and Sweden.[13] Between 2013 and 2018 such transfers most often took place in Luxembourg, Germany, the Netherlands, Spain and Italy. It is

11 C-106/16, Polbud – Wykonawstwo sp. z o.o. (2017).
12 For detailed analysis see H. Horak and K. Dumančič, *op. cit.*, pp. 711 ff.
13 T. Biermeyer and M. Meyer, Cross-border Corporate Mobility in the EU. Empirical Findings 2018, ETUI 2018, p. 60.

noteworthy that Austria, Germany, the Netherlands and the United Kingdom do not have legislation covering the transfer of the seat of companies. In the light of current ECJ rulings, it can be said that for companies seated in other Member States this can result in relevant competition disadvantages.

## 4. The possible solution

In the United States of America people are free to decide which state they would like to set up their company in, and they can freely relocate the head office of that company to another state. This has resulted in 40% of companies listed on the New York stock exchange being incorporated in the state of Delaware for example. The emergence of the US *Delaware effect* in the European Union is hotly debated. Many support the efforts made to have a directive adopted in the European Union that enables the free relocation of head offices between Member States. Others remain sceptical since incorporation costs only represent minor revenue flows for Member States. The differences between national company laws in individual Member States are in fact narrowing thanks to EU company law directives, and linguistic barriers in Europe mean that a mass relocation of head offices is unlikely anyway.

### 4.1. The Directive on cross-border mergers

A significant step forward was the Directive on cross-border mergers of limited liability companies which the Directive facilitates.[14] Under its provisions, the laws of the Member States are to allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of company. Each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger. None of the provisions and formalities of national law should introduce restrictions on freedom of establishment or on the free movement of capital, save where these can be justified in accordance with the case law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such over riding requirements.

On the basis of the Directive, Biermeyer and Meyer state that the United Kingdom for example has a "negative net balance", which means that more companies seem to have exited the UK between 2013 and 2018 than companies entering it through

14 Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1), repealed by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.06.2017, p. 46).

cross-border mergers.[15] This trend can of course be the result of Brexit. Overall, from their analysis between 2013 and 2018, some 1,936 cross border mergers took place in the European Union. German companies participated the most in such movement, while companies in the Netherlands, Luxemburg, Austria, Italy, the United Kingdom and France were also very active.[16]

### 4.2. The supranational companies

The real solution to the problem is supranational companies, which provide owners with an appropriate legal framework to manage their head offices, actual places of administration and operational areas in a flexible manner.

Besides the European Company (*Societas Europaea* – SE),[17] the European Cooperative Society[18] and the European Economic Interest Grouping,[19] an initiative was launched under the aegis of the European Union for a fourth supranational form of company, primarily to offer an appropriate legal framework for small and medium-sized businesses. 99% of companies in the European Union are small and medium-sized businesses; only 8% of them pursue any form of international trade and only 5% have subsidiaries or joint ventures abroad. At the same time, the standard regulation of company law throughout the European Union has clearly failed over the last 50 years, principally due to resistance against unifying the various regulatory models. In order to have a veritable single market within the European Union it is essential for companies to be able to move freely within the territory of the EU, be able to relocate their head office from one Member State to another and be subject to the same rules. Additionally, it is equally important in the context of small and medium-sized enterprises for it to be simple, inexpensive and flexible to set up a company. To this end, a draft regulation on regulating the Private European Company (*Societas Privata Europaea* – SPE) was created.[20] The SPE is largely similar to the SE, but does without all the administrative, bureaucratic and costly features, and therefore could make it ideal for becoming the most popular type of company in the European Union.

According to the draft regulation, an SPE could be established by one or more members with a minimum start-up capital of 1 euro. The statute provides a great deal of freedom for members in terms of shaping their articles of association as they

15 T. Biermeyer and M. Meyer, *op. cit.*, p. ii.
16 T. Biermeyer and M. Meyer, *op. cit.*, pp. 5 ff.
17 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).
18 Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
19 Regulation (EEC) No 2137/85 – the European Economic Interest Grouping.
20 Cf. S. Steiner, Societas Privata Europaea. Perspektiven einer neuen supranationalen Rechtsform, Frankfurt am Main 2009; K. Noussia, European Private Company ("Societas Privata Europaea"), "Business Law International" 2010, vol. 11(3), pp. 277 ff.

see fit; the incorporation and the company law regulations of a given Member State are subsidiary in nature. It would also be possible to convert existing companies into an SPE. The registered office of such a company could be freely relocated from one Member State to another. It will also be possible to issue ordinary shares and preference shares in the business. The transfer of shares and any restrictions must be regulated in the articles of association. With capital being low, rules to protect creditors and minority shareholders are ensured by the *balance sheet test*, based on which dividends may only be paid or own shares purchased if the balance sheet shows that this will not jeopardise the settlement of liabilities on time, and by the *solvency test*, which takes the company's cash flow into account in relation to income and outgoings.

The draft was debated by the European Parliament on 10 March 2009, but has yet to be adopted, largely on account of resistance from several Member States.

### 4.3. The need for the 14th Company Law Directive

Another solution would be the adoption of the 14th Company Law Directive.[21] The directive would allow companies to exercise their right of establishment by migrating to a host Member State without losing their legal personality but by being converted into a company governed by the law of the host Member State without first having to be wound up.[22] The basis of the movement would be a transfer plan approved by the general meeting of the company. The transfer should take effect on the date of registration in the host Member State, and it should not circumvent legal, social and fiscal conditions. From the date of registration in the host Member State, the company should be governed by the legislation of that State. The transfer should not affect the company's legal relationship with third parties and the transfer should be tax-neutral as well.

## 5. The Hungarian point of view

### 5.1. Freedom of establishment in Hungary

The Hungarian Civil Code (Act V of 2013 on the Civil Code) also guarantees freedom of establishment in the case of legal persons, including companies. According to paragraph (1) Section 4 of Book 3 of the Civil Code, persons shall have freedom of establishment of a legal person by means of a contract, charter document

21 See European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)) (2013/C 239 E/03).

22 In relation to this it is necessary to highlight the importance of the Commission's Company Law package. For details see: https://ec.europa.eu/info/publications/company-law-package_en (accessed 19.03.2019).

or articles of association (referred to collectively as "instrument of constitution"), and shall themselves decide on the legal person's organizational structure and operational arrangements.

Section 8 of Book 3 of the Civil Code, sets out the requirements on the activity or activities legal persons may carry out. Legal persons may engage in the pursuit of any activity that is not expressly prohibited or restricted by law.

Hungarian law, correspondingly with the general practice of many other Member States of the European Union, guarantees standards. It enables the full and free establishment of legal persons, with reasonable legal restrictions (concerning name, minimum capital requirements and the like) provided always that it's activity is not unlawful or otherwise restricted by the law.

### 5.2. Cross-border transfer of seats in Hungary

As previously discussed in connection with the Cartesio and VALE cases, the cross-border transfer of seats is not allowed under Hungarian law. There is no specific mechanism in the Hungarian legal system that enables legal entities to relocate their seat or main office in or from another country. If a legal person wishes to transfer its seat, then according to the statements of the Hungarian national courts, as in the Cartesio and VALE cases, the only way to achieve this is to remove the legal person from the registry of the state in which it was established, and establish a new legal entity under Hungarian law.

The legal situation in this regard was made clear in the Cartesio and VALE cases, the ECJ having concluded that Member States have a sovereign right to decide whether companies should be able to relocate their seat to another Member State. However, if only one participant Member State enables the transfer of seats, this by itself is insufficient. Both Member States involved need to allow the transfer of seats across borders for it to be possible.

Therefore, until such time as a change occurs in Hungarian law, it is not possible to relocate the head office of a legal person either out of Hungary into another Member State or into Hungary from another Member State.

### 5.3. Cross-Border Mergers of limited liability companies

Although the transfer of seats is not possible under Hungarian law, one way to change a seat in the case of limited liability companies, is to engage in a cross-border merger. Act CXL of 2007 on the Cross-Border Mergers of Limited Liability Companies, enables the merger of multiple legal entities registered in different Member States of the European Union. The Act contains provisions to govern the cross-border mergers of limited liability companies with a registered office in Hungary, and the incorporation of companies with a registered office in Hungary, by way of cross-border mergers. Moreover, it lays down the provisions for related company registration proceedings.

According to the Act, the term "limited liability company" means any private limited liability company, public limited liability company or European public limited liability company, and it is companies of this kind that are allowed to form mergers. The term "cross-border merger" means the merger of limited liability companies in accordance with the Hungarian Civil Code and Act CLXXVI of 2013 on the Transformation, Merger and Division of Legal Entities, where each company taking part in the merger has been formed in accordance with the law of a Member State of the European Union and has its registered office, central administration or principal place of business within a Member State of the European Union, provided that at least one of the merging parties is governed by the law of another Member State of the European Union.

Thus, to summarise the legal framework, although the establishment of legal entities is fully guaranteed by Hungarian law, the cross-border transfer of the seat of a legal person is not permitted, either by relocating the main office out of Hungary, or by relocating one into Hungary. This does not mean, however, that it is altogether impossible for a legal person to establish a seat within or outside of the country. This can be accomplished by way of a cross-border merger between limited liability companies which is permissible under Hungarian law.

## 6. Closing remarks

In the context of the limited liability form of company so popular with small and medium-sized enterprises, there is a clear international trend towards making entrepreneurial freedom as simple, as quick and as cost-effective as possible, while at the same time ensuring that changes can be made to such companies in as flexible a manner as possible.

Some thought should be given in the European Union to the sustainability of regulations in some Member States that are based on the real seat doctrine, taking into account the efforts made towards establishing cross-border branches and relocating registered offices. New legal acts planned by the European Union could resolve part of this problem, especially the possible introduction of the SPE or the 14th Company Law Directive.

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# Right for Equal Opportunity for Fair Public Contract? Human Rights in Public Procurement[1]

**Abstract**: According to the new European Union' Public procurement legislation (hereinafter 2014 PP Directives), the award of public contracts by or on behalf public authority has to comply with the principles of the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency and sound procedural management. We understand that the main goal of public procurement is not to protect human or fundamental rights, but to put public funds to effective use. However, by adopting the new concept of procurement, there exists space for the penetration of such rights in the public procurement arena. Human and fundamental rights protection shall be applied continuously during the process of procurement, and in both the contracting and implementation phases. The authors will focus their research especially on the competitor´s right to good administration which shall guarantee the competitor´s right for equal opportunity for fair contract. Nowadays, it is not rare a situation, when the contracting authority due to breach of the principle of sound administration prioritizes another competitor rather than one, who was supposed to win. Therefore, a competitor´s right to adequate compensation under such circumstances will also be examined.
**Keywords**: public procurement, fundamental rights, fair public contract, equality, discrimination, principle of sound administration, conflict of interests, principle of legal certainty, the principle of legitimate expectations

1 The paper was prepared within project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context".

## 1. Introduction

The general legal framework of the human rights (hereinafter HR) protection concept in business is introduced in the UN Guiding Principles on Business and Human Rights (2011).[2] The EU recognises these Guiding Principles as a framework conducive to responsible business, as forming part of its Strategy on Corporate Social Responsibility[3] (hereinafter CSR). According to this strategy, one of the tools for implementing the HR protection concept into the business environment, is to apply it in public procurement. This approach is confirmed also in the United Nation's 2030 Agenda for Sustainable Development,[4] which includes targets on public procurement as a means for sustainable consumption, production patterns, decent work and more inclusive economies, and calls upon all countries to implement sustainable procurement policies and action plans in their respective strategies.

The European Union (hereinafter EU) has reacted to this call by transferring some HR policies into public procurement – especially in relation to environmental requirements, social considerations (non-discrimination, equality and integration of marginalised or disadvantaged groups) and the right to good administration.

The 2014 PP Directives impose on Member States an obligation to take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions.[5]

Despite the fact, that the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union[6] (hereinafter Charter) is directed only to the bodies, offices or agencies of the EU when they are applying EU law (for example when they procure goods, services and construction works), we can find references to this principle, its requirements and method of application in national public procurement case law.

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2 Available at: https://www.ohchr.org/Documnents/Publications/GuidingprinciplesBusinesshr_en.pdf (accessed 16.10.2018).

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility /* COM/2011/0681 final */.

4 Resolution of the General Assembly from 25 September 2015 No. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (A/RES/70/1). Available at: https://sustainabledevelopment.un.org/post2015/transformingourworld (accessed 31.12.2018).

5 2014 PP Directives were transposed to Slovak legal order by the Act No. 343/2015 Coll. on Public Procurement and on change and amendment of certain legislation. The Public Procurement Office then introduced guidelines on responsible procurement: Green Public Procurement (2017), Social Aspects in Public Procurement (2017).

6 Charter of Fundamental rights of the European Union (OJ 2012/C 326/02).

In relation thereto, we can point to the Slovak act, Act No. 343/2015 Coll. on Public Procurement (hereinafter PPA) and on the change and amendment of certain legislation,[7] which excludes the application of the Administrative Procedure Act[8] and its general requirement on application of the principles of sound administration in administrative procedures. The reason is that the PPA is *lex specialis* toward the Administrative Procedure Act and introduces simpler procedure of the Public Procurement Office (hereinafter PPO) with the aim to enforce the most effective revision and to exclude possible procedural obstacles prolonging the decision-making process of the PPO in procedures under the PPA. However, application bodies have been seeing it differently. The Supreme Court of the Slovak Republic in its decision *Železnice Slovenskej republiky*,[9] confirmed the legal opinion of the Regional Court of Bratislava, that the "*procedure and decision-making process of the Public Procurement Office must respect, inter alia, Article 41 of the Charter of Fundamental Rights of the European Union, which establishes the right to good administration, as well as Recommendation CM/REC(2007)/7 of the Committee of Ministers to Member States on good administration, based on respect for the principles of legality, equality, impartiality, proportionality, legal certainty, timeliness, participation, respect for privacy and transparency*" and in judgement *Allen & Overy Bratislava*[10] held, that legal norms cannot be analysed and interpreted in isolation and independently from the very essence of the law, which is represented mainly by its principles. The importance of principles is *a priori* interpretative for a whole range of reasons, especially in a situation of absence of the necessary explicit legislation, when it could replace that missing legislation.

We consider this legal opinion in compliance with the settled case law of the CJEU[11] according to which even if the procured contract does not fall within the scope of application of EU public procurement directives (for example due to a lower contract value), contracting authorities awarding contracts are nevertheless bound to abide by the general principles of Union law. That covers also the principle of good administration.

7 Online available at: www.slov-lex.sk.

8 Act No.71/1967 Coll. on Administrative Procedure (Administrative Order) (online www.slov-lex.sk).

9 Decision of the Supreme Court of the Slovak republic of 24 May 2017 No. 3Sžf/38/2015 (available at: https://www.nsud.sk/rozhodnutia/).

10 Judgement of the Supreme Court of the Slovak republic of 18 June 2015 No. 8Sžf/39/2014. (online available at: https://www.nsud.sk/rozhodnutia/).

11 See for example Judgements of the CJEU in Case C-324/98 Telaustria and Telefonadress (EU:C:2000:669), para. 60 and 61; Case C-231/03 *Coname* (EU:C:2005:487), paras. 16 and 17; C-6/05 *Medipac-Kazantzidis AE v Venizeleio-Pananeio* (2007) EU:C:2007:337, para. 33; C-318/15 *Tecnoedi Costruzioni Srl proti Comune di Fossano* (2016) EU:C:2016:747, para 19, 20 and 22.

Therefore, the principle of good administration as a fundamental right shall be respected in public procurement procedure even in the legal regime, where national law does not explicitly acknowledge this principle in public procurement law.

Later, the authors will thoroughly examine the application of principles of sound administration and equal treatment. During the research, the authors used scientific methods such as analysis, deduction, comparison and synthesis.

## 2. Right to good administration as a mean to achieve equal treatment

The EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition.[12] Therefore, one of the goals of public procurement is to open competition in the market of public contracts as wide as possible to EU competitors when procuring goods, services and construction works at best value for money. In this context, fair competition embraces not only fair behaviour on the part of competing tenderers but also the practice of fair and diligent behaviour by contracting authorities and the Public Procurement Office.

As the CJEU held in case *European Ombudsman v Claire Staelen,*[13] the duty of the (EU) administration to act diligently is inherent in the principle of sound administration and applies generally to the actions of the administration in its relations with the public and requires that the administration act with care and caution. Therefore, sound public procurement must be realized strictly with respect to named basic principles of EU (and Slovak) procurement: equity, non-discrimination, transparency, proportionality, effectivity and efficiency[14] as well as with respect to the principle of sound administration which is an inherent (fundamental) part of the right to good administration according to Article 41 of the Charter.

Earlier the CJEU held in the *Evropaïki* case[15] that Article 47 of the Charter, constitutes the expression of such legitimate expectations[16] and the finding of an irregularity, which in comparable circumstances would not have been committed by a normally prudent and diligent administration, permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to give rise to

12 Judgement of CJEU of 8 February 2018 in Case *Lloyd´s of London* C-144/17, ECLI:EU:C:2018:78, para. 33.

13 Judgement of CJEU of 4 April 2017 in case *European Ombudsman v Claire Staelen*, C-337/15 P, ECLI: EU:C:2017:256, para. 34.

14 See the Article 18 of Directive 2014/24/EU and Article 10 of Slovak PP Act.

15 See judgement of the General Court of 20 September 2011 in case *Evropaïki Dynamiki v European Investment Bank (EIB),* T-461/08, ECLI:EU:T:2011:494, para. 46

16 See judgement of the General Court of 28 February 2018 in Case *Vakakis kai Synergates - Symvouloi gia Agrotiki Anaptixi AE Meleton, formerly Vakakis International — Symvouloi gia Agrotiki Anaptixi AE v European Commission*, T-292/15, ECLI:EU:T:2018:103, para. 79, 85.

non-contractual liability for having failed to act with due diligence and caused injury as a result[17] which infringes the principle of sound administration.[18]

It needs to be reminded that under the principle of treating tenderers equally, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded the opportunity to prepare their tenders on an equal footing, which therefore implies that the tenders of all competitors must be subject to the same conditions.[19] The contracting authority must treat all tenderers the same and must not directly, indirectly, consciously or unconsciously prioritize or disadvantage any tenderer against other tenderers in the same position. Therefore, the principle of equal treatment presupposes an objective assessment and any different form of approach on the part of the contracting authority when assessing individual tenders may result in an advantage or disadvantage to the tenderer. Therefore, the obligation of due diligence requires that the institutions act with care and caution by carefully and impartially evaluating all relevant aspects of each tender submitted.

Typical examples of the breach of the tenderer´s right to good administration leading also to breach of the principle of equal treatment and transparency, can be found in both EU and Slovak case law. These include *inter alia*: awarding a contract to a tenderer where a conflict of interest exists; accepting a tender proposal which does not meet with the criteria of the tender;[20] withdrawing from the procurement without relevant justification.[21]

However, at the level of the Slovak Supreme Court, in the last 5 years, from all 39 decisions of this court only one explicitly referred to the principle of sound administration (the above mentioned *Železnice* case).

### 3. Competitor´s right to adequate compensation

Claiming damages is the logical consequence of the breach of the competitor´s right to good administration. As the Supreme Court held in the *SKANSKA* case,[22]

17 Ibid, para. 82.

18 Judgement of the General Court of 20 September 2011 in Case *Evropaïki Dynamiki v European Investment Bank (EIB)* T-461/08, ECLI:EU:T:2011:494, para. 128.

19 See the judgement of CJEU of 12 March 2015 in Case *eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos*, C-538-13, ECLI:EU:C:2015:166, para. 33

20 See for example the judgement of the Supreme Court of the Slovak Republic of 15 April 2015 in case *BUSE* No. 2Sžf/98/2018. (Online available at: https://www.nsud.sk/rozhodnutia).

21 Charter of Fundamental rights of the European Union (OJ 2012/C 326/02).the judgement of the Supreme Court of the Slovak republic of 1 July in case *Národná diaľničná spoločnosť* No. 8Sžf/15/2014 (Online available at: https://www.nsud.sk/rozhodnutia).

22 Judgement of the Supreme Court of the Slovak republic of 17 December 2013 in case *SKANSKA* No. 2Sžf/96/2013. (Online available at: https://www.nsud.sk/rozhodnutia).

damage will occur to a competitor, if the tenderer will be favoured by not rigorously assessing his bid, which is contrary to the principles of public procurement, in particular to the principle of equity and fair competition. In other words, the competitor could have suffered harm by the procedure of the contracting authority as the successful tenderer´s bid had not been thoroughly assessed and evaluated to the same extent and in the same detail as the competitor´s bid was assessed.

Analogically the General Court in the *Vakakis* case (para. 82) pointed out that "the EU administration may incur non-contractual liability where it failed to act with due diligence and caused injury as a result. In particular, the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to give rise to the liability of the EU under Article 340 TFEU."

Reparation is then afforded where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation on the author of the act and the damage sustained by the injured party. As to the second condition, the Court has, in the same context, also noted that the decisive test for finding that a breach of EU law is sufficiently serious is whether the EU institution or body concerned manifestly and gravely disregarded the limits of its discretion.

In relation to public procurement, the authors would like to analyse two decisions of the General Court on compensation in public procurement cases - *Evropaïki Dynamiki* (2010) and *Vakakis* (2018). In both cases, the applicant was an unsuccessful tenderer who suffered damage due to maladministration of the contracting authority (which was an EU institution), who did not provide diligent care when assessing the bids of tenderers and therefore favoured a tenderer other than the applicant to win the contract. In both cases, the principle of sound administration was breached, the contracts fully implemented and the tenders not-reopenable.

In *Evropaïki Dynamiki* the applicant, Evropaïki Dynamiki, claimed that the court should annul the contested decision of the European Investment Bank (hereinafter EIB) as the contracting authority and order the EIB to pay compensation for the damage suffered in the tendering procedure as a result of the unlawful nature of the contested decision.

In the first instance the Court stated that (paras. 65-67), the fact that the agreement for the execution of a public contract has been signed and indeed implemented before a decision is delivered concluding the main proceedings brought by an unsuccessful tenderer against the decision awarding that contract and that there is a contractual relationship between the contracting authority and the successful tenderer does not remove the requirement for the contracting authority, if the main action is successful, to take the measures necessary to ensure appropriate protection of the unsuccessful

tenderer's interests. Where the decision awarding the contract is annulled, but the contracting authority is no longer able to reopen the tendering procedure for the public contract in question, the interests of the unsuccessful tenderer may be protected, for example, by pecuniary compensation corresponding to the loss of the chance of securing the contract or, if it can be definitively established that the tenderer should have been awarded the contract, the loss of profit. An economic value can then be attributed to the loss of chance of securing a contract suffered by an unsuccessful tenderer for the contract as a result of an unlawful decision.

The Court then decided, that the EIB has infringed the principles of equal treatment and transparency and acted in breach of the principle of sound administration and therefore annulled the decision of the EIB not to accept the tender submitted by Evropaïki Dynamiki and to award the contract to Sybase BVBA.

Despite the fact, that the court annulled the contested decision as unlawful, it dismissed the claim for compensation of loss of profit, reasoning that the applicant did not prove the causal link between the unlawful conduct of EIB and the damage, as at that time, there did not exist any principle or rule applicable to the EIB´s tendering procedure which requires it to sign the relevant contract with the tenderer designated as the winning contractor at the conclusion of the tendering procedure. The EIB by not concluding the contract with the assumed winning tenderer cannot breach any duty and therefore its conduct cannot be in this relation considered as unlawful.

However, in para. 214 of the judgement the court also stated, that dismissal of the claim for compensation of loss of profit is without prejudice to the compensation to which the applicant may be entitled to, by being restored sufficiently to its original position, following the annulment of the contested decision. Such restoration can have, where appropriate, a form of pecuniary compensation corresponding to the loss of chance of securing the contract.

Such a claim was brought to the General Court by Vakakis kai Synergates – Symvouloi gia Agrotiki Anaptixi AE Meleton in case T-292/15 against the European Commission as the contracting authority. In this case, Vakakis claimed compensation for the damage suffered in relation to the loss of an opportunity to be awarded the contract. Since Vakakis did not bring an action for annulment of the Commission´s decision rejecting its tender and awarding the public contract to another consortium, that act had become final. Therefore, the court firstly had to consider the admissibility of the claim. The key factor in this regard, was whether the action for damages seeks the same result as the action for annulment. The Court noted (para. 35-36), that in view of the special nature of disputes relating to EU public contracts, the present action for damages has neither the same object nor the same legal and economic implications as an action for annulment of the Commission´s decision and it cannot consequently nullify the effects of that decision. Whereas actions for annulment seek a declaration that a legally binding measure is unlawful, actions for damages,

on the other hand, seek compensation for damage resulting from a measure or from unlawful conduct, attributable to an (EU) institution or body.

In the *Vakakis* case, the applicant did not seek to have the Commission´s decision set aside, rather to obtain compensation for damage allegedly resulting from its adoption. The applicant therefore did not seek to obtain by its action the same or similar result as an action for annulment. Therefore, the Court found the action admissible. The Court then concluded that the inadequacy of the supervision of the tendering procedure was unlawful (see the argumentation in paras. 87-156) and realized the assessment, whether the damage invoked by the applicant is real and certain and whether there is a direct cause and effect between it and the unlawfulness found by the Court. Despite the facts, that Vakakis claimed five various types of damages (loss on profit, cost incurred in contesting the lawfulness of the tendering procedure, loss of an opportunity to participate and win other tenders, loss of an opportunity to be awarded the contract and costs relating to the participation in the tendering procedure), the Court ordered the EU to pay compensation only for the damage suffered by the applicant in relation to the loss of an opportunity to be awarded the contract and for the costs and expenses incurred in participating in that call for tenders.

Here we can point to the argumentation of the Court (paras. 188-189), where it explained the differences between loss of profit and loss of opportunity (the loss of profit concerns compensation for the loss of the contract itself, whereas the loss of opportunity concerns compensation for the loss of the opportunity to conclude that contract) and stressed that the fact that the contracting authority is never obliged to award a public contract does not preclude the finding of a loss of opportunity in this case. Although that fact affects the tenderer's certainty of winning the contract, and, therefore, a corresponding loss, it cannot preclude all likelihood of winning that contract and therefore the loss of opportunity. In any event, although it is true that the contracting authority may always, until the signature of the contract, either abandon the procurement, or cancel the procedure for the award of a public contract, without the candidates or tenderers being entitled to claim compensation, the fact remains that those situations of abandonment of the procurement or cancellation of the procedure did not actually materialize and that, as a result of the unlawful acts committed during the procedure for the award of the contract, the applicant lost an opportunity of winning that contract.

The Vakakis case confirms the continuity of legal approach of the General Court and brings the question of compensation for damages in public procurement into closer view.

## 4. Conclusions

In summarising the aforementioned facts, we can conclude that extending the concept of human rights and fundamental rights into European public procurement is not only the wish of the UN and its initiatives, but (at least at EU level) also a working reality. The parallel application of written law and general principles, in particular the principles of equality and sound administration, does not create greater problems for the courts of the CJEU.

However, under recent EU public procurement case law, it will be interesting to follow relevant case law in the Slovak Republic, especially in relation to the award of damages. From recent cases brought before the Supreme Court of the Republic, it is clear that Slovak judicial bodies apply the principle of sound administration in public procurement very carefully and mostly implicitly. As of the last 5 years, the Supreme Court has not been called upon to rule on awarding damages suffered by a tenderer due to the unlawful procedure of a contracting authority. Consequently, we have to wait for assessment as to whether or not forthcoming Slovak case law in this regard will be in conformity with EU case law.

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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.[1] 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.[2]

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[3] (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.[4] 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.[5] There are currently 12 professional associations with compulsory membership required for the rendering specific professions in the Republic:

– Czech Medical Chamber[6] (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 (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 (accessed 2.12.2018).

- Czech Chamber of Pharmacists[7] (CCP)
- Czech Dental Chamber[8] (CDC)
- Chamber of Architects[9] (CA)
- Czech Chamber of Chartered Engineers and Technicians[10] (CCET)
- Czech Bar Association[11] (CBA)
- Chamber of Executors[12] (CE)
- The Chamber of Auditors[13] (CA)
- Chamber of Tax Advisors[14] (CTA)
- Chamber of Patent Attorneys[15] (CPA)
- Chamber of Veterinary Surgeons[16] (CVS)
- Notarial Chamber[17] (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 [18] 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

7 Act no. 220/1991 Coll., available at: 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 (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 (accessed 2.12.2018).

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

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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.nkcr.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.[19] The above specifics confirmed by the Constitutional Court interpretation[20] 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.[21] 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.[22] 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 pharmaceutics,[23] but also in large extent to certified architects and other professions involved in the construction industry.[24]

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 (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.[25] 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[26] 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, 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,[27] review of legislation providing for flat rate attorney and notary fees in small claims in 2013[28] and legislation limiting executors´ fees in 2018.[29]

## 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.[30] The Notary Act,[31] 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.[32] 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.[33]

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

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 (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, (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 Comission vs. France, C-51/08 Commision vs. Luxembourg, C-53/08 Commision vs. Austria, C-54/08Comission vs. Germany, C-61/08 Commission vs. Greece, C-52/08 Commision 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.[34] 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.[35] Leading Constitutional Court Decision No. 6/2009 Coll.,[36] was established by way of claims contesting compulsory membership in the Czech Medical Chamber, Czech Dental Chamber and Czech Pharmacists' Chamber.[37] 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 (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 (accessed 28.12.2018).

rights to associate freely with others "*in clubs, societies and other associations*",[38] the right to choose freely a profession and the training for such profession[39] and the right to associate freely with others for the protection of his or her economic and social interests,[40] 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.[41] 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[42] 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.[43] 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)[44] together with decisions of the European Commission for Human Rights (hereinafter ECHR)[45]. With regard to the specific nature of professional associations not being associations within the meaning of Art. 11 interference with the negative

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. Kubíček, *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.[46]

## 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.[47] 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.[48] 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.[49] Claims of this nature

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. Svejkovský, 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[50] graduates being denied admission to the CBA. This negative decision of the CBA supported by court review,[51] 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*[52] *Republic*".[53] A graduate of the Police Academy who later acquired a JUDr.[54] 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,[55] the right to equality before the law and non-discrimination.[56] 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.[57]

The qualification requirement of a "*degree in law granted by a Law Faculty seated in the Czech or Slovak Federal Republic*",[58] 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.[59] 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"*.[60] 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.[61]

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.[62] The decision specifically emphasized the quality of Polish law schools curricula in respect to practical skills[63] 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.[64] 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.[65] 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.[66]

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.[67] 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[68]

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, (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. Vlašinová, Vybrané případy UOHS, in „Sdružení soutěžitelů pohledem ÚOHS", 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.[69] Regardless of such authorization, the decision of the association to issue a list of recommended minimum service fees was sanctioned by the Office.[70] 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.[71] 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.[72]

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-architekty/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://iudictum.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.[73]

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,[74] the Association of Graphical Design,[75] the Association of Funeral Services[76] 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

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-prekladatelu-a-tlumocniku-porusovala-soutezni-pravo.html (accessed 12.12.2018); Sdružení překladatelů a tlumočníků porušovala soutěžní právo, 2018, available at: http://www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/2446-sdruzeni-prekladatelu-a-tlumocniku-porusovala-soutezni-pravo.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-pohrebnictvi-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´etre* 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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# Guarantees of Human Rights in Competition Proceedings in the European Union and the Republic of Lithuania

**Abstract:** This article focuses on the protection of human rights in disputes related to competition proceedings. The European Convention on Human Rights is regarded as a most effective instrument for the protection of human rights at the international level. National courts of the European Union member states have also developed specific systems for the protection of human rights. Entities that are charged with breaches of EU competition law, in most cases complain about breaches of two provisions of the ECHR: Article 6 of the Convention which guarantees the right to a fair trial and Article 8 which guarantees the right to respect for private life. In this article, we also discuss a couple of cases decided by the Competition Council of Lithuania, which raise doubts regarding proper guarantee of the right to a fair trial. One of the key problems is that during the questioning of witnesses the Competition Council makes an audio recording of the interview but afterwards deletes the recording without allowing the undertakings under investigation to have access to the Council's case file. The article concludes with a short summary.
**Keywords:** antitrust damage, human rights, procedural rights, Competition Council, Lithuania, the European Convention on Human Rights

## 1. Introduction

The instrument based on the European Convention on Human Rights (hereinafter – ECHR) is still regarded as a most effective tool for the protection of

human rights at the international level.[1] However, national courts of the European Union member states have also developed specific systems for the protection of human rights. Initially it was recognised that fundamental human rights are enshrined in the general principles of Community law.[2] Later on special importance of the Convention on human rights and fundamental freedoms was emphasised[3] and jurisprudence of the European Court of Human Rights (hereinafter ECtHR) was quoted.[4] On the other hand in some cases EU courts have stated that the ECHR is not a part of EU law and the claimant cannot refer directly to the provisions of the Convention in EU courts[5] or "were the appellant's view to be upheld, this would impinge seriously on the effectiveness of Community competition law".[6] Therefore, some authors who compare the protection of certain rights under EU law with the ECHR emphasise certain differences.[7] On the other hand, other authors claim that statements about the alleged conflict between legal practices are highly exaggerated.[8]

Courts of the EU have not been analysing application of the fundamental rights in competition cases for a long time. For example, during the period from 1995 to 2005 courts of the EU only heard around thirty competition cases in which

1 D. Jočienė, Europos Žmogaus Teisių Teismo jurisprudencijos įtaka nacionalinei teisei bei jurisprudencijai, tobulinant žmogaus teisių apsaugą. Konvencijos ir Europos Sąjungos teisės santykis. *Jurisprudencija*. 2007, 7(97): 17-27, p. 17.

2 Judgment of CJEU of 12 November 1969 on the case of Erich Stauder v. Ville d'Ulm – Sozialamt, 29-69, point 7.

3 Judgment of the CJEU of 21 September 1989 on the case of Hoechst AG v. European Commission, 46/87 and 227/88, point 13; Judgment of the CJEU of 18 June 1991 of Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and other C 260/89, point 41.

4 Judgment of the CJEU of 30 April 1996 on the case of P v. S and Cornwall County Council, C 13/94, point 16; Judgment of the CJEU of 11 July 2002 on the case of Mary Carpenter v. Secretary of State for the Home Department, C 60/00, point 42; Judgment of the CJEU of 22 October 2002 on the case of Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, C 94/00, points 29, 52.

5 Judgment of the CJEU of 20 February 2001 on the case of Mannesmannröhren-Werke AG v. European Commission, T 112/98, points 59, 75; Judgment of the CJEU of 14 May 1998 on the case of Mayr-Melnhof Kartongesellschaft mbH v. European Commission, T 347/94.

6 Judgment of the CJEU of 18 September on the case of Volkswagen AG v. European Commission, C 338/00, points 94-97; Judgment of the CJEU of 8 March 1995 on the case of Société Générale v. European Commission, T 34/93, points 445, 448.

7 Van Overbeek, W. The right to remain silent in Competition Investigations: The Funke decision of the Court of Human Rights makes revision of the ECJ's case law necessary. *European Competition Law Review*. 1994, 15: 127; Waelbroeck, D. Competition law proceedings before the European Commission and the right to a fair trial: no need for reform? *European Competition Journal*. 2009, 5(1): 97–143.

8 Rosas, A. International Human Rights Instruments in the Case-Law of the European Court of Justice. In: *Teisė besikeičiančioje Europoje. Liber Amicorum Pranas Kūris*. Vilnius: Mykolo Romerio universitetas, 2008, p. 368–371, p. 372.

companies complained about breaches of fundamental rights. However, EU courts began to hear more serious breaches after the Charter of Fundamental Rights of the European Union was proclaimed on 7 December of 2000.[9] It should be noted that even after publication of this document, EU courts while recognising fundamental rights as a general principles of EU law, quite often were referring to the procedural or formal deficiencies of the competition process and were avoiding analysis of the disputes related to the complaints concerning breaches of fundamental rights.[10]

## 2. National courts and competition authorities are obliged to ensure protection of human rights

Entities charged with breaches of EU competition law, in most cases complain about the breach of two provisions of the ECHR: Article 6 of the Convention which guarantees right to a fair trial and Article 8 which guarantee the right to respect for private life. In most Constitutions and international treaties, such provisions traditionally aim to protect human rights during criminal proceedings.[11] The ECtHR has developed the concept of a "criminal charge" which, under certain circumstances, also encompasses administrative processes.[12] Although EU courts don't want to agree that during proceedings related to EU competition law issues related to criminal charges are analysed, we should recognise that investigations of the European Commission correspond to the criteria of the concept of a "criminal charge". Therefore, during EU competition proceedings the undertakings should have all the above-mentioned guarantees established in the ECHR.

The right of the EU Commission to request information[13] and the right to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents,[14] illustrates the conflict between effective investigation of the breach of competition law and right of the person not to incriminate himself. The Court of Justice emphasises the obligation to cooperate, which means that the undertaking may not evade requests for the production of

9 E.M. Ameye, The Interplay between Human Rights and Competition Law in the EU. *European Competition Law Review*. 2004, 25(6): 332-341, p. 333.

10 *Ibidem.*

11 K. Dekeyser, C. Gauer, The New Enforcement System for Articles 81 and 82 and the Rights of Defence. In: *International Antitrust Law & Policy: Fordham Corporate Law*. 2004, p. 552.

12 The process is recognised as a criminal case if it meets the so-called "Engel criteria", which has been formulated by the Judgment of the ECtHR of 8 June1976 on the case of Engel and Others v. the Netherlands, No. 22, point 82.

13 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (OJ C 365 E, 19.12.2000, p. 284), Article 18.

14 *Ibidem*, para e) of part 2 of the Article 20.

documents on grounds that by complying with such request it would be required to give evidence against itself.[15] On the other hand the right against self-incrimination (or the right to remain silent) although not directly enshrined in Article 6 of the ECHR has been developed in the practice of the ECtHR.[16] Therefore, while evaluating the right of the undertaking against self-incrimination we suggest paying attention to the elements of the analogous right, which are established in jurisprudence of the ECtHR.

Oral proceedings, during which undertakings are charged with breach of competition law, are usually held behind closed doors. Such feature could be considered problematic, since the public character of proceedings before judicial bodies protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained.[17]

The other aspect of competition proceedings related to Article 6 of the Convention is the right to confidentiality of communication between attorney and client. The ECtHR recognises that right of the person to communicate with the attorney stems from the para c) of part 3 of Article 6 of the ECHR, which establishes the right of the defendant to defend himself in person or through legal assistance.[18] Article 8 of the ECHR, which guarantees the right to respect for private and family life, home and correspondence, also protects such communication.[19] In the opinion of the ECtHR, the Convention does not make a difference, whether the person who acts on behalf of the client is recognised as a practising attorney.[20] The Court of Justice stated that the confidentiality of written communications between lawyers and clients should be protected at Community level and must be connected to "the client's rights of defence" and second, that the exchange must emanate from "independent lawyers", that is to say "lawyers who are not bound to the client by a relationship of employment".[21] Therefore, we could raise the question of whether without recognition of such protection towards the communication between the suspected company

15 Judgment of the CJEU of 29 June 2006 on the case of European Commission v. SGL Carbon AG, C 301/04 P, points 47-50.

16 Judgment of the ECtHR of 25 February 1993 on the case of Funke v. France, No. 256-A, point 43.

17 Judgment of the ECtHR of 8 December 1983 on the case of Axen v. Germany, No. 72, point 25.

18 Judgment of the ECtHR of 28 November 1991 on the case of S. v. Switzerland, No. 12629/87, point 48.

19 Judgment of the ECtHR of 22 December 2008 on the case of Iliya Stefanov v. Bulgaria, No. 65755/01; Judgment of the ECtHR of22 December 2008 on the case of Aleksanyan v. Russia, No. 46468/06.

20 Judgment of the ECtHR of21 March 2002 on the case of Nikula v. Finland, No. 31611/96, point 53; Judgment of the ECtHR of29 January 2002 on the case of A.B. v. Netherlands, No. 37328/97, points 82-83.

21 Judgment of the CJEU of 14 September 2010 on the case of Akzo Nobel Chemicals Ltd ir Akcros Chemicals Ltd v. European Commission, C 550/07, points 40-45.

and its lawyers bound by the relationship of employment, it is possible to ensure an appropriate level of confidentiality between the correspondence of the lawyer and its client during competition proceedings.

Another problematic question is the classified identity of the person or of the undertakings, who have submitted confidential information to the European Commission. In the *Mannesmannröhren-Werke* case the General Court, while recognising the importance to guarantee anonymity of informers, stated that doubts raised by the claimant concerning the validity of the evidence submitted by the classified witness were not sufficient to force the Commission to reject the evidence.[22] On the other hand, the ECtHR claims that testimony of the classified witness does not constitute breach of the Convention *per se*, however it limits exercise of the rights of the defence and therefore the applicant should have the right to verify the testimony of the witness, to challenge them and to question the witness by himself.[23] Therefore, we can raise the question of whether rights of the defence that are limited in competition cases are compensated by the duly organised judicial process, which ensures protection of the right to a fair trial.

Regulation No. 17/62 established the right of the European Commission to enter any premises, land and means of transport of undertakings.[24] Regulation No. 1/2003 extended this right to include carrying out inspections in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings[25]. Such expansion of the rights of the European Commission raises doubts concerning correspondence to Article 8 of the Convention, especially bearing in mind that the Strasbourg court has recognized such right not only in relation to private premises, but also in relation to the premises of undertakings.[26]

Shared competence to apply the Article 101 and 102 of the TFEU poses a danger that several parallel investigations of the national competition authorities and/or European Commission may take place. This means that given that the undertaking acted in the markets of three separate member states and breached Article 101 and 102 of the TFEU, such actions of the undertaking can cause three different investigations in three separate member states, which all may result in the application

22 Judgment of the CJEU of 8 July 2004 on the case of Mannesmannröhren-Werke AG v. European Commission, T 44/00, point 84.

23 Judgment of the ECtHR of 20 November 1989 on the case of Kostovski v. Netherlands, No. 166, points 41-44.

24 Regulation No. 17/62: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 013, 21/02/1962 P. 0204 – 0211) para d of part 1 of the Article 14.

25 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ C 365 E, 19.12.2000, p. 284) part 1 of the Article 21.

26 Judgment of the ECtHR of16 December 1992 on the case of Niemietz v. Germany, No. 251-B.

of fines. It is possible to question correspondence of such process to the *non bis in idem* principle that is enshrined in Article 4 of Protocol No. 7 of the ECHR and in the Charter of Fundamental Rights of the European Union.

## 3. Problems related to the protection of human rights during Lithuanian Competition Council proceedings

The Competition Council of the Republic of Lithuania (hereinafter the CC) has very wide powers of inspection and collection of evidence during the investigation of a breach of Competition law. On the other hand, the undertakings under investigation do not have the same powers as the CC to prepare their defence. The right of the undertakings to a fair trial can only be exercised with effect if they have access to the same information as the CC and the CC is obliged to disclose all of that information to them. Therefore, the wide powers of the CC are legitimate only insofar as they allow the undertakings to exercise their right to a fair trial effectively.

The CC, during its investigation of alleged breaches of Competition law, most often question employees of the undertakings under investigation and other witnesses. Such questioning by the CC has to correspond to *inter alia*: (i) the Rules of procedure adopted by the resolution of the Competition Council; (ii) EU law provisions, Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union, practice of the Court of Justice; (iii) Article 6 of the ECHR, which establishes the right to a fair trial as well as the principle of procedural equality and principle of adversarial process; (iv) Legal acts of the Republic of Lithuania and jurisprudence of the Lithuanian courts.

### 3.1. Rules of procedure of the Competition Council regulating audio recording during proceedings

Procedure concerning the questioning of the accused and witnesses during the investigation of an alleged breach of Competition law, is established in the rules of procedure adopted by the Competition Council (hereinafter Rules of procedure of the CC). The Competition Council of Lithuania by Resolution of 1 February 2018 No. 1S-10 (2018) has adopted the "last" wording of the Rules of procedure of the CC.[27] The last wording came into force on 1 January 2019. In this article, we are referring to the last wording.

Article 52 of the Rules of the procedure of the CC provides that *"Oral explanations of the person have to be recorded by the officer at the explanatory protocol, which has to capture the correct content of the explanations. The authorized officer may suggest for the person who provides explanations to write all the explanations to the protocol by himself.*

27 The Act of 1 February, 2018 – Regarding Approval of the Rules of Procedure of the Competition Council of the Republic of Lithuania (Registry of Legal Acts 2018, No 2273).

*In case of need, additional documents or other annexes are attached to the protocol. The authorized officer, having informed the person and remarking about it in the explanatory protocol, has the right to make audio or video recording of the explanations"*. This means that the Rules of the procedure of the CC provide that persons may be questioned in two ways: 1) by immediate recording of the testimony of the person in the protocol; 2) by making audio or video recording and remarking about it in the protocol. In the case of officials making an audio or video recording during questioning, this has to be remarked about in the explanatory protocol at the time. The Rules of the procedure of the CC do not provide for the possibility to make an audio or video recording without first informing the person being questioned for the purpose of preparing a protocol after the event. Moreover, it is prohibited to delete audio recordings. Such legal regulation is applicable in all cases where representatives of state institutions question private persons. We believe that non-compliance with such requirement breaches the rights of the person questioned, since representatives of that person do not have full access to the content of the material concerning the examination of witnesses.

Non-provision of the audio or video recording to the representatives of suspected undertakings, may raise doubts whether the process of interrogation was carried out by the CC properly and whether testimony of witnesses to be presented were not chosen selectively.

### 3.2. The Competition Council during competition proceedings has to respect the right to a fair trial established in Article 6 of the ECHR – principle of procedural equality and principle of adversarial process

The Competition Council recognises that during the competition proceedings it is necessary to respect Article 6 of the ECHR. The ECtHR has recognised that provisions of the Convention also ensure protection of the rights of the legal entities. Institutions of Strasbourg have stated in competition cases that the amount of fine imposed led to recognition that a "criminal charge" has been addressed. The case *Société Stenuit v. France* was tried under French competition law rules; the company has been penalised with an administrative fine of 50,000 French francs. The ECHR decided that this fine amounts to a criminal sanction, since it has criminal and deterrent elements. The ECtHR held that competition law bearing in mind the gravity of fines and their repressive nature has the character of criminal law. Therefore, in relation to the parties involved in such cases, the full protection of Article 6 of the Convention is applicable.[28] Parts 1 and 3 of Article 6 of the ECHR establish the principle of "equality of arms".[29]

28 Judgment of the ECtHR of 27 February 1992 on the case of Société Stenuit v. France, No. 232-A, points 62-65.

29 Judgment of the ECtHR of 18 March 1997 on the case of Foucher v. France, No. 22209/93, point 36; Judgment of the ECtHR of 23 October 1996 on the case of Ankerl v. Switzerland, No.

The Court of Justice and the Supreme Administrative Court of the Republic of Lithuania both recognised that competition proceedings amount to criminal proceedings in the meaning of the ECHR. Therefore, the CC while carrying out an investigation concerning a suspected breach of competition law, has to ensure that the parties under investigation are subject to no lesser legal guarantees than those provided under ECHR.

The right to be acquainted with all the case material collected by the officials is one of the key guarantees during competition proceedings. Access to the file of the Competition Council or of the European Commission is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. The undertakings should be able to access not only the documents based on which the competition authority is formulating its charges, but to all the materials of the case, except business secrets and confidential information. Such right is also known as a principle of equality of arms – a necessary element of the right to be heard.[30]

The principle of equality of arms, similarly as a principle of prohibition of discrimination, requires behaving in the same way in identical cases. In the legal process, it means that both parties in civil and criminal cases should be able to lay out their position and defend themselves at any stage of the proceedings. Equality of arms does not mean determination of truth at any price, but determination of the truth by making sure that both parties have an equal chance to prove their position.

Although Article 6 of the Convention does not directly establish the principle of procedural equality, however, it is one of the most important principles developed in the practice of the ECtHR. Principle of equality of arms, similarly as the principle of competitive process, is very important in order to exercise the right to defence. Without guarantee of the principle of equality of arms, it is not possible to implement the other rights enshrined in Article 6. For example, the right to have sufficient time and opportunity to prepare a defence, the right to defend himself in person or through legal assistance of his own choosing or to examine or have examined witnesses against him and the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[31] Without procedural equality, there will be no equal litigation between the parties and the outcome of the case will not be just.

17748/91, point 38; Judgment of the ECtHR of 18 February 1997 on the case of Nideröst Huber v. Switzerland, No. 18990/91, point 23.

30 Nasutavičienė J. Žmogaus teisių ir pagrindinių laisvių konvencijoje įtvirtintų įmonių teisių apsaugos problemos ES konkurencijos teisėje. Daktaro disertacija. Mykolo Romerio Universitetas. 2012. p. 78.

31 Štarienė, L. Teisė į teisingą teismą pagal Europos Žmogaus Teisių Konvenciją. Monografija, Mykolo Romerio universitetas, Vilnius, 2010, p. 253-254.

The ECtHR provides that in order to ensure effective participation in the administrative process, the parties should be acquainted with the evidence collected by the state institutions in order to be able to influence the process of the litigation.[32] The ECtHR recognises that the ability of the person (*inter alia* legal person) to provide its materials and to be acquainted with the evidence is one of the key aspects of the legality of the judicial process.[33] Where administrative institutions do not disclose their documents to the parties in the case, it may cause the breach of their rights, since it has negative effect on their ability to influence the judicial process.[34] Therefore, in order to ensure "the right judicial procedure" parties of the case should be able to access the evidence of the administrative institutions.

### 3.3. EU law establishes the right to access the file of the European Commission or the Competition Council

Commission Regulation No. 773/2004 of 7 April 2004 "Relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty" (hereinafter Regulation concerning the conduct of proceedings)[35] establishes the main principles concerning access to the file of competition authority. Part 1 of Article 3 of the Regulation concerning the conduct of proceedings provides that "*It shall also inform the person interviewed of its intention to make a record of the interview*". Part 3 of Article 3 provides that "*a copy of any recording shall be made available to the person interviewed for approval*". Part 2 of Article 4 of the Regulation provides that *"a copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection*". We believe that since in order to ensure due process officials of the European Commission are obliged to follow specific obligations concerning the securing of evidence, it is possible that the same requirements could also be applicable to officials of the Competition Council. However, in recent court proceedings officials of the Competition Council of the Republic of Lithuania have claimed that they are not obliged to follow the principles concerning use of the evidence and recording established in the aforementioned Regulation.

The European Commission Notice on the rules for access to the Commission's file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement (hereinafter Commission Notice) and Council Regulation (EC)

32 Judgment of the ECtHR of16 February 2 000 on the case of Jasper v. United Kingdom.

33 Judgment of the ECtHR of 24 March 1988 on the case of Olsson v. Sweden, No. 130, point 90.

34 Judgment of the ECtHR of Human Rights of7 August 1996 on the case of Johansen v. Norway, point 66.

35 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004, (OJ L 68, 6.3.2004, p. 1).

No 139/2004 (hereinafter Council Regulation)[36] resolve all questions concerning access to the file. The Commission Notice provides that the parties must be able to acquaint themselves with the information in the Commission's file, so that based on this information they can effectively express their views on the preliminary conclusions reached by the Commission in its objections. For this purpose, they will be granted access to all documents making up the Commission's file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.[37] The 'Commission file' in a competition investigation (hereinafter also referred to as "the file") consists of all documents, which have been obtained, produced or assembled by the Commission during the investigation. In the Commission Notice the term "document" is used for all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available.[38]

The undertakings should be able to express their position concerning the legality and importance of the data, which is present at the file. This right encompasses access to all documents that are used by the competition authority in order to prove the breach of Competition law.[39] The undertakings, whose actions are under scrutiny, should be able to access the same documents, which are accessible to the officials of the competition institutions that are investigating alleged breaches of the law.[40] Similarly, undertakings should be able to access all the documents that are at the disposal of the Commission.[41] Ability to get all the documents increases chances for successful litigation.[42] Competition authorities cannot be given the unilateral

36 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, (2005/C 325/07).

37 *Ibidem,* para. 10.

38 *Ibidem,* para. 8 and footnote 6.

39 Judgment of the CJEU of 13 February 1979 on the case of Hoffman-La Roche, 85/76, points 9 and 11; Judgment of the CJEU of 25 October 2011 on the case of Solvay v. Commission, C 109/10 P, point 53; Judgment of the CJEU of 7 January 2004 on the case of Aalborg Portland and Others v. Commission, C 204/00, point 66.

40 Judgment of the CJEU of 7 June 1983 on the case of SA Musique Diffusion Francaise and Others v. Commission, C 100/80, point 29.

41 Judgment of the CJEU of 29 June 1995 on the case of Solvay v. Commission, T 30/91, point 59; Judgment of the CJEU of 18 December 1992 on the case of Cimenteries CBR and Others v. Commission, T 10/92, point 38; Judgment of the CJEU of 1 April 1993 on the case of BPB Industries and British Gypsum v. Commission, T 65/89, point 30; Judgment of the CJEU of 15 October 2002 on the case of Limburgse Vinyl Maatschappij and Others v. Commission, C 238/99, points 315 and 316; Judgment of the CJEU of 7 January 2004 on the case of Aalborg Portland and Others v. Commission, C 204/00, points 66 and 67; Judgment of the CJEU of 10 May 2007 on the case of SGL Carbon AG v. Commission, C 328/05, point 55.

42 Judgment of the CJEU of 18 December 1992 on the case of Cimenteries CBR and Others v. Commission, T 10/92, point 38.

right to evaluate what documents could be used (or be useful) for the defence of the undertakings.[43]

Whether the right to defence is breached should be evaluated on a case-by-case basis. In order to decide that the rights of the defence are infringed, it is sufficient to establish that non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment. The possibility of such influence exists if a provisional examination of the evidence reveals that the documents not disclosed might have played a significant role in the outcome of the case. Where the right to defence is infringed, the administrative procedure and hence the appraisal of the facts in the decision is defective.[44] In cases where access to documents only became available during the litigation procedure, undertakings only have to explain how the documents under consideration (or other data received) could have been useful for the defence. It needs to be emphasised that the Court of Justice does not require the undertaking to prove that the decision of the competition authority would have been different if the undisclosed documents had been made available.[45]

Infringement of the right of access to the Commission file (audio or video records, and other evidence) during the procedure prior to adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed.[46] In such case, the infringement committed is not remedied by providing access during the judicial proceedings relating to an action in which annulment of the contested decision is sought.[47] It is common ground that belated disclosure of documents in the file does not place the undertaking contesting the Commission's decision back into the position it would have had if those documents had been available at the time of presenting its written and oral observations to the Commission.[48]

The right of the undertakings to be acquainted with the file of the competition authorities is also guaranteed by Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union, which guarantees the right to good administration, right to an effective remedy and to a fair trial, as well as the right of defence. The

43 *Ibidem*, point 81.

44 *Ibidem*, point 68.

45 Judgment of the CJEU of 29 June 1995 on the case of *Solvay v. Commission*, Case T-30/91, para. 57; Judgment of the CJEU of 15 October 2002 on the case of Limburgse Vinyl Maatschappij and Others v. Commission, C 238/99, point 318; Judgment of the CJEU of 7 January 2004 on the case of Aalborg Portland and Others v. Commission, C 204/00, point 131.

46 Judgment of the CJEU of 15 October 2002 on the case of Limburgse Vinyl Maatschappij and Others v. Commission, C 238/99, point 317.

47 *Ibidem*, para. 318.

48 Judgment of the CJEU of 7 January 2004 on the case of Aalborg Portland and Others v. Commission, C 204/00, point 103.

Charter became obligatory after the Treaty of Lisbon entered into force. The Court of Justice recognised the right of the legal person to rely on Article 47 of the Charter, which establishes the right to an effective remedy. The Court of Justice recognised that the right to an effective remedy before a court, enshrined in Article 47 of the Charter (found under Title VI of the Charter) relating to justice, in which other procedural principles are established that apply to both natural and legal persons.[49] Therefore, the EU courts recognise that the right to an effective remedy is also guaranteed to legal persons not just natural persons.

### 3.4. Guarantee of the presumption of innocence towards undertakings under investigation

The Supreme Administrative Court of the Republic of Lithuania (hereinafter the Supreme Administrative Court) recognised in its decision of 1 March 2012[50] that the existing legal regulation, which establishes fines for breaches of competition law, provides sufficient background to claim that liability for the infringement of such law is even stricter than criminal liability. Moreover, the Supreme Administrative Court by its decision of 11 February 2003[51] recognised that if, in an administrative case the expected fine by its strictness may be equal to a criminal sanction, then the person under investigation should have the same rights as the accused person in criminal proceedings as well as the guarantees foreseen in the ECHR. The Supreme Administrative Court in its decision of 22 December 2016, added that while breaches of competition law and the sanctions applied are not regulated by criminal law, on the basis of the third "Engel criteria" it can be concluded that sanctions should be viewed as criminal in the meaning of the Convention. The Court noted that the undertakings who are investigated by the CC should have to be granted the guarantees provided in Article 5 of the Convention, however, it does not mean that the CC pursued the applicant's criminal prosecution.[52]

Part 2 of Article 6 of the ECHR provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law. Moreover, the presumption of innocence also means that the burden of proof is placed on the accusing party (prosecutor) and every doubt is taken for the benefit of

49 Judgment of the CJEU of 22 December 2010 on the case of DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH prieš Bundesrepublik Deutschland, C 279/09, point 40.

50 The decision of the Supreme Administrative Court of the Republic of Lithuania of 1 March 2012, Administrative case No. A[502]-1668/2012.

51 The decision of the Supreme Administrative Court of the Republic of Lithuania of 11 February 2003, Administrative case No. 259_03.

52 The decision of the Supreme Administrative Court of the Republic of Lithuania of 22 December 2018, Administrative case No. eA-2330-520/2016.

the accused.[53] The Supreme Administrative Court in the decision of 13 August 2012[54] stated that during the investigation of breaches of competition law it is necessary to take into account the presumption of innocence. Moreover, Article 2 of Regulation 1/2003 provides that in any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement.

## 4. Some problematic cases in Lithuania concerning guaranteeing the right of access to the file of the Competition Council

On 5 December 2016 the CC passed resolution No. 2S-15/2016 "Concerning correspondence of the actions of the undertakings, which participated in the public procurement for the purchase of a technique, pursuant to Article 5 of the Competition Law". By this resolution the CC recognised that two undertakings, UAB Rovaltra and UAB Žagarės inžinerija, have concluded an anticompetitive agreement. Subsequently, this resolution of the CC was appealed and is currently still under investigation at the Supreme Administrative Court.[55] This means that a final decision in the case has still to be made.

During investigation of this case, the applicants raised some alleged breaches of human rights. One of the main arguments relates to the alleged failure of the CC to guarantee the right of defence and access to the file. While challenging the resolution of the CC both applicants (UAB Rovaltra and UAB Žagarės inžinerija) noted that the CC was not following its own rules of procedure. As previously mentioned, Article 52 of the Rules of the procedure of the CC provides that "[…] *The authorized officer, having informed the person and remarking about it in the explanatory protocol, has the right to make audio or video recording of the explanations*". Moreover, as also mentioned, we believe that it is strictly prohibited to delete audio recordings. Such legal regulation is applicable in all the cases when the representatives of state institutions question natural persons. We believe that non-compliance with such requirement breaches the rights of the person under examination, since their representative(s) do not have full access to the content of the material concerning examination of the witnesses.

53 V. Valančius, R. Norkus, Lietuvos administracinės ir baudžiamosios justicijos sąlyčio aspektai, Jurisprudencija, 2006, 4(82); 91-98.

54 The decision of the Supreme Administrative Court of the Republic of Lithuania of 13 August 2012, Administrative case No. $A^{858}$-1516/2012.

55 One of the authors of this article Dr. Raimundas Moisejevas was acting as an attorney on behalf of UAB „Žagarės inžinerija" and UAB „Rovaltra".

In the abovementioned case the CC, while questioning all the witnesses, have made audio recordings. However, such recordings were not noted in the explanatory protocols prepared by the CC. Initially, the CC claimed that all material related to the case had been submitted to the court but did not elaborate or provide any additional details. The defendant's attorney had to ask the court to invite one of the officials of the CC to testify in the proceedings in order to respond to the questions raised in the request and provide clear answers concerning the availability of the audio recordings of the witnesses and of his clients. The Vilnius County Administrative Court has invited the official of the CC to the court hearing and questioned her. During this questioning some quite interesting facts have emerged.

– Firstly, officials of the CC have been audio recording the interviews of representatives of the companies under investigation and other witnesses.
– Secondly, the CC claimed that it made the audio recordings of the interviews in order to write the explanatory protocols and afterwards all of the recordings were simply deleted.
– Thirdly, some discrepancies concerning the facts provided in the explanatory protocols prepared by the CC and the evidence given by witnesses were established.

**4.1. Discrepancies concerning the facts provided in the explanatory protocols of the CC and the evidence given by witnesses**

Here, we would like to elaborate more on the abovementioned nonconformity between the protocol prepared by the CC and the actual evidence given by one of the witnesses.

The attorney representing UAB Rovaltra and UAB Žagarės inžinerija requested the CC to question two witnesses and provided a list of questions they should be asked. One witness (we will name him X) possessed important information about the preparation of the alleged anticompetitive agreement. In this case, some suspicions existed that a third person could have prepared some of the documents. If these suspicions proved to be of substance, it would mean that the undertakings under investigation had not concluded an anticompetitive agreement. Therefore, the testimony of witness X in this regard was very important. The CC invited witness X to interview and questioned him. As the attorneys for the undertakings did not represent the witness they were not allowed to be present during the interview.

In the subsequent court hearing at Vilnius County Administrative Court the official of the CC who conducted the interview and witness X were both questioned. This established the following:

1) the CC official claimed that an audio recording had not been made during the interview with witness X, whereas witness X claimed that an audio recording had been made;

2) the CC official claimed that witness X had not been invited to the CC as a witness for questioning, the invitation was only for the purpose of "conversation" (the Law on Competition does not foresee any possibility to hold simple "conversations" with witnesses and moreover, in this instance the CC had used the information provided by witness X as evidence);
3) the CC official claimed that the interview with witness X had lasted only 10-15 minutes, whereas witness X claimed that he had been questioned for about one hour;
4) the CC official claimed that witness X was asked only one question, whereas witness X said that he was asked more than 5 questions;
5) the CC official claimed that witness X has not mentioned any third persons who could have prepared public procurement documents for the undertakings under investigation, whereas witness X said that he has mentioned specific persons who had prepared documents for the tender;
6) the CC decided to name its explanatory protocol with witness X as a protocol of the establishment of factual circumstances. However, the Law on Competition does not foresee that the CC by questioning a witness could make a protocol concerning the fixing of factual circumstances;
7) as result of the prolonged discussion with witness X, which lasted for about one hour, the CC official wrote only one sentence representing the testimony of witness X and further, had not recorded in the protocol any of the questions that witness X was asked to address.

Given the degree of disparity between the facts presented by the CC in the protocol and the actual testimony of witness X, it is quite clear that the protocol of the CC does not reflect a true account of the examination of the witness. Moreover, it has to be borne in mind that in the present case the CC has questioned a large number of witnesses and, on the basis of the discrepancies described above, it is not altogether clear how to evaluate the validity of the questioning of the other witnesses in the meaning of due process.

It should be noted that Vilnius County Administrative Court, by way of the decision handed down on 27 April 2017 in case No. eI-1923-473/2017, has failed to recognise both the breach of the right to a fair trial and breach of the right to an effective defence. In consequence, the decision of that court was appealed to the Supreme Administrative Court.

As previously mentioned, the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004,[56] provides that the parties must be able to acquaint themselves with the information

56 Commission Notice, *op. cit*.

in the Commission's file, so that, on the basis of this information, they can effectively express their views on the preliminary conclusions reached by the Commission in their objections. For this purpose, they will be granted access to all documents making up the Commission file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.[57] It was also mentioned that the Commission file in a competition investigation consists of all documents, which have been obtained, produced or assembled by the Commission during the investigation.

It is interesting to note that the CC, while investigating the actions of undertakings, still fails to grant full access to the file of the competition authority to those under investigation and deletes audio recordings made during investigatory interviews. On 17 December 2018, the CC passed Resolution No. 2S-7 (2018) "Regarding the compliance of actions of undertakings providing driving training services with the requirements of Article 5 of the Republic of Lithuania Competition Law".[58] In this case, in the explanatory protocols the CC wrote that audio recordings were made. Probably the CC decided to improve its protocols bearing in mind previous disputes. However, the CC has still to grant access to those audio recordings to the undertakings under investigation. Moreover, the head of one of the undertakings involved has said that during questioning at the CC he asked the CC official for permission to make a recording of the proceedings using his own means (a mobile phone). The CC official refused the request, stating that they alone are doing the recording. Moreover, after being questioned he observed that what the CC official had noted in the protocol was at variance with the answers he had provided and asked for corrections to be made. Indeed, the CC official had written in the draft protocol that the head of the undertaking under investigation recognises its involvement in the anticompetitive agreement. This conclusion was contested by the head of the undertaking and the protocol amended.[59]

## 5. Conclusions

Entities that are charged with breaches of EU competition law, in most cases complain about breaches of two provisions of the ECHR: Article 6 of the Convention, which guarantees the right to a fair trial and Article 8 of the Convention, which

57 *Ibidem*, para. 10.

58 Resolution of the Competition Council of the Republic of Lithuania Regarding the compliance of actions of economic entities providing driving training services with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania, available at: https://kt.gov.lt/uploads/docs/docs/3705_2de8c4a97568bfd851c2746d0f8b23f4.pdf (accessed 30.04.2019).

59 This information was received from one of the heads of the undertakings under investigation during legal consultation.

guarantees the right to respect for private life. In most constitutions and international treaties such provisions traditionally aim to protect human rights during criminal proceedings. ECtHR has developed the concept of a "criminal charge" which, under certain circumstances, also encompasses the administrative process. We should recognise that investigations of the European Commission correspond to the criteria of the concept of a "criminal charge". Therefore, during EU competition proceedings the undertakings are entitled to all the aforementioned guarantees established in the ECHR. The right of the EU Commission to request information and the right to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents, illustrates the conflict between the effective investigation of a breach of competition law and the right of the person not to incriminate himself. In the article, we have also discussed cases decided by the Competition Council of Lithuania, in which one could suspect a breach of the guarantee of the right to a fair trial. One of the key problems here, is that during the questioning of witnesses the CC makes audio or video recordings but afterwards deletes those recordings without allowing the undertakings under investigation to have access to the CC file.

Proceedings conducted by the CC are completely different from court proceedings. At the CC the official cannot be asked questions and the ability to gain access to the CC file is limited. The CC invites of its own choosing the witnesses that are to be called upon, decides what questions should be asked, how the information should be collected, recorded and so on.

In competition proceedings the Competition Council and in some cases also the courts are using the standard of "balance of probabilities" used in civil cases, instead of the standard of "beyond reasonable doubt" used in criminal cases. Nevertheless, from the standpoint of effective protection of human rights it would be more appropriate if in competition proceedings the same guarantees and standards of proof would be applied as those in criminal law.

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# COMMENTARY

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# Judicial Review of Decisions Relating to Inspections of the President of the Polish Office of Competition and Consumer Protection – Between the Judgment of the European Court of Human Rights in Case Delta Pekárny v. The Czech Republic and the Judgement of the Polish Constitutional Tribunal of 16 January 2019 in Case P 19/17

**Abstract:** The article discusses a recent legal change in relation to inspections conducted by the Polish Office of Competition and Consumer Protection (the "OCCP") in light of the standards of procedural safeguards that should be available to companies during inspections of competition authorities as described by the European Court of Human Rights (the "ECtHR") in case *Delta Pekárny v. the Czech Republic*. During inspections the OCCP could obtain access to documents unrelated to the subject of the proceedings, including private documents. This may lead to the infringement of the right to respect for private and family life protected under Article 8 of the European Convention on Human Rights (the "Convention"). In light of the *Delta Pekárny* judgment, decisions about the initiation of the inspection of competition authorities should be subject to effective judicial review. The judicial review should take place either prior to inspection or thereafter (*ex post facto*). The goal of the article is to verify the consistency of procedural safeguards during controls and searches conducted by the OCCP with the standards of protection in the *Delta Pekárny* judgement.
**Keywords**: right to privacy, competition law, controls, searches, judicial review

## 1. Introduction

The Convention sets the standards for human rights protection in Convention States. The impact of the ECtHR's judgments is not limited to the parties of a dispute

only. According to the Interlaken Declaration from 2010, implementation of the Convention at the national level should *inter alia* include that Convention States take into account the ECtHR's developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system.[1]

This article discusses a recent legal change in relation to inspections conducted by the OCCP in light of the standards of procedural safeguards during inspections of competition authorities in the ECtHR's judgment in case *Delta Pekárny v. the Czech Republic*.[2] As a result of the judgment of the Polish Constitutional Tribunal (the "PCT") of 16 January 2019, entrepreneurs may appeal the decisions of the Court of Competition and Consumer Protection (the "CCCP") expressing consent for searches.

## 2. Major aspects of proceedings before the ECtHR relating to inspections of competition authorities

According to Article 8 par. 1 of the Convention, everyone has the right to respect for his private and family life, his home and his correspondence. According to Article 8 par. 2, there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

According to established case law of the ECtHR the right to respect for private and family life, home and correspondence is applicable also to professional and business activities. In the judgement *Niemietz v. Germany* relating to the search of a lawyer's office in the course of criminal proceedings, the ECtHR argued that the exclusion of professional or business activities from the notion of "private life" is not warranted by any reason of principle and could lead to inequality of treatment under Article 8.[3] In

1 High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration 19 February 2010, point B.4.c, available at: https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf (accessed 20.05.2019).

2 The ECtHR judgment of 2 October 2014 in case Delta Pekárny A.S. v. the Czech Republic, no. 97/11.

3 See § 29 of the ECtHR judgment in case Niemietz v. Germany, 16 December 1992 (no.13710/88): "There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish

effect, the notion of "home" in the meaning of Article 8 covers not only private places of residence, but also the registered office of a company run by a private individual, as well as a legal person's registered office, branches and other business premises.[4] However, with respect to inspections in commercial premises, the interference of public authorities can be wider than in the case of private premises, provided that the rules and practice of using them ensure adequate, effective protection against fraud.[5]

The analysis of the ECtHR under Article 8 in relation to the inspection of the public authorities is aimed at determining, whether the inspection is "necessary in a democratic society" and whether the legislation and administrative practice relating to inspections of competition authorities provide sufficient safeguards to prevent arbitrary measures of administration affecting the right to privacy.

In the light of the case law of the ECtHR, inspections of competition authorities could be justified by the protection of public safety or the economic well-being of the country. In case *Debút Zrt. and others v. Hungary* the ECtHR argued that "the measures complained of [a dawn raid – added by author] were indisputably lawful and pursued the legitimate aim of ensuring the "economic well-being of the country" by combating cartel practices. An unannounced court ordered search of the suspected companies' business premises must be seen as an appropriate measure to collect evidence, without which the authorities had virtually no chance to unveil those activities."[6]

## 3. Findings of the ECtHR in the *Delta Pekárny* judgment

In the *Delta Pekárny* judgement the ECtHR was concerned with the application of Article 8 of the Convention to the inspection conducted by the Czech Competition Authority (the "Czech Authority") at the premises of Delta Pekárny A.S. (the "Delta" or "Company"), a bakery company from the Czech Republic. The Czech Authority suspected Delta and two other companies for price collusion of bakery products. For

clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time".

4 See, inter alia, the ECtHR judgment of 15 February 2011 in case Heino v. Finland, no. 56720/09, §31; the ECtHR judgment of 28 April 2005 in case Buck v. Germany, no. 41604/98, § 31; the ECtHR judgement of 30 March 1989 in case Chappell v. the United Kingdom, §§ 26 and 51; the ECtHR judgment of 16 December 1992 in case Niemietz v. Germany, §§ 29-31; the ECtHR judgment of 6 April 2002 in case Société Colas Est and Others v. France, no. 37971/97, §§ 40-41.

5 The ECtHR judgment of 16 December 1992 in case Niemietz v. Germany, §31; the ECtHR judgment of 6 April 2002 in case Société Colas Est and Others v. France, no. 37971/97, §§ 48-49.

6 The ECtHR judgment of 20 November 2012 in case Debút Zrt. and Others v. Hungary, no. 24851/10, §3; the ECtHR judgment of 21 December 2010 in case Groupe Canal Plus and Sport Plus v. France, no. 29408/08, §§ 54-55.

that reason, the Czech Authority inspected the offices of Delta in Brno and Prague on 19 November 2003. On this day the Czech Authority's officials handed in to the representatives of Delta a notice on the initiation of the proceedings indicating the subject-matter of the proceedings (the "Notice"). The Notice was signed by the senior director of the Czech Authority and was accompanied by an authorization with the names of officials empowered to conduct the onsite inspection. The Notice was not reviewed by the court.

The inspection mainly consisted in reviewing and making copies of email correspondence of Delta's selected managers. However, some managers declined to cooperate with the officials. In particular, the CEO prevented the officials from reading his e-mail correspondence contained in his notebook, took away the notebook and left the premises of the company, while another manager took away from the officials two printed e-mails that had been previously handed over to them on the ground that they represented private correspondence.[7] As a result, the Czech Authority issued a decision to impose a fine of CZK 300,000 (ca. EUR 11,500) on Delta for obstructing the inspection. Later, the Czech Authority issued a decision finding an agreement restricting competition and imposing a penalty of CZK 55 million (ca. EUR 2.1 million).

Delta appealed the decisions to the antimonopoly authority, then before the Regional Court in Brno, the Czech Supreme Administrative Court and subsequently before the Czech Constitutional Court. Delta questioned the legality of obtaining evidence during the inspection and the legitimacy of its execution. According to the Company, an inspection without the prior authorization of the court and effective control by an independent authority violated the Czech Constitution and Article 8 of the Convention. It referred to the standards established in the ECtHR case law[8] according to which judicial authorization prior to inspection and effective independent supervision of the Czech Authority's actions should have been available. The Czech Authority and courts rejected the appeals arguing that the inspection was lawful and that Czech law provided entrepreneurs sufficient measures to challenge the very fact of the inspection and the way in which it had been carried out.[9]

In the *Delta Pekárny* judgement the ECtHR argued that in the absence of prior consent of a court to conduct an inspection by the competition authority, the protection of individual rights resulting from the initiation of the control that is not

7 R. Barinka, The Czech Constitutional Court rules that inspection at business premises of a company does not require a prior judicial authorization (Delta Pekarny), 26 August 2010, e-Competitions Bulletin August 2010, Art. N° 33217, available at: https://www.concurrences.com/en/bulletin/news-issues/august-2010/The-Czech-Constitutional-Court (accessed 20.05.2019).

8 The ECtHR judgment of 6 April 2002 in case Société Colas Est and Others v. France, no. 37971/97.

9 § 19 of the ECtHR judgment of 2 October 2014 in case Delta Pekárny A.S. v. Czech Republic, no. 97/11.

disproportionate and justified, should be guaranteed by *ex post* judicial review.[10] It found that under the Czech law the competition authorities were entitled to conduct inspections in order to verify the existence of evidence of suspected antimonopoly practice, but the existing legal measures did not allow companies to judicially review the very fact of initiation of inspection neither *ex ante* nor *ex post*.[11] The ECtHR took into consideration, firstly, that the notification of the inspection was authorized by the senior director of the Czech Authority.[12] Secondly, the notice initiating the inspection did not precisely state either the facts or the evidence on which the presumptions of anti-competitive practices were based.[13] Thirdly, two appeal proceedings initiated by Delta before national courts focused on the amount of the fine imposed for the obstruction of the inspection and on substantive finding of the Czech Authority that Delta was party to anti-competitive practice.

In effect, the violation of Article 8 was found by the ECtHR, as national courts did not conduct a sufficient judicial review of the arbitrariness of the inspection.[14] In other words, the national courts did not review the reasons for initiation of the inspection, its duration, goal, scope and necessity.[15] Hence the intervention into Delta's rights protected under Article 8 cannot be considered as proportionate to the legitimate goal.[16]

## 4. Inspections of the Polish competition authority

According to the *Delta Pekárny* judgement protection of the right to privacy requires that companies have effective measures to challenge the reasons and proportionality of inspections of competition authorities. The effective review measures should be provided either before the inspection in the form of judicial authorization or *ex post facto*. The effective review consists in the assessment of the scope, the duration of the inspection, along with its necessity and proportionality. From this perspective I will review below the quality of the existing review measures for inspections conducted by the Polish competition authority, i.e. the OCCP.

As a starting point it should be noted that the Polish Act on Competition and Consumer Protection (the "Polish Act") distinguishes between two types of inspections: controls (pl: *kontrole*) and searches (pl: *przeszukania*). In both types the OCCP can look for the same types of documents. Both types of investigations are

10 Id. § 93.
11 Id. §§ 86-91.
12 Id. § 85.
13 Id. § 85.
14 Id. § 93.
15 Id. § 87, § 91.
16 Id. § 93.

authorized by the OCCP's President but a prior consent of the court, i.e. the CCCP, is required for searches, but not for controls. Both, the authorization of the OCCP's President to conduct the control and the CCCP's decision consenting to conduct the search are handed in by the OCCP's officers to the representatives of the company at the beginning of the inspection.

From the formal perspective the control should be based on "cooperation" between the OCCP and the company, i.e. the OCCP's officers can ask for the documents to be made accessible to them, but they cannot search for the documents themselves. Whereas during the searches, the OCCP's officers can search for the documents themselves. In practice, the legal position of inspected companies is basically the same in the case of obstruction. Firstly, the OCCP may always switch from "cooperative" control to forced searches, if, in its view the company does not sufficiently cooperate. Secondly, in both types of inspections the OCCP's officers may be assisted by the police, which creates an obvious pressure on the staff of the company to "cooperate". Thirdly, in both cases the OCCP may impose a penalty of up to EUR 50 million on the company. In light of this it seems obvious that the prior judicial authorization of the CCCP should be ensured for both types of inspections, not only for searches.[17]

## 5. Prior judicial review under the Polish law

As regards controls, under the Polish Act the authorization of the OCCP's President to conduct the control does not indicate the evidence or even suspicion which substantiates the decision to initiate the procedure. Likewise, the OCCP's President does not require the consent of the CCCP to authorize the control to be conducted. In addition, inspected company may not appeal such authorization, which is even not a formal decision.

In light of the *Delta Pekárny* judgement, facts justifying the initiation of the inspection need to be verified by courts and the necessity of inspection cannot be proven by the evidence collected during the inspection.[18] In this respect, the

17 Turno B., Wardęga E., Uprzednia i następcza kontrola aktów upoważaniających organ ochrony konkurencji do przeprowadzenia niezapowiedzianej kontroli (przeszukania) przedsiębiorcy. Glosa do wyroku Europejskiego Trybunału Praw Człowieka z 2 października 2014 r. w sprawie Delta Pekárny przeciwko Republice Czeskiej, internetowy Kwartalnik Antymonopolowy i Regulacyjny, 2015, nr 8(4), p. 117.

18 M. Bernatt, Between Menarini and Delta Pekarny - Strasbourg view on intensity of judicial review in competition law. [in] The procedural aspects of the application of competition law: European frameworks – Central European perspectives, Csongor István Nagy (ed.), Europa Law Publishing, Gröningen, 2016, p. 8, available at: https://www.academia.edu/26014468/Between_Menarini_and_Delta_Pekarny_Strasbourg_view_on_intensity_of_judicial_review_in_competition_law (accessed 20.05.2019).

authorization of the OCCP's President to conduct searches indeed requires prior consent of the CCCP.[19] However, the decisions of the CCCP have not, until recently (see following section), been subject to appeal. In the absence of two instance proceedings a very rigorous examination of the OCCP's notion for conducting a search is required,[20] i.e. the CCCP should investigate whether the OCCP has actually proved the necessity to carry out a search.[21] In practice, there are doubts with respect to the thoroughness of the CCCP's review. Firstly, copies of the OCCP's application for the CCCP's consent are not added to the administrative file. Secondly, the CCCP's consent for searches does not include justification. In effect, the evidence or suspicion which substantiate the search remains unknown to the companies. Thirdly, searches were conducted by the OCCP also in relation to vertical agreements, where the evidence can usually be obtained in the course of simple requests for information without initiating formal proceedings.[22] As rightly pointed out by B. Turno and E. Wardęga, one can therefore argue, that the effectiveness of the consent procedure is rather illusionary.[23]

## 6. Judgement of the Polish Constitutional Tribunal of 16 January 2019 in case P 19/17

The above assessment may however change soon as a result of the judgement of the PCT of 16 January 2019.[24] The PCT argued that provision that makes it impossible to appeal the decision of the CCCP on consenting to an OCCP search (i.e. second sentence in art. 105n par. 4 of the Polish Act) is not compliant with the Polish Constitution, because it completely deprives entrepreneurs of the right to court. The complaint referred directly to the *Delta Pekárny* ruling, which was followed by the PCT. The PCT stressed that the inability to appeal, concerns searches which deeply interfere with the sphere of the entrepreneur's rights. Activities undertaken during searches by the antimonopoly authority violate the freedom of economic activity, the

19 Art. 105n par. 2 of the Polish Act.

20 M. Bernatt, Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2011, p. 227.

21 M. Bernatt, Ustawa o ochronie konkurencji i konsumentów. Komentarz. T. Skoczny (ed.), 2 issue, Warszawa 2014, Legalis.

22 Art. 50 of the Polish Act.

23 Turno B., Wardęga E., Uprzednia i następcza kontrola…*op. cit.,* p. 114.

24 Judgement of the Polish Constitutional Tribunal of 16 January 2019 in case P 19/17, Official Journal of 22 January 2019, pos. 128. The judgement was issued in response to the legal question of the Appellate Court in Warsaw of 22 August 2017, considering the complaint a company against the CCCP decision rejecting the complaint against the CCCP's decision agreeing to conduct a search in the premises of that company.

right to privacy and property rights to a greater extent than in the case of standard controls carried out by other authorities. Considering the substantial nature of those rights and freedoms, such a construction of the procedure that completely excludes one party from presenting arguments before court, is incompatible with art. 45 par. 1 of the Polish Constitution. In the opinion of the PCT, in light of the nature of interference a balance between the effectiveness of the proceedings and the rights of defence is required. The balance should protect against arbitrary interference in the sphere of private entrepreneurial activity and disproportional control activities.[25]

The PCT followed the argumentation of the Appellate Court that the content of this provision leads to gross disproportion of the parties procedural positions: "*If the OCCP's application for consent to a search is dismissed, despite the lack of the opportunity to challenge the CCCP's decision, it may reapply by presenting new arguments. On the other hand, the entrepreneur whose premises are to be inspected, does not take part in the pre-consent proceedings. The decision is issued in closed session without informing the entrepreneur about the court seating. What's more, if the OCCP's application is accepted, the entrepreneur has no possibility of appeal against the ruling, which in turn closes him the opportunity to present his position not only before second instance court, but in the course of the proceedings. In other words, by depriving the entrepreneur of the right to lodge a complaint, the entrepreneur is completely deprived of the right to court, and has no option to present his arguments. In this way the legislator violated the foundation of the right to court - the right to be heard. Searched entrepreneur, in the case of a positive court decision, is presented with a fait accompli*."[26]

As a result of the PCT's judgement appeals from the CCCP's decisions expressing consent to a search will be allowed under Article 394 § 1 of the Polish Code of Civil Procedure.

## 7. Ex post facto judicial review under the Polish law

As regards controls under Polish law, companies may file objections (pl: *sprzeciw*) to the initiation and exercise of control by the OCCP.[27] The objections are filed to the OCCP within three working days from the day on which the control was initiated or from the day it came to procedural breach in relation to the delivery and the content of authorizations to perform control activities as well as in relation to persons

25 Statement of the Polish Constitutional Tribunal available at: http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10461-ustawa-o-ochronie-konkurencji-i-konsumentow/ (accessed 20.05.2019).

26 Legal question of the Appellate Court of 22 August 2017 to the Polish Constitutional Tribunal in case P 19/17 available at: https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=P%2019/17 (accessed 20.05.2019).

27 Art. 59 par. 1 of the Law of Entrepreneurs.

participating in the control. These aspects are of minor importance for the protection of companies' interest. Objection may also be filed in case control activities go beyond the scope indicated in the authorization.[28] The practical importance of this provision seems also rather doubtful, as the scope of control can be described only in a general way, which is typical for suspected infringements of competition law. In fact, by filing objections companies cannot challenge the essential aspects of the control, i.e. its justification and the proportionality of inspections.[29]

Inspected companies may also appeal to the CCCP, if the activities of the OCCP go beyond the scope of the control given in the OCCP's authorization (for controls[30]) or in the consent given by the court (for searches[31]) or if other control (or search) activities have violated the law. Similarly, to objections, the scope of those complaints is limited to violation of the conditions of controls and searches only, not the very fact of their conduct.[32]

Significant weakness in privacy protection can be indicated also with respect to the handling of private documents found during inspections conducted by the OCCP. If private documents are found during search activities, the officials of the OCCP should send them, without reading them, to the prosecutor or court in a sealed envelope.[33] Surprisingly, according to the literal wording of Polish law, the envelope procedure applies only to documents identified during searches but not during control activities. This does not seem rational given the fact that the OCCP has access to the same documents in both types of inspections.

It seems also that an appeal from the OCCP's final decision stating an infringement of competition law and imposing a fine does not guarantee full judicial review of the inspection.[34] Firstly, such decisions in antimonopoly cases are usually issued after 2-3 years or later, which is further prolonged by the appeal procedure. Secondly, the evidence found in their course is usually an important basis for finding the alleged practice and imposing a fine. As the finding of the OCCP are in the public domain not only by virtue of the decision but also by way of press releases, companies are exposed not only to antitrust fines, but also civil claims related to antitrust infringements and reputational damages. Even if the decision is eventually lifted

28 Art. 49 par. 9 in connection with art. art. 59 par. 1 of the Law of Entrepreneurs.

29 See G. Materna, Warunki podejmowania kontroli i przeszukań w postępowaniach z zakresu ochrony konkurencji prowadzonych na podstawie ustawy o ochronie konkurencji i konsumentów w aspekcie orzecznictwa na tle art. 8 ETPCz, internetowy Kwartalnik Antymonopolowy i Regulacyjny 2015, nr 8(4), p. 16.

30 Art. 105m par. 1 in connection with art. 105b par. 1 point 2 of the Polish Act.

31 Art. 105p of the Polish Act.

32 See B. Turno, E. Wardęga, Uprzednia i następcza kontrola…*op.cit.,* p. 115.

33 Art. 105q of the Polish Act in connection with art. 225 par. 1 of the Polish Code of Penal Procedure.

34 Different view is presented by M. Sieradzka in comments to art. 105n [in] K. Kohutek, M. Sieradzka, Ustawa o ochronie konkurencji i konsumentów. Komentarz, LEX 2014.

for procedural reasons, the company may not be able to fully compensate for the reputational damage incurred[35] or losses related to participation in civil proceedings.

## 8. Conclusions

According to the *Delta Pekárny* ruling the right to privacy in the meaning of Article 8 of the Convention requires that companies should have effective measures to challenge the reasons and proportionality of inspections of competition authorities. The judicial review could be provided either before the inspection in the form of judicial authorization or *ex post facto*. The effective review consists in the assessment of necessity and proportionality of inspections. In the absence of such review mechanisms, inspections of competition authorities are likely to violate Article 8 of the Convention.

Polish law formally distinguishes between two types of inspections of competition authorities, i.e. controls and searches. For controls there are no measures guaranteeing sufficient judicial review, either before or *ex post facto*, of the initiation of control and its proportionality. As regards searches, the recent judgment of the Polish Constitutional Tribunal of 16 January 2019 has significantly improved the position of companies. Although the judgments of the ECtHR are binding only between the parties to the dispute, the judgment of the PCT is evidence of the direct influence of the *Delta Pekárny* judgment on the standards of inspections conducted by the OCCP. As a result of the PCT ruling entrepreneurs may appeal the CCCP's decisions expressing consent for searches. This legal tool may significantly improve the effectiveness of judicial review not only by allowing companies to appeal the CCCP's decisions but may also stimulate the CCCP for more thorough verification of the OCCP's justification for inspections.

As a result of the recent judgment of the Polish Constitutional Tribunal, there is wide divergence between possibilities to protect against the arbitrariness of the OCCP during controls and searches. From the perspective of the *Delta Pekárny* judgment, lack of effective judicial review for controls (prior or ex post facto) should be considered a major legal gap. It is therefore a *de lege ferenda* postulate either to supplement the controls with the same mechanisms of judicial review available for searches or to integrate controls and searches into one type of inspection.

More generally, considering the importance of the values protected under Article 8 of the Convention, the *Delta Pekárny* judgment should be further promoted as a conceptual framework for the assessment of inspections conducted by competition authorities. In the digital era, when competition authorities can copy vast sets of

35 See B. Turno, E. Wardęga, Uprzednia i następcza kontrola…, *op.cit.,* p. 115.

data, the risk of interference into right to privacy, is inevitable. This risk needs to be mitigated by the introduction of effective judicial review mechanisms.

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# REVIEW

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# European Union as a Highly Competitive Social Market Economy – Legal and Economic Analysis,

*rw & w Science & New Media, Passau-Berlin-Prague 2016, pp. 178*

The European Union pays considerable attention to the problems arising from the differences in competitiveness between individual EU Member States and to the issue of increasing competitiveness of the European Union as a whole. The European Union perceives its competitiveness as a determining factor of its position in the global economy and the differences in competitiveness between the EU Member States are considered as a limiting factor for the effective and smooth functioning of the EU internal market and of the euro area. Therefore, since 2000, the European Union has adopted long-term comprehensive economic strategies aimed at increasing the competitiveness of EU Member States and of the European Union as a whole. The European Union is currently implementing the ten-year Europe 2020 Strategy.

The European Union, however, strives not only to achieve high competitiveness, but also to maintain and develop its specific socio-economic model, the so-called social market economy. That is why the Treaty on European Union also provides for the sustainable development of Europe based on a highly competitive social market economy as one of the EU's economic goals.

The issue of how the European Union is succeeding or failing to combine efforts to increase its competitiveness and to develop its social dimension, is discussed in various contexts in the book entitled *European Union as a Highly Competitive*

*Social Market Economy - Legal and Economic Analysis*.[1] The book was published by rw&w Science & New Media Passau-Berlin-Prague in 2016. Its authors are Václav Šmejkal, Stanislav Šaroch and Pavel Svoboda. All three authors have been focusing on the issue of European integration for a long time – Václav Šmejkal and Pavel Svoboda from the legal point of view, Stanislav Šaroch from the economic perspective.

The central theme of the book, that is thoroughly analyzed, is a certain tension or contradiction between the pursuit of a market economy with free competition, increasing competitiveness and maintaining fiscal discipline in the EU on the one hand, and efforts to preserve and develop the social dimension of economies and social welfare in the EU on the other. The basis of the book is a thorough legal analysis complemented by economic analysis.

The book points out that the European integration project has, since its inception, essentially neglected social integration. The social area is left largely under the competences of the EU Member States. On the contrary, competences relating to the EU internal market and its four freedoms, competition and competitiveness are to a large extent transferred to the EU level. In the context of the introduction of the euro, the EU's competences in the area of fiscal surveillance strengthened and monetary policy for the euro area countries became the exclusive competence of the EU. The correction of the euro area institutional framework in response to the debt crisis in some Member States has further strengthened the EU's competences in the area of fiscal, macroeconomic and banking surveillance to promote fiscal discipline, to prevent macroeconomic imbalances more effectively and to better manage risks in the banking sector in the euro area Member States. However, these changes to the EU's institutional framework have not brought about a shift in the social area, so the social area remains a minimalist part of the European Union's structure.

However, this is somewhat paradoxical because the social market economy is the basis of the socio-economic model of the European Union and its Member States. The existence of the social market economy, in addition highly competitive, is an explicit EU objective set out in Article 3 Paragraph 3 of the Treaty on European Union. As the book shows, the realization of this goal is not underpinned by sufficient competences of the European Union, and thus remains dependent on the activities of individual EU Member States. This creates a certain imbalance between the objective of an effective internal market and a highly competitive economy on the one hand, and a socially oriented economy on the other. This imbalance is also supported by the inconsistent judgments of the Court of Justice of the EU, which seek to establish a balance between the economic and social approaches in some cases, but in others they favour internal market objectives to social objectives.

1 The reviewed book is freely downloadable from: https://www.free-ebooks.net/ebook/European-Union-as-a-Highly-Competitive-Social-Market-Economy-Legal-and-Economic-Analysis.

The imbalance between economic and social approaches in the European Union, however, does not arise only from EU law. It has deeper economic causes and is more generally given by the character of European integration. From the economic point of view, the concept of the social market economy is based on German ordoliberalism, which has been applied to a certain extent in a modernized and modified form within the EU. According to this concept, the basis of the well-functioning social market economy is an efficient, highly competitive economy. The social area is a complement to the economic sphere, although desirable and, essentially, indispensable.

However, only some EU countries have a truly highly competitive economy that can be a steady basis for the well-functioning social market economy. This reflects the differences between the EU Member States and the unsustainability or erosion of the European social model in a number of EU countries. According to the book, the main immediate reason for erosion of the European social model is not a globalization pressure coming from outside the EU, but rather the asymmetry of integration of the EU and of the euro area respectively. Under these conditions, less competitive euro area countries can only increase their competitiveness by internal devaluation, and thus by destruction of the social dimension of their economies. The book then presents various proposals for measures and tools that could halt the erosion of the European social model and bring the European Union closer to the ideal of the social market economy. However, the question is to what extent these proposals are feasible in practice, or what real impact they might have.

Here the book ends and the reader is left with a great deal of information, analyses, and contexts to consider. However, as it is a very topical and crucial issue for the future of the European Union, its Member States and citizens, the book compels the reader to ask many other related questions: What is the real relationship between the European social model and competitiveness? Is this relationship competitive, or complementary, or mutually supportive? Does this relationship vary in individual EU countries and change over time? Can the European Union as a whole become a highly competitive social market economy, or can this goal be achieved only by some EU Member States? If there are differences between levels of economic and social indicators and competitiveness of individual EU Member States, are they short-term or long-term? If these differences are long-term, is the asymmetric way of integration of the EU truly the main immediate reason for erosion of the European social model, or can more relevant causes be found? How significant is the impact of globalization, the emergence of new strong players in the world economy and the fundamental redistribution of economic and political power in the contemporary world to the erosion of the European social model? Under these conditions, will it be possible to maintain a highly competitive economy and a specific socio-economic model in the EU at the same time?

Answers to these questions can be so extensive, complicated, and often uncertain, that they could well become the subject of several other books. Many of these

questions will be answered only in the future. But one fact is certain now. Efforts to increase EU competitiveness and to preserve and develop the European social model are a never-ending story because the EU's internal and external environments are incessantly changing and the goal of a highly competitive social market economy is in constant motion. Therefore, finding an anchor and easy answers in this turbulent world is very difficult.

# Contributors

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