SOCIAL FUNCTION OF PRIVATE LAW AND ITS PROLIFERATION BY APPLYING THE PRINCIPLES OF EUROPEAN PRIVATE LAW

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Monika Jurčová et al.

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FOREWORD

Dear reader,

This book was written by a team of authors from the Faculty of Law of the Trnava University in Trnava, which, together with a supplementary publication by colleagues *Gešková* and *Novotná* (Zásady európskeho súkromného práva – súbor interpretačných a aplikačných nástrojov. Prague: Leges, 2019), is the outcome of the four-year research project APVV-14-0061 "Proliferation of the social function of the Slovak private law by the application of European private law principles".

The book atemporally responds to the phenomenon of invoking the social function of private law by the population. Population have been sensitive to any changes in private law since ancient times. In private law, "it is always about property and property goods", and as Niccolò Machiavelli wrote in *The Prince* "Men sooner forget the death of their father than the loss of their patrimony". The population puts pressure on lawmakers through politicians, which often results in *ad hoc* legislation being adopted in private law.

The exploration of aspects of the social function of private law performed by the respective authors, in terms of their scientific and pedagogical speciality, aimed to present a contemporariness and quality of ideas. It can be immodestly stated that this book publication is a first in Slovakia, but certainly not the last step in this little-investigated area of private law. Changes to paradigms in private law will soon come to light. The dynamics of legal-social relations in both Slovakia and globally suggests that especially the increase of wealth inequalities may enforce sudden and non-standard legislative changes precisely in private law.

For the team of authors

Róbert Dobrovodský
co-author

INTRODUCTION

The team of authors from the Faculty of Law of the Trnava University in Trnava present this monograph as the final outcome of the solution to the APVV-14-0061 project: "Proliferation of the social function of the Slovak private law by the application of European private law principles".

The first stage of the transition to a market-oriented economy after 1989 was also characterised by the partial negation of social elements; a trend that was also reflected in legislation. The initiated processes of transforming the social system also inevitably entailed negative elements in neglecting the social aspects of legislation, which Western Europe began to cope with only from the end of the 20th century. New regulations in civil, commercial and labour law have currently been adopted mainly in relation to EU law (particularly the implementation of EU directives), or such adoption is a response to the social need to provide for certain relationships. The influence of the European Union on making new or revising existing private laws is in many ways positive. From the point of view of private law, such influence ensures that rules which highlight the social responsibility of private law entities and contribute to accentuating the social function of private law are incorporated into the regulations of civil, commercial and labour law. A shortcoming of Slovak law-making and application practice is that such law-making partially modifies, amends, and alters Slovak private law and its interpretation, but rather naturally and *ad hoc*, without a deeper understanding and importance of the value base and sources of European law-making.

The project solution aimed to overcome the shortcomings identified in the follow-up stages of the research, which were intended to generalise the knowledge gained in individual sectors of private law. First of all, the implementation of European legislation regulating the increased protection of the weaker party was subject to examination, where we expected to identify the basic features of the application of the principles of European private law and the social function promoted therein. In the second stage, we focused on the principles of European private law in application practice, especially in Slovak decision-making practice. The linking of the first two stages led to the synthesis of knowledge and its generalisation through the theme of "Social Rules of Private Law, Their Role in the Structure of Private Law".

The first chapter of the monograph deals with the application of European values and principles of European private law, with an emphasis on the social

function of Slovak private law. It is based on the assumption that rules containing the protection of the weaker party are a manifestation of social justice. In order to promote the social function, it is generally advisable to use argumentation through principles in the interpretation of legal rules. The constitutionalisation of private law through the indirect effect of directives promotes the value application of law, and is an expression of non-positivist legal thinking.

The following chapters of the monograph address the social function of legal rules in connection with the application of the principles of European private law in the respective subsystems of civil law, especially in the general part of the Civil Code and obligation law. The special role of commercial and labour law should be stressed. These sectors of private law require a specific assessment, since the intensity of the admissibility of interference and the influence of these private-law relations is different from those of civil law, thus general conclusions cannot be applied thereto automatically. Given the prevailing professionalism of commercial-law relationships, sensitivity to the aspects of social justice is somewhat weaker in the system of commercial law (it allows specifics of business ethics to be taken into account). Depending on circumstances, even practices that could already appear immoral in general civil law can be considered fair and honest in terms of commercial law. On the other hand, a distinctive feature of labour law is that it is deemed to be a separate area of law of a hybrid nature, characterised not only by private-law, but also by public-law elements. The fundamental function of labour law, which is more pronounced in this sector of private law, is its protective function, which should be targeted at protecting an employee as the weaker party.

Beyond the scope of the general treatise on obligation law, we pay particular attention to the content of a consumer credit contract and the process of its conclusion, as we cannot ignore the adverse consequences of indebtedness of a large portion of the Slovak population. We regard this phenomenon as a possible threat to society to the extent that other social instruments could no longer rectify the lost balance in private-law relationships.

The publication of a set of tools designed for application practice in line with the project objectives is a natural complement to this monograph.[1] This supplementary publication was prepared by a creative synthesis of scientific knowledge gained about selected European law principles, in respect of

[1] GEŠKOVÁ, K., NOVOTNÁ, M. et al. *Zásady európskeho súkromného práva – súbor interpretačných a aplikačných nástrojov.* Prague: Leges, 2019.

which the team of authors have identified the highest degree of relevance to private law; the manifestations of such principles can be observed in relation to the national decision-making process in the assessment of private law at the level of scientific discourse, as well as the decision-making practice of courts that further develop and specify the content and scope of the respective principles.

With respect to maintaining the vitality of private law (in the words of Professor Eliáš, a member of the research team), the authors sought to emphasise that private law has limits which need to be observed and borders that should not be crossed. However, this does not mean being resigned with respect to the aim of social justice. The private-law nature of rules and EU membership commitments form the basis for the authors to identify crucial tools to promote the social model of private law. It is also pointed out that social rules cannot be proposed only with regard to the promotion and protection of individual interests; we consider sustainable development to be a prerequisite for guaranteeing all individual interests. Using the advantages of the digital economy should not only be a market support tool, such should also be used to promote sharing to protect natural resources. Promoting subjective rights and obligations should be enhanced by increasing the individual responsibility of private law entities.

For the team of authors

Monika Jurčová
project leader

1. THE APPLICATION OF EUROPEAN VALUES AND PRINCIPLES OF EUROPEAN PRIVATE LAW WITH AN EMPHASIS ON THE SOCIAL FUNCTION OF SLOVAK PRIVATE LAW

It is a challenging task to explore the values or principles on which the system of law is based, since there is no uniform approach in this area; even within legal terminology it is not established how value and principle respectively differ, the meaning and effects of these terms, and it is not clear who creates these values or principles and where they can be found. Is law based on certain values and principles, or does the law itself create such values and principles? An author who resolves to deal with these general questions will always be criticised for building on sand, because the author is the one who needs to lay the solid foundations for this exploration and then rely on them. But on the other hand, **no matter how general the question of values and principles may seem, this can also greatly affect everyday application in practice**.

That EU law currently influences Slovak private law cannot be questioned, the point is to what extent. When assessing the aforementioned extent of influence, it is also important what effects we assign to the values and principles of EU law or European private law in relation to Slovak private law.

We agree with Prusák's statement that: *"In order for society to positively evaluate law, it must be convinced that law expresses society-specific values*."[2] But on the other hand, it must also be added that law is an appropriate normative system (binding effect and enforceability of the rules of law) to promote such values in society which it lacks. According to Bárány: "*Law has significant elements of will and power that allow it to be a means of realising values and ideal models.*"[3] It can be stated that it is the focus on the value foundations of law and the legal principles arising therefrom that rejects some kind of formalism.[4] **The European area is characterised by the concept of a material rule of law, where the close connection between the con-**

[2] PRUSÁK, J. *Vybrané kapitoly z modernej teórie štátu a práva.* Bratislava: Polygrafické stredisko UK, 1990, p. 88.

[3] BÁRÁNY, E. Právo v postmodernej situácii. In *Právny obzor*. 1997, vol. 80, no. 1, p. 19–20.

[4] This is also confirmed by Canaris. See CANARIS, C. W. – GRIGOLEIT, H. CH. Interpre-

tents of legal rules and values is emphasised. According to the decision of the Constitutional Court of the Slovak Republic: *"The essence of the material rule of law comprises bringing the applicable law into line with the fundamental values of a democratically organised society, and subsequently in the consistent application of the applicable law without exceptions based on purpose-based reasons."*[5] As Procházka states, the material rule of law does not only mean *"that public authorities are strictly bound by pre-established rules, but also the existence of fundamental value bases and regulatory ideas by which the contents of these rules and their manner of application are to be measured. In short, power must accord with law – which must respect certain value requirements and be applied fairly."*[6]

According to Hesselink, values pertain to something external on which the legal system is based, and the principles are already an internal aspect of the legal system; in other words: principles belong to law and values to lawmakers.[7] In our opinion, **principles are an expression of values**. Values are mostly more general in nature than principles and are usually not only related to a particular legal area, but to the system of law as a whole. Even Števček states that *"value is protected and expressed by principle."*[8] We would like to add that one value is commonly expressed by several principles (e.g. the value of freedom is expressed by the principle of contractual autonomy or also by the fundamental right to private and family life, which can be understood as a principle; the value of solidarity is expressed by the principle of consumer or employee protection). However, even the boundaries between values are unclear; values often overlap and complement each other (e.g. the value of freedom and the value of respect for fundamental human rights). In our opinion, the absolute value towards which law as such is to be directed is the

tation of Contracts. In HARTKAMP, A. S. et al. (eds.). *Towards a European Civil Code*. 4th edition. Nijmegen: Kluwer Law International, 2010, p. 591.

[5] The Findings of the Constitutional Court of the Slovak Republic of 20 May 2009, ref. no. PL. ÚS 17/08.

[6] PROCHÁZKA, R. In PROCHÁZKA, R. – KÁČER, M. *Teória práva*. Bratislava: C. H. Beck, 2013, p. 88.

[7] HESSELINK, M. W. If You Don't Like our Principles We Have Others. On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New Principles Section in the Draft CFR. In BROWNSWORD, R., MICKLITZ, H. W., NIGLIA, L., WEATHERILL, S. (eds.). *The Foundations of European Private Law*. Oxford: Hart Publishing, 2011, p. 61.

[8] ŠTEVČEK, M. Princípy a princípmi chránené hodnoty občianskeho práva v 21. storočí – náčrt formalizovanej metodológie. In *Právny obzor*, 2016, vol. 99, no. 5. Available in the ASPI system.

good (in an absolutely idealistic and realistically never-attainable concept). It can be argued that assessing good is unclear and subjective, but even the strong belief of today's Western world that every human being shall have innate rights (fundamental human rights) does not stem from any convincing scientific basis, and there is no evidence that such rights exist; yet contemporary society respects and attaches great importance to such rights.[9]

Melzer is of the opinion that the legal concept of principle, together with the legal concept of rule, constitutes a legal norm.[10] This means that **the content of a legal rule cannot be inferred only from the text of a legal regulation, but legal principles must also be taken into account and relied on when establishing such content**.[11] As Reich points out, legal principles are somewhere between primary and secondary EU law, and legal principles are more general in nature than legal rules. Although they are linked to rules, they are not the rules themselves; they are more general, more flexible, partly indefinite, and are included in the system of law through courts.[12] According to Lazzerini, the system of written sources of EU law is supplemented by a system of unwritten legal principles which become part of the system of law through the activity of the Court of Justice of the European Union or national courts.[13] In addition, Lukáčiková and Zámožík state that law is not only contained in written laws, but also the legal principles included in law must be taken in account.[14]

Legal principles need not be unavoidably explicitly enshrined in legislation; their existence can be inferred from the characteristics of a set of certain legal rules. Adar and Sirena state that the use of legal principles depends on their application by the judiciary, and that the greater the importance of legal principles, the greater the power of courts. In relation to "judicial law-mak-

[9] See also Preuss and Zagorin's opinion cited therein. PREUSS, O. Demokratický právní stát tesaný do pískovce. In *Časopis pro právní vědu a praxi.* 2016, vol. 24, no. 3, p. 375.

[10] MELZER, F. *Metodologie nalézání práva. Úvod do právní argumentace.* 2nd edition, Prague: C. H. Beck, 2011, p. 46.

[11] Cf. PROCHÁZKA, R. In PROCHÁZKA, R., KÁČER, M. *Teória práva.* Prague: C. H. Beck, 2013, p. 203 and other sources listed therein.

[12] REICH, N. *General Principles of EU Civil Law*. Cambridge: Intersentia Publishing Ltd., 2014, p. 2–3.

[13] LAZZERINI, N. "Please, Handle with Care!" – Some Considerations on the Approach of the European Court of Justice to the Direct Effect of General Principles of European Union Law. In PINESCHI, L. (ed.). *General Principles of Law – The Role of the Judiciary*. Cham: Springer, 2015, p. 165.

[14] LUKÁČIKOVÁ, P., ZÁMOŽÍK, J. *Vývojové tendencie princípov civilného procesu po rekodifikácii civilného práva procesného.* Bratislava: VEDA, 2016, p. 31.

ing", Drgonec says: "*The status of the early 19th century is not the same as the current one. Thanks to political movements in Europe, the practical application of the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as Community and Union law in the EU, continental law and common law are not completely different, but considerably approximate to each other.*"[15] However, it should be noted that the completion of law by courts still exists to some extent given the relationship between the principle of the prohibition of denial of justice (*denegatio iustitiae*) and the incompleteness of law arising from the facts of a case.[16] We believe that it is appropriate to discuss the issue of finding the real role of courts, rather than increasing their power to the detriment of the lawmaker; since the lawmaker's powers remain unchanged, it only depends on how the lawmaker exercises such powers.

1.1 Values and Principles Typical of European Private Law

We can say that the 19th century is characterised by an emphasis on freedom arising from the fact that major codifications of private law in the 19th century were based on the protection of individuals against the state. Hurdík points out that the liberalism and individualism of the early 19th century is enshrined "*in the systemic base of civilian thinking very deeply and its re-evaluation has a genetic-systemic logic or rather inertia.*"[17] On the other hand, it must be noted that the creation of the European Union is linked to the experience of World War II and the realisation that cooperation is more beneficial than conflict. After World War II, there was a struggle to enshrine a value base in Europe, followed by its actual establishment when human dignity and respect for fundamental human rights in general came under the spotlight. In accordance with Art. 2 of the Treaty on European Union, the EU values are human dignity, freedom, democracy, equality, the rule of law, respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity, as well as equality between women and men. It should be stressed again that respect for fun-

[15] DRGONEC, J. *Ochrana ústavnosti Ústavným súdom Slovenskej republiky*. Bratislava: Eurokódex, 2010, p. 151.

[16] HÖLLANDER, P. Otevřená textura práva a soudcovská tvorba práva plynoucí z neurčitosti normativních premis. In PROCHÁZKA, R., KÁČER, M. *De arte boni et aequi. Pocta k životnému jubileu Alexandry Krskovej.* Trnava: Typi Universitatis Tyrnaviensis, 2012, p. 200.

[17] HURDÍK, J. Jsou či nejsou občanský zákoník a občanské právo nástrojem řízení společnosti? In JURČOVÁ, M., DOBROVODSKÝ, R., NEVOLNÁ, Z., ŠTEFANKO, J. (eds.). *Liber amicorum Jána Lazar.* Trnava: Typi Universitatis Tyrnaviensis, 2014, p. 293.

damental human rights is deeply enshrined in the case law of the Court of Justice of the European Union (which can be seen as the values upon which European society is built, while individual fundamental rights can be understood as principles).

We also need to take account of the fact that, in addition to the vision of peace in Europe of those actively involved in the establishment of an entity which became the European Union, it was also set up on an economic basis. From this point of view, the EU's current objective is also to create and continue to build a single market. We certainly agree that capitalism is linked to the EU area, and that the EU is part of the "Western" world.[18] Therefore, also in respect of the European legislator's potential competence, an essential part of European private law is that its standards must in some way be aimed at promoting the internal market. As Dulak rightly states, European private law is largely an instrumental tool for creating suitable conditions for the development of the single market, with less focus on guaranteeing legal autonomy and contracting justice, and is more committed to ensuring fair market access and strengthening market competition.[19] This objective may lead us to conclude that, as European private law is only a means to build the internal market (which is, in itself, a correct premise), its character will be significantly liberal.

Collins and Hesselink also talk about the Commission's liberal rhetoric in the area under discussion, when pointing out that the European Commission's goal in the action plan entitled *"A More Coherent European Contract Law"*,[20] as well as other documents that it has issued, was greater coherence of European contract law in line with the purpose of promoting the internal market; although these documents do not mention social objectives in relation to the Common Frame of Reference.[21] In response to this overly neoliberal rhetoric of the European Commission, the Study Group on Social

[18] It also implies that moral relativism is a hallmark of European society. In this regard, we find Vasil's statement concise: *"to become prey to pagan nations – today does not mean to fear the invasion of some Hun or Avar hordes – today's paganism is spreading much more insidiously, even almost inconspicuously, as moral relativism, under the slogan of falsely understood freedom or boundless tolerance."* VASIĽ, C. *Bez súcitu víťazí nenávisť.* Bratislava: Postoy, 2016, p. 52.

[19] DULAK, A. Súkromnoprávna autonómia a jej limity (an inaugural lecture). In *Právny obzor*, 2018, vol. 101, no. 1. Available in the ASPI system.

[20] COM (2003) 68.

[21] HESSELINK, M. W. Common Frame of Reference & Social Justice. In *European Review of Contract Law.* 2008, vol. 4, no. 3, p. 250. See also COLLINS, H. The Constitutionalization of European Private Law as a Path to Social Justice? In MICKLITZ, H. W. (ed.). *The Many*

Justice in European Private Law published **the Manifesto on Social Justice in European Contract Law**, which states that European private law must assume constitutional principles and show signs of social justice.[22] Quoting Lando: *"Experience shows us that societies that are built on a market economy combined with solidarity, decency, and loyalty are doing better than those with law of the jungle."*[23] As Hurdík adds, many of Europe's leading civilians are now interested in the social dimension of private law.[24] **Thus, it can be said that currently the value of freedom is considerably counterbalanced by the value of solidarity, which thanks to the EU and its activities is represented by the protection of the weaker party (consumer, discriminated, employee). On the one hand, EU law is sometimes too casuistic, but on the other hand it opens the way to seeing law as value.** Although European private law is based on the value of freedom as a classical liberal value, it also significantly entails social goals and a certain degree of altruism in legal relations, which is manifested mainly through legal acts in consumer protection and non-discrimination.

Lurger argues that if market mechanisms or other factors do not motivate one party to behave in a fair and regardful manner towards the other party, such fairness and regard must be authoritatively established by law.[25] Some tension can currently be observed between the classical principle of freedom of contract (freedom of will) and protective legal rules for the benefit of a weaker party, especially a consumer, which are regarded as a limitation of contractual freedom. The economic liberalism of the 19th and 20th centuries brought the principle of freedom of contract in a formal sense. The protection of the weaker party is focused on the fact that a stronger party shall not only think of its own interests and goals, but shall somehow consider the interests and goals of a weaker party to a contract. Current trends therefore

Concepts of Social Justice in European Private Law. Cheltenham: Edward Elgar Publishing Limited, 2011, p. 133.

[22] STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW. Social Justice in European Contract Law: a Manifesto. In *European Law Journal*. 2004, vol. 10, no. 6, p. 654.

[23] LANDO, O. The Structure and Legal Values of the Common Frame of Reference. In *European Review of Contract Law*. 2007, vol. 3, no. 3, p. 251.

[24] HURDÍK, J. Jsou či nejsou občanský zákoník a občanské právo nástrojem řízení společnosti? In JURČOVÁ, M., DOBROVODSKÝ, R., NEVOLNÁ, Z., ŠTEFANKO, J. (eds.). *Liber amicorum Ján Lazar*. Trnava: Typi Universitatis Tyrnaviensis, 2014, p. 292.

[25] LURGER, B. The "Social" Side of Contract Law and the New Principle of Regard and Fairness. In HARTKAMP, S. A. et al. (eds.). *Towards a European Civil Code*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 282.

lead to conclusions on the application of contractual solidarity, social contract law, and social justice in contract law. This involves a certain degree of application of altruism in legal relations. Lurger thinks that social-based concepts can be misleading because their original meaning is different; they rather relate to public law, or the state's influence and redistribution of goods. In this respect, he therefore mentions a new principle, namely that of regard and fairness, stating that while the parties cannot be expected to fully cooperate and waive their interests, what can nevertheless be expected is that the parties will behave fairly (in good faith) and take into account the other party's interests.[26] In this sense, the principle of regard and fairness is related to the principles of good faith (in the sense of good-naturedness as well as good morals), cooperation, or transparency in contractual relationships; even we could say that these principles can be subordinated to the general notion of regard and fairness in contractual relationships.

In the light of the foregoing, it can be concluded that rules containing protection of the weaker party are a manifestation of social justice. For example, consumer protection is an issue introduced into national laws precisely due to the work of the EU, without which many Member States would not have the same standard of consumer protection in their national laws as they have today. As Micklitz states, the EU plays a leading role, as consumer protection had not previously been established in the Member States.[27] Hesselink highlights the pragmatic and user-friendly nature of European consumer protection rules, as opposed to the sophisticated or rather doctrinal national contract law constructions.[28] Lazar sees a contribution of the social function of private law in reducing wealth inequality, calling for more intensified and wider protection of the weaker party in contractual relationships, because such can help alleviate wealth-based polarization of society.[29]

[26] LURGER, B. The "Social" Side of Contract Law and the New Principle of Regard and Fairness. In HARTKAMP, S. A. et al. (eds.). *Towards a European Civil Code*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 286.

[27] MICKLITZ, H. W. Introduction. In MICKLITZ, H. W. (ed.). *The Many Concepts of Social Justice in European Private Law*. Cheltenham: Edward Elgar Publishing Limited, 2011, p. 5.

[28] See HESSELINK, M. W. Private Law, Regulation and Justice. In Postnational Rulemaking Working Paper No. 2016-04. [online], 2016. Available on the website: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2744565>.

[29] LAZAR, J. Majetková nerovnosť a sociálna funkcia súkromného práva. (Topical reflection essay). In *Právny obzor*, 2016, vol. 99, no. 4. Available in the ASPI system.

Consumer protection legal rules cannot be regarded as serving only the interests of individuals, but rather also those of society as a whole, including businesses. Mészáros states that genuine legal protection encourages consumers to consume, thus also serving the interests of entrepreneurs.[30] However, such protection also acts preventively by freeing the market from dishonest businesses, thus enabling the honest ones to do better. By protecting the weaker party, the law allows for the social and economic differences in the society in which it is applied. We can mention Hurdík's statement: "*The use of a liberally individualistic concept through a commutative type of justice is based on a regulatory method of active non-interference in the regulated relationships of private law entities. However, a society based on solidarity and social responsibility requires an active method of regulation which is, among other things, associated with enabling more frequent legal-regulatory interventions in private law relationships, and also with the regulation of the necessary types of social cooperation of such relations organised at a significantly higher level.*"[31] EU law, especially in the protection of the weaker party, regulatorily interferes in private law relationships, which suggests that it considerably contributes to the requirement to apply the value of solidarity in relationships between individuals. European private law *de lege lata* is characterised by its mandatory/binding effect; the European legislator often seeks to authoritatively regulate legal relations. This is also confirmed by Della Negra, who states that while national private law motivates parties to pursue their own interests, European regulatory contract law transforms this view of a traditional individualistic understanding into a wider general collective socio-economic context, which also includes a particular transaction, thus referring to the collective dimension of contract law.[32]

In its results, European private law *de lege ferenda* also clearly shows the content of several equal values and counterbalancing of the principles arising from those values. As stated by Hesselink, the Proposal for a Common Frame of Reference has all the characteristics of a European compro-

[30] MÉSZÁROS, P. *Ochrana slabšej strany v súkromnom práve*: dizertačná práca. Trnava: PF TU, 2014, p. 13.

[31] HURDÍK, J. Sociální normy soukromého práva a jejich místo ve struktuře soukromého práva. In *Právny obzor*, 2018, vol. 101, no. 5. Available in the ASPI system.

[32] DELLA NEGRA, F. Does "European Regulatory Contract Law" Enhance Citizens' Rights? An Analysis of Consumer and Services Law from Theory to Practice. In *Opinio Juris in Comparatione*. 2015, vol. I, no. I, p. 28–29.

mise, where social justice is properly balanced.[33] However, not even the value of freedom and its importance in private law need to be wholly condemned, since, as Jančo argues, although solidarity is increasingly promoted in European contract law, freedom of contract continues to be the underlying principle, because in its absence no contract expressing the idea of contractual solidarity could be concluded.[34]

The Statement of Reasons for the draft amendment to the Civil Code[35] also refers to the incorporation of social elements being introduced into our law and required by EU law, specifically in business-to-consumer relationships. But on the other hand, it further notes that the protection of the weaker party will not affect business relations, since in these relations *"there is no social need for special private law protection of any contractual partner."*[36] And what about the number of small entrepreneurs who, with regard to their bargaining position, awareness level, etc., are often at the level of natural persons – non-entrepreneurs? Hesselink claims that there is no argument that justifies consumer protection while not also justifying the protection of small entrepreneurs. He responds to the argument that if consumer protection is extended to other weaker entities, the level of consumer protection would be reduced, this relates to a traditional leftist resistance to businesses (even though they may also be weaker and more vulnerable) and this argument does not correspond to justice.[37] Similarly, Bejček states that even in relationships *B2B*, we can encounter differences in bargaining power (especially in economic power, limited rationality, information asymmetry).[38]

As can be seen from the foregoing, the common ground of the EU and its value background are also affected by private law, whether European private law or the private law of the Member States. Private law cannot be perceived in isolation from the question of constitutional (European) values. According to Hesselink, the values referred to in Article 2 of the Treaty

[33] HESSELINK, M. W. Common Frame of Reference & Social Justice. In *European Review of Contract Law.* 2008, vol. 4, no. 3, p. 264–265.

[34] JANČO, M. In JANČO, M., JURČOVÁ, M., NOVOTNÁ, M. et al. *Európske súkromné právo*. Bratislava: Euroiuris, 2012, p. 164.

[35] Act No. 40/1964 Coll., the Civil Code.

[36] The Statement of Reasons is available at: <http://www.justice.gov.sk/Stranky/Ministerstvo/Aktuality-obcianskeho-zakonnika.aspx>.

[37] HESSELINK, M. W. Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive. In *European Review of Private Law*. 2010, vol. 18, no. 1, p. 100.

[38] BEJČEK, J. Nekalé obchodní praktiky mezi podnikateli a smluvní svoboda. In *Časopis pro právní vědu a praxi*. 2015, vol. 23, no. 1, p. 4.

on European Union also impact on private law, and affect the interpretation and further development of private law rules,[39] and there is no reason why European private law should not be inspired by these values.[40] In relation to the reference of values in Art. 2 of the Treaty on European Union, Micklitz states that they are not fully specified in the system of law and must be understood as *Leitnorm* without direct legal implications. On the other hand, together with the rights set out in the Charter of Fundamental Rights of the European Union, they can establish the concept of social justice in private law.[41] When examining and defining the value perspective, we determine the course that European private law can take, either by way of unlimited freedom of contract or balancing it with other principles emerging from the values of respect for fundamental human rights, equality or solidarity.

1.2 Argumentation by Principles in the Interpretation of Legal Rules

Števček regards the principles as a means of *"grasping stability in the ever-changing dynamic interaction of legal being and non-being"*,[42] i.e. as certain stability in a rapidly changing world. It should be added, however, that this is not entirely true, as the new one is often introduced through principles while maintaining the same text of a legal regulation. In other words, principles can also be understood as a means of introducing new political or social ideas into law. It is a political or social change which can use principles to alter/amend the law, even without altering/amending specific texts of legal regulations. Indeed, the establishment of socialism required that the legislation be interpreted in accordance with the fundamental principles which the-then society or state was based on. Thus, principle-based argumentation

[39] HESSELINK, M. W. Common Frame of Reference & Social Justice. In *European Review of Contract Law.* 2008, vol. 4, no. 3, p. 258.

[40] HESSELINK, M. W. If You Don't Like our Principles We Have Others. On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New Principles Section in the Draft CFR. In BROWNSWORD, R., MICKLITZ, H. W., NIGLIA, L., WEATHERILL, S. (eds.). *The Foundations of European Private Law*. Oxford: Hart Publishing, 2011, p. 65.

[41] MICKLITZ, H. W. Introduction. In MICKLITZ, H. W. (ed.). *The Many Concepts of Social Justice in European Private Law.* Cheltenham: Edward Elgar Publishing Limited, 2011, p. 39.

[42] ŠTEVČEK, M. Princípy a princípmi chránené hodnoty občianskeho práva v 21. storočí – náčrt formalizovanej metodológie. In *Právny obzor*, 2016, vol. 99, no. 5. Available in the ASPI system.

can be politically abused. Changing the values underlying society will also affect the interpretation and construction of legal regulation texts. Hurdík also agrees with this statement when he points out that **the social dimension of private law can be promoted by changing the perception of principles**.[43] As Melzer states, the reinterpretation of an old law is legitimate when the fundamental nature of the state is being changed, if the change of the state itself was also legitimate. Melzer gives an example with the theory of mediated action of fundamental rights in private law applied in Germany (*Drittwirkung*), specifically by means of general clauses that are referred to as points where fundamental rights were embedded in private law. An interesting fact is that such method was also used during the Nazis' rise to power in Germany.[44] In this respect, we can mention Neumann's opinion on the subject of the material core of the constitution: *"The concept itself is, figuratively speaking, promiscuous. Although the idea that there is some kind of immutable (value) core in the constitution, i.e. the most essential of the essential, may be appealing, it is important to realise that every ideology, including totalitarian, is very fond of referring to the same safeguard. Above all, the key is an opportunity seized to find principles that suit a situation."*[45]

The principles are therefore an important tool used in the interpretation of legal rules. It is such interpretation through which principles apply to specific legal relationships. Lazzerini also sees the significance of principles in the interpretation of legal rules, as well as filling gaps in law.[46] Melzer also notes that argumentation by legal principles is used not only in the interpretation of legal rules (objective teleological construction), but also in completing law, which he regards as analogy or teleological reduction.[47]

Argumentation by principles is often used in (recently) preferred teleological interpretation. The teleological construction is often helpful in interpreting national law so that it complies with a directive. In other words, the

[43] HURDÍK, J. Sociální normy soukromého práva a jejich místo ve struktuře soukromého práva. In *Právny obzor*, 2018, vol. 101, no. 5. Available in the ASPI system.

[44] MELZER, F. *Metodologie nalézání práva. Úvod do právní argumentace.* 2nd edition. Prague: C. H. Beck, 2011, p. 157 and 158.

[45] NEUMANN, J. Kritické reflexie materiálneho jadra ústavy. In *Právny obzor*, 2018, vol. 101, no. 4. Available in the ASPI system.

[46] LAZZERINI, N. "Please, Handle with Care!" – Some Considerations on the Approach of the European Court of Justice to the Direct Effect of General Principles of European Union Law. In PINESCHI, L. (ed.). *General Principles of Law – The Role of the Judiciary*. Cham: Springer, 2015, p. 165.

[47] MELZER, F. *Metodologie nalézání práva. Úvod do právní argumentace.* 2nd edition. Prague: C. H. Beck, 2011, p. 56.

teleological construction is closely related to the euro-conform interpretation, since recognised interpretation methods must be used in the euro-conform interpretation of national laws so that the final content of the legal rule (after its interpretation) corresponds to the objectives (purpose) of the directive. As stated by the Constitutional Court of the Slovak Republic in its decision under ref. no. III. ÚS 666/2016: *"For the application practice of national public authorities entrusted with the power to decide in individual cases, it means that even though the stability of legal relations and legal certainty justifiably require to remain based on legal concepts developed prior to accession to the European Union, in respect of the sphere of regulation by the EU lawmaker, it is necessary to confront it with the national legislator's regulatory ideas and, if a deviation is found, to make every effort to favour the goal embodied in the legally binding acts of the European Union."*

With regard to the teleological method of interpretation, this mainly means objective teleological construction, i.e. an interpretation according to the social purpose of a legal rule. We also know subjective teleological construction, which examines the legislator's intent in adopting a legal rule (the so-called *original intent*[48]). Since social conditions are not invariable, the legislator's intent need not correspond to current reality, thus such intent may be irrelevant after these conditions change.[49] For example, the requirement to use a teleological method of interpretation is also explicitly referred to in Art. 3(2) of the Civil Litigation Code,[50] i.e. that we should primarily rely on the linguistic method of interpretation, but also that no one can invoke the words and sentences of the Civil Litigation Code against their purpose and meaning. **Teleological construction can also be understood as a certain penetration of natural-law approaches into law.**

The decision of the Constitutional Court of the Slovak Republic, ref. no. III. ÚS 72/2010 is also often quoted as follows: *"There is no doubt that the interpretation and application of the provisions of legal regulations must be based on their exact wording. However, a court is not fully bound by the exact wording of a statutory provision. A court may, or even must, deviate from it (the ex-*

[48] PROCHÁZKA, R. In PROCHÁZKA, R., KÁČER, M. *Teória práva.* Prague: C. H. Beck, 2013, p. 240.

[49] See, for example, ŠTEVČEK, M. In ŠTEVČEK, M., FICOVÁ, S., BARICOVÁ, J., MESIARKINOVÁ, S., BAJÁNKOVÁ, J., TOMAŠOVIČ, M. et al. *Civilný sporový poriadok. Komentár.* Prague: C. H. Beck, 2016, p. 34–35 or MELZER, F. *Metodologie nalézání práva. Úvod do právní argumentace.* 2nd edition. Prague: C. H. Beck, 2011, p. 124–125, 153 et seq.

[50] Act No. 160/2015 Coll., the Civil Litigation Code, as amended.

act wording of a legal text) where required, for serious reasons, by the purpose of the law, a systematic link or a requirement of constitutionally consistent interpretation of laws and other generally binding legal regulations (Article 152(4) of the Constitution). Of course, in such cases a court must also avoid arbitrariness and base its interpretation of the legal rule on rational argumentation." As regards the objective teleological method, we can have some doubts as to whether or not there is a risk of arbitrariness on the part of judges upon use of this method, whether or not this method contributes to the unpredictability of a court's decisions, etc. What is the social purpose of a particular legal rule, where can it be found? There are indeed different (often conflicting) interests in society (individual, collective, society-wide). Procházka also states that the purpose of a legal rule is often disputed, and that this is a reason why judicial decisions are rarely accepted unconditionally.[51] In addition, it is true that legal principles are not explicitly expressed in the text of a legal regulation; there are a number of such principles which need to be measured. It should also be added that every judge applying a legal rule to specific findings of fact is influenced by so-called "pre-understanding", which is a natural unavoidable trait. This includes the gained knowledge, experience and value attitudes of a judge or other interpreting person which are, at least subconsciously, transferred to determining the content of (explaining) a legal regulation text.

Melzer points out that when examining the purpose of a legal rule, it is necessary to take into account what purpose is assigned to such legal rule by an informed recipient of the rule, or to focus on what purpose would be pursued by a rational legislator knowing the existing state of the world and applicable law upon applying such legal rule.[52] Števček rightly states that a rational legislator is primarily aware of the limits of his rationality and is not objectively able to regulate everything in society. So according to Števček such a rational (sensible) legislator should create scope for allowing the application and interpretation of law to complete his "irrationality" by reasonable interpretation.[53] Objective teleological construction and argumentation with principles linked to value argumentation can give a general legal rule

[51] PROCHÁZKA, R. In PROCHÁZKA, R., KÁČER, M. *Teória práva.* Prague: C. H. Beck, 2013, p. 241.

[52] MELZER, F. *Metodologie nalézání práva. Úvod do právní argumentace.* 2nd edition. Prague: C. H. Beck, 2011, p. 161–162.

[53] ŠTEVČEK, M. Princípy a princípmi chránené hodnoty občianskeho práva v 21. storočí – náčrt formalizovanej metodológie. In *Právny obzor*, 2016, vol. 99, no. 5. Available in the ASPI system.

a meaning corresponding to the specific circumstances of each case (without general mechanical judgement). **Objective teleological construction also allows the applicable law to be adapted (adjusted) to changing social conditions, without the normative text being amended by the legislator.** On the other hand, **objective teleological construction and argumentation by principles are also appropriate when a legislator's approach is too casuistic**, however, in our opinion, there is a greater risk of unpredictability of judicial decisions or arbitrariness. EU law introduces the casuistic approach into our system of law (especially in consumer protection). Here we should mention Holländer, who talks about the deconstruction of law due to continuing legislative optimism, claiming that every social problem can be solved by adopting a legal rule. As a result, more and more casuistic legal rules can be found in law, which paradoxically leads to greater demands on decision-making by the judiciary, as the casuistic approach to law-making entails the virus of its incompleteness. Holländer also highlights the excessive dynamics of law, which does not enable gradual awareness of its content, meaning and purpose, and inevitably results in pressure on its authoritative interpretation and hence completion by courts.[54]

In relation to interpretation that uses legal principles, or even the values of the rule of law as such, it is necessary to add that the text of legislation should not only be general and relatively brief, but also as clear as possible for recipients, while providing as accurate information on content as possible. In this regard, Csach's words seem to be apt in his criticism of the changed definition of mandatory effect in the draft amendment to the Civil Code, where he says: *"Appropriate legal regulations can be distinguished in that they provide the recipient with the most accurate information on their contents and expected application, while taking into account the formal and material consistency of the system of law. In addition, legislation of genuine quality is generally elegant in terms of formulation and contains a deeper philosophical message... Although law is a kind of art, we should not forget about honest craftsmanship specifically in the law-making process."*[55] Frequent and boundless argumentation by principles or values may hinder rather than help, and thus have a sig-

[54] See HÖLLANDER, P. Otevřená textura práva a soudcovská tvorba práva plynoucí z neurčitosti normativních premis. In PROCHÁZKA, R., KÁČER, M. *De arte boni et aequi. Pocta k životnému jubileu Alexandry Krskovej.* Trnava: Typi Universitatis Tyrnaviensis, 2012, p. 202 et seq.

[55] CSACH, K. Vymedzenie kogentnosti pravidiel súkromného práva v návrhu novelizácie Občianskeho zákonníka. In *Súkromné právo*, 2018, vol. IV, no. 6, p. 224.

nificant impact on the principle of legal certainty and legitimate expectations of recipients of legal rules. **The preference for objective teleological construction cannot mean the renunciation of high-quality law-making, i.e. high-quality linguistic formulation of a legal regulation text.**

1.3 Euro-conform interpretation or direct horizontal effect of directives or even fundamental rights?

Králik and Karas argue that directives in horizontal relationships (between private individuals) are generally not given a direct effect by the Court of Justice of the European Union, since the directive *per se* cannot impose obligations on individuals as it is only binding on Member States.[56] But on the other hand, they stress that the Court of Justice of the European Union assigns an indirect effect to directives in horizontal relationships, i.e. that national law needs to be construed in the light of the wording and objectives of the directive.[57] The indirect effect of directives in horizontal relationships (through euro-conform interpretation) is still based on the EU judicial authority's judgement in the *Van Colson and Kamann* case from the 1980s.[58]

The requirement to apply the indirect effect of directives, i.e. the national authorities' obligation to construe national law in a euro-conform way (in conformity with the objectives of directives) was highlighted by the Court of Justice of the European Union in numerous decisions. We can also mention the *OSA* case,[59] which involved a dispute between a collecting society managing copyright in musical works and a health spa establishment with regard to the payment of royalties for making television and radio broadcasts available in rooms of the spa establishment. The Court of Justice of the European Union adjudicated that Section 23 of the Czech Copyright Act[60] is not in accordance with the Directive on the harmonisation of certain aspects of copyright and related rights in the information society.[61] Pursuant to Section 23 of

[56] KARAS, V., KRÁLIK, A. *Európske právo*. 2nd edition. Bratislava: Iura Edition, 2007, p. 166–167. Reference can be made here to the judgement of the Court of Justice of the European Union in Case C-152/84, *Marshall*.

[57] Ibid., p. 169–170.

[58] Judgement of the Court of Justice of the European Union in Case 14/83, *Van Colson and Kamann*.

[59] Judgement of the Court of Justice of the European Union in Case C-351/12, *OSA*.

[60] Act No. 121/2000 Coll.

[61] Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society.

the Czech Copyright Act, operation of the radio or television transmission of a work does not mean making the work available to patients during the provision of healthcare in healthcare facilities. Although the Court of Justice of the European Union clearly stated in the second operative part of its judgement that the directive cannot be relied upon by the collecting society managing copyright in a dispute between individuals, however, the national court is required *"to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive."* Also in the *Dominguez* case, it stated that the national court is required to apply the interpretation methods recognised by domestic law in order to bring the application of the law in question into line with the directive, thus ensuring that the directive is fully effective.[62]

However, in the aforementioned publication from 2007, Karas and Králik state that some decisions by the Court of Justice of the European Union gave the directive a direct effect in horizontal relationships, namely where the text of the directive is sufficiently definite and specific.[63] For example, in the *Panagis Pafitis* case, before the national court the plaintiff was claiming invalidity of the increased registered capital of the company pursuant to the Presidential Decree, since such increase was without a decision of the general meeting. The European Court of Justice considered the Presidential Decree inconsistent and incompatible with Directive 77/91/EEC,[64] which required the general meeting to decide on any increase in the capital.

Fekete rejects the direct horizontal effect of the directives, and criticises the decision of the Constitutional Court of the Slovak Republic, ref. no. III. ÚS 666/2016, in which the court, in the matter of the assessment of the bereaved persons' claims to compensation for non-material damage against

[62] Judgement of the Court of Justice of the European Union in Case C-282/10, *Dominguez*. Cf. Judgement of the Court of Justice of the European Union in Joined Cases C-397/01 to C-403/01, *Pfeiffer and others*, as well as Judgement of the Court of Justice of the European Union in Case C-32/12, *Duarte Hueros*.

[63] KARAS, V., KRÁLIK, A. *Európske právo*. 2nd edition. Bratislava: Iura Edition, 2007, p. 170–172. The authors of this publication refer to the judgements of the Court of Justice of the European Union in Case C-441/93, *Panagis Pafitis*, or in Case C-129/94, *Ruiz Bernáldez*.

[64] The Second Council Directive 77/91/EEC of 13 December 1976 on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

commercial insurance companies after the death of a victim of a traffic accident, stated that the concept of damage to health used in the Act on Compulsory Contractual Insurance against Civil Liability in Respect of the Use of Motor Vehicles also included[65] non-material damage of the bereaved,[66] and that it was of the opinion that such conclusion could be supported on the basis of the indirect horizontal effect of the directives.[67] Fekete states that in the aforementioned decision, the Constitutional Court of the Slovak Republic failed to use standard methods of interpretation of a legal text, and that this is not the indirect horizontal effect of directives, since such interpretation by the Constitutional Court of the Slovak Republic is no longer *contra verba legis*, but explicitly *contra legem*. As further outlined by Fekete: *"Claims for compensation for damage and claims for compensation for non-material damage have different preconditions for occurrence; these claims vary in the manner and extent of redress (e.g. compensation for non-material damage in money is preceded by moral satisfaction); they are proved and barred in a different way."*[68] It should be noted that the Court of Justice of the European Union states in its judgement in the *Haasová* case[69] that the applicable directives relating to insurance against civil liability in respect of the use of a motor vehicle must be interpreted as meaning that compulsory insurance against civil liability in respect of the use of a motor vehicles must cover compensation for non-material damage suffered by the next of kin of the deceased victims of a road traffic accident, in so far as such compensation is provided for as part of the civil liability of the insured party under the national law. As

[65] Act No. 381/2001 Coll. on Compulsory Contractual Insurance against Civil Liability in Respect of the Use of Motor Vehicles, as amended.

[66] FEKETE, I. Právne rámce eurokonformného výkladu vo svetle niektorých rozhodnutí Ústavného súdu SR a Najvyššieho súdu SR. In *Súkromné právo*, 2018, vol. IV, no. 4. Available in the ASPI system.

[67] These include Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability; Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005; and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.

[68] FEKETE, I. Právne rámce eurokonformného výkladu vo svetle niektorých rozhodnutí Ústavného súdu SR a Najvyššieho súdu SR. In *Súkromné právo*, 2018, vol. IV, no. 4. Available in the ASPI system.

[69] Judgement of the Court of Justice of the European Union in Case C-22/12, *Haasová*.

Fekete argues, euro-conform interpretation cannot be interpretation *contra legem*,[70] and the other limits of this interpretation are mainly the principle of legal certainty, the prohibition of retroactivity,[71] as well as usual methods of interpretation. In other words, interpretation cannot mean an amendment to the national law.[72]

The Court of Justice of the European Union sees a relatively wide range of possibilities of euro-conform interpretation of national law, while requiring the national court to take into account national law as a whole (i.e. not only those provisions implementing the directive),[73] hence this interpretation may also be directed against the wording of the law, but on the other hand, it perceives that this interpretation cannot be illegal.[74] After all, it would no longer be an interpretation of the law. Although it should be noted that the boundary between the cases when it still concerns an interpretation (including completion of law-making), and when the court directly makes new law, might be very marginal.

By contrast, or rather moreover, the Court of Justice of the European Union exceptionally awarded a direct horizontal effect not only to directives, but also to fundamental rights.[75] However, the indirect effect of fundamental rights is generally recognised in private law relationships. In this case, we are referring to the constitutionalization of private law or "shine-through" effect of fundamental human rights and freedoms. In this respect, we can point to the decision of the Constitutional Court of the Czech Republic, ref. no. I. ÚS 185/04: "*The function of courts and the judiciary in general is to protect the rights of an individual, including fundamental rights in the material rule of law. All fundamental rights are not always directly enforceable with an immediate effect on an individual. In some cases, their effect is only indirect through the individual rules of simple law, so that they 'shine' through the simple law. This is the case in horizontal relationships – relationships that are*

[70] Here it is necessary to distinguish between interpretation *contra verba legis* and *contra legem*.

[71] Judgement of the Court of Justice of the European Union in Case C-105/03, *Pupino*.

[72] FEKETE, I. Právne rámce eurokonformného výkladu vo svetle niektorých rozhodnutí Ústavného súdu SR a Najvyššieho súdu SR. In *Súkromné právo*, 2018, vol. IV, no. 4. Available in the ASPI system.

[73] Judgement of the Court of Justice of the European Union in Joined Cases C-397/01 to 403/01, *Pfeiffer and others*.

[74] Judgement of the Court of Justice of the European Union in Case C-105/03, *Pupino*.

[75] Judgement of the Court of Justice of the European Union in Case C-144/04, *Mangold*; Judgement of the Court of Justice of the European Union in Case C-555/07, *Kücükdeveci.*

not based on superiority and subordination, i.e. relationships in which parties thereto are equal. Therefore, when interpreting or applying simple law to such relationships, the courts are required to carefully consider such 'shine-through' effect and take account thereof so that they simultaneously fulfil their obligation to protect rights at the level of simple law as well as fundamental rights."[76] After all, in 1958 the German Constitutional Court held in *Lüth* case[77] that constitutional rights (the case involved freedom of speech) must also be taken into account in disputes of a civil nature, or even in settlement of disputes stemming from other legal sectors or, in other words, fundamental rights protect in the first instance citizens against state, but this also concerns principles that apply throughout the legal system. We use the foregoing in constitutionally-conform interpretation. This constitutionally-conform interpretation also has an impact on euro-conform interpretation, as the order of methodological equality of EU law applies here,[78] i.e. where national law allows a particular regulation to be completed by means of constitutionally-conform interpretation, EU law must also apply in this way.

In addressing private law issues, the Court of Justice of the European Union can rely on a broader context and point to values affecting private law as well, and since the EU judicial system is not differentiated, it can also directly award a certain level of constitutional background to private law. In addition, the Charter of Fundamental Rights of the European Union has become part of primary EU law following the adoption of the Lisbon Treaty as of 1 December 2009. As Mazák states, the Charter of Fundamental Rights of the European Union has become a significant interpretative guideline, while providing the Court of Justice of the European Union with a source of general legal principles.[79] But with regard to our national environment, namely the decision-making of the Constitutional Court of the Slovak Republic, Mazák notes that the question of applicability of the Charter of Fundamental Rights

[76] Cf. Ruling of the Constitutional Court of the Slovak Republic, ref. no. II. ÚS 13/01.

[77] Judgement of the German Federal Constitutional Court of 15 January 1958, BverfGE 7, 198; 1 BvR 400/51. The facts of the case were based on Mr Lüth (a German writer and director) calling for a boycott against (discouraged the public from) Veit Harlan's film in view of the director's connection with the Third Reich.

[78] See MELZER, F. *Metodologie nalézání práva. Úvod do právní argumentace.* 2nd edition. Prague: C. H. Beck, 2011, p. 241–242 and the decision-making practice of the Court of Justice of the European Union specified therein.

[79] MAZÁK, J. Charta základných práv Európskej únie v doktríne Ústavného súdu Slovenskej republiky: prvé výsledky a mierne hodnotenie. In *Studia Iuridica Cassoviensia*, 2013, no. 1, p. 10. Available on: <http://sic.pravo.upjs.sk/files/2_mazak_-_charta_zp_v_doktrine_ussr.pdf>.

of the European Union is still a tangential issue.[80] Hurdík also mentions that there is currently a trend in Europe, which promotes the horizontalisation of fundamental rights, with the Court of Justice of the European Union and the Charter of Fundamental Rights of the European Union contributing to this.[81] It should be added that even before the Charter of Fundamental Rights of the European Union was adopted, the Court of Justice of the European Union had sought support in the constitutions of the Member States and international documents on fundamental rights.[82]

Moreover, as the fundamental human rights 'shine through' and also apply to private law disputes through euro-interpretation, the following decisions of the EU judicial authority can be highlighted. In *Netlog* case, the Court of Justice ruled in a dispute between a management company representing authors, composers and publishers of musical works (SABAM) and a social network operator, when SABAM demanded before the national court that the operator be required to establish a system for filtering the social network users' files shared with the public, with a view to blocking them due to SABAM's intellectual property rights to such files. In its judgement, the Court stated that it was necessary to strike a fair balance between the protection of the right to intellectual property (Article 17(2) of the Charter of Fundamental Rights of the European Union), on the one hand, and the social network operator's right to freedom to conduct business (Art. 16 of the Charter of Fundamental Rights of the European Union), the social network users' right to the protection of personal data and their freedom to receive or impart information, on the other (Articles 8 and 11 of the Charter of Fundamental Rights of the European Union).[83] Similarly, in the *Google Spain* case, the court took into account the right to respect for private and family life and the right to the protection of personal data (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union), where it was possible to use the *Google* search engine to find no longer relevant information

[80] Ibid., p. 19.

[81] HURDÍK, J. Prolínání kategorií základních (ústavních) práv a zásad soukromého práva. In *Právnické listy*, 2017, no. 2, p. 24. Available on: <https://fpr.zcu.cz/export/sites/fpr/research/pravnicke-listy/2017/Pravnicke_listy_02_17-04-Prolinani-kategorii-zakladnich-ustavnich-prav.pdf>.

[82] KARAS, V., KRÁLIK, A. *Európske právo*. 2nd edition. Bratislava: Iura Edition, 2007, p. 153.

[83] Judgement of the Court of Justice of the European Union in Case C-360/10, *SABAM v Netlog*.

about Mr González, relating to attachment proceedings for the recovery of social security debts.[84]

On the other hand, the direct horizontal effect of fundamental rights or the direct effect of primary EU law in private law relationships were unequivocally supported by the Court of Justice of the European Union in the *Mangold*[85] and *Kücükdeveci* cases,[86] where the court took an exceptional approach posing many obstacles and its justification can be questioned. In the two cases above, the European judicial authority was of the opinion that the general principle of Union law could establish a direct effect in horizontal relationships (this concerned the principle of non-discrimination on the grounds of age). In the *Mangold* case, the Court of Justice declared a national law that allowed the repeated conclusion of fixed-term contracts with all workers who had reached the age of 52 to be contrary to EU law, and in the *Kücükdeveci* case, it declared a national law providing for that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal to be contrary to EU law. In the operative part of its judgement in the *Mangold* case, the Court of Justice of the European Union stated that *"it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired."* In the *Kücükdeveci* case, the Court of Justice of the European Union stated that *"it is for the national court, hearing proceedings between individuals to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle."* We can agree with Lazzerini, who draws attention to the fact that general principles need to be treated with care and responsibility, considering that the direct effect of the general principles of EU law is problematic in terms of requirements for their clarity, specificity and uncondi-

[84] Judgement of the Court of Justice of the European Union in Case C-131/12, *Google Spain and Google*.

[85] Judgement of the Court of Justice of the European Union in Case C-144/04, *Mangold.*

[86] Judgement of the Court of Justice of the European Union in Case C-555/07, *Kücükdeveci.*

tional nature.[87] In the *Mangold* case, the period prescribed for the transposition of the directive applicable to the national legislator has not yet expired, however, the Court of Justice of the European Union stated that such fact was not in itself decisive, since the Member State must, even within the period prescribed for transposition of the directive, refrain from taking any measures liable to compromise the attainment of the result prescribed by that directive, but especially that the national law was contrary to the general principle of non-discrimination on grounds of age. In the *Kücükdeveci* case, the approach taken by the Court of Justice of the European Union may not have been so active, as the period prescribed for transposition of the directive has already expired in this case, and therefore, in our opinion, it did not have to directly apply the principle of non-discrimination based on primary EU law and could have stated a contradiction between the national law and the directive establishing a general framework for equal treatment in employment and occupation. Such an approach was selected by the Court of Justice of the European Union in many other cases, where it pronounced inconsistency between the national law and secondary EU law without applying constitutional principles, but mainly without directly commenting on the consequences of the inconsistent national law. Hurdík points out that the judgements of the Court of Justice of the European Union in the *Mangold* and the *Kücükdeveci* cases mean a breakthrough in the concepts of and boundaries between public and private law. After all, such judgements are crucial to the perception of the Charter of Fundamental Rights of the European Union as an integral part of EU law.[88]

On the other hand, we can look at this issue from the perspective that it is not a direct horizontal effect, but only an indirect one, where a national court is required to interpret the national law in a way that makes it consistent with EU law and entitled to use all available interpretation methods to the extent that the interpretation is not *contra legem*. In these cases, we come to a teleological reduction, an interpretation against the words of the law, but it need not be an illegal interpretation. As regards the activeness of the Court of Justice of the European Union in the *Mangold* and *Kücükdeveci* cases, we also

[87] LAZZERINI, N. "Please, Handle with Care!" – Some Considerations on the Approach of the European Court of Justice to the Direct Effect of General Principles of European Union Law. In PINESCHI, L. (ed.). *General Principles of Law – The Role of the Judiciary*. Cham: Springer, 2015, p. 146, 155.

[88] HURDÍK, J. Sociální normy soukromého práva a jejich místo ve struktuře soukromého práva. In *Právny obzor*, 2018, vol. 101, no. 5. Available in the ASPI system.

need to consider the fact that the principle of non-discrimination is regarded as one of the guiding principles deeply rooted in European law.

The foregoing nevertheless implies that in most cases the Court of Justice of the European Union is not so active as in the *Mangold* and *Kücükdeveci* cases, which were the exception rather than the rule. This is also confirmed by the *Association de médiation sociale* case,[89] in which the Court of Justice of the European Union ruled that Article 27 of the Charter of Fundamental Rights of the European Union concerning workers' right to information and consultation within the undertaking could not be invoked in a dispute between individuals, although national law was contrary to such article of the Charter in conjunction with the directive establishing a general framework for informing and consulting employees in the European Community.[90] In its justification, the Court of Justice of the European Union also stated that the fact did not exclude the individual's claim for damages against the state (a direct vertical effect of the directive). As stated in paragraph 47 of this judgement, this case differs from the *Kücükdeveci* case in that the principle of non-discrimination on the grounds of age laid down in Article 21(1) of the Charter of Fundamental Rights of the European Union is sufficient in itself to confer on individuals an individual right which they may invoke as such, however, Art. 27 of the Charter refers to the concretisation of the article by Union law or national law.

Drawing attention to fundamental human rights reflects the value orientation of the process of law application, as well as the hierarchisation of legal sources. **The constitutionalization of private law through indirect effect promotes the value application of law, and is an expression of non-positivist legal thinking.** However, a genuine legal revolution would be to apply the direct horizontal effect of fundamental rights, as the Court of Justice adjudicated in the *Mangold* and *Kücükdeveci* cases, which would also mean giving considerable scope for judicial law-making (or legal findings by courts could only be discussed in a very extensive sense). However, the cases of direct horizontal effect of fundamental rights seem to be the exception rather than the rule. Concerning the recognition (award) of direct horizontal effect, this is also very problematic with regard to Art. 6(1) of the Treaty on European Union and Art. 51 of the Charter of Fundamental Rights of the European

[89] Judgement of the Court of Justice of the European Union in Case C-176/12, *Association de médiation sociale.*

[90] Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community.

Union, under which the Charter does not extend the EU powers, as well as with regard to Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, pursuant to which the Charter of Fundamental Rights of the European Union does not establish a horizontal effect of rights.[91] Jančo also argues that the direct application of the general principle which, in itself, does not meet the conditions for direct effect and is specified by the provisions of the directive, needs to be rejected due to the application of Article 51 of the Charter of Fundamental Rights of the European Union and the violation of the principle of legal certainty. Furthermore, in relation to the direct horizontal effect of fundamental rights, he points out that fundamental rights are abstract and do not provide a sufficient solution for private law relationships, while negating the relationship of speciality and subsidiarity (*lex specialis derogat legi generali*) between general regulations on fundamental rights and special regulations on private law relationships. Jančo considers that the importance of fundamental rights for private law need not be overestimated, but acknowledges that they have at least an indirect horizontal effect in most Member States, which he considers admissible.[92] We fully go along with his opinion, and believe that **the direct horizontal effect of fundamental rights should be admitted very rarely**.[93] Consequently, the constitutionalization of private law suggests that European private law cannot be perceived in isolation from the question of constitutional values (or of constitutional principles in a narrower sense). There is no reason not to apply these values in private law as well. As stated in the Manifesto: *"The principles of social justice in European contract law must be consistent with the constitutional principles recognised in*

[91] Under Art. 1 of the Protocol: *"1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom, except in so far as Poland or the United Kingdom has provided for such rights in its national law."*

[92] JANČO, M., JURČOVÁ, M., NOVOTNÁ, M. et al. *Európske súkromné právo*. Bratislava: Euroiuris, 2012. p. 166 and 172–174.

[93] Attention should also be focused on Art. II. – 7:301 of the Draft Common Frame of Reference as one of the most significant rules of European private law *de lege ferenda*, under which contracts violating the fundamental principles of the rights of EU Member States may be invalid if the invalidity is required for the effect of the principle.

Europe."[94] Similarly, pursuant to Art. I. – 1:102 par. 2 of the Draft Common Frame of Reference, the provisions contained therein are to be interpreted in accordance with instruments guaranteeing human rights, fundamental freedoms and other applicable constitutional law.

According to Dulak: *"If we agree with the notion that constitutional rights and private law are no longer in isolation from each other, we need to answer the question of what level of influence on private law by constitutional law is considered acceptable. Cases with no supersedure of private law rules refer to complementarity, where influence on private law rules may be a spontaneous or obligatory inspiration. However, if it is recognised that fundamental rights are to have a direct binding effect on private law entities, this is subordination. A note on private law as a servant of fundamental rights would clearly relate to such an approach.*"[95] In our opinion, there is a need to sensitively assess the cases where it is necessary to recognise (award) a direct effect to fundamental rights in private law relationships. These should certainly involve exceptional cases, as **in most cases subconstitutional law may be interpreted in accordance with the "shine-through" effect of fundamental rights (e.g. through general clauses or general terms, such as good morals), so there may be no direct horizontal effect**. For example, a situation can be envisaged whereby after the end of an auction for a house/flat, the buyer would claim the property's vacating, but the buyer's claim for vacation would be rejected on the grounds that given the particular circumstances of the case, the exercise of the buyer's right is contrary to good morals. Specifically that the financial situation of the defendant(s) does not allow them to find another dwelling (of lower quality but still guaranteeing decent housing), i.e. the courts would measure the plaintiff's title against the defendant's right to housing.[96] This is an indirect horizontal effect of fundamental human rights in the sense that fundamental rights not only serve the purpose of interpretation and further

[94] STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW. Social Justice in European Contract Law: a Manifesto. In *European Law Journal*. 2004, vol. 10, no. 6, p. 667.

[95] DULAK, A. Súkromnoprávna autonómia a jej limity (an inaugural lecture). In *Právny obzor*, 2018, vol. 101, no. 1. Available in the ASPI system.

[96] See also the judgement of the Supreme Court of the Czech Republic, ref. no. 22 Cdo 1630/2002.

development of private law rules, but are also effective through general institutes, such as good faith or good morals.[97]

The direct horizontal effect of fundamental human rights will often directly imply law-making (not its completion) by a court, so we think that it can come under consideration only in exceptional cases which would otherwise involve clear injustice, and the relevant rules of subconstitutional law could not be construed by available interpretation methods so that a just and fair solution is achieved in a particular case. A short time ago, we critically commented on the ruling of the Supreme Court of the Slovak Republic, ref. no. 6 Cdo 224/2016, which was eventually published in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic (R 68/2018). In such ruling, the Supreme Court of the Slovak Republic allowed an action for the annulment of the parental affirmative declaration, whereby, in our opinion, it disrupted the valid regime of legal presumptions of paternity under the Act on Family.[98] The Supreme Court of the Slovak Republic intervened here in the concept of legal presumptions of paternity, where it cannot address the issue comprehensively (since it is not a legislator), thus significantly interfering with the principle of legal certainty. When, by virtue of such ruling of the Supreme Court of the Slovak Republic, a third party (the putative biological father) can seek annulment of the affirmative declaration, further questions arise – why can't the putative biological father claim his right to family and private life in the first presumption of paternity?; what is the time limit for seeking annulment of the parental affirmative declaration in the second presumption of paternity?; can the annulment of such affirmative declaration also be sought by the legitimate father after the expiry of the period for denying paternity?; how, including on the basis of a judgement upholding the action for annulment of the parental affirmative declaration, can the putative biological father claim determination of his paternity, when even Section 109 of the Civil Non-Litigation Code[99] respects the succession of legal presumptions of paternity? In our already-published opinion, this is the case of law-making by the Supreme Court of the Slovak

[97] See also LURGER, B. The "Social" Side of Contract Law and the New Principle of Regard and Fairness. In HARTKAMP, S. A. et al. (eds.). *Towards a European Civil Code*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 282.

[98] Act No. 36/2005 Coll. on Family, as amended.

[99] Section 109 of Act No. 161/2015 Coll., the Civil Non-Litigation Code, as amended: "*If, during affiliation proceedings, paternity is determined by a parental affirmative declaration or the child is adopted, the court shall suspend proceedings.*"

Republic, which also justified it by the effect of the putative biological father's right to family and private life. In other words, the legislator was represented here by the Supreme Court of the Slovak Republic.[100]

We are therefore of the opinion that constitutional values and principles cannot be perceived in isolation from private law rules. On the other hand, the direct application of fundamental rights in private law relationships cannot circumvent the requirement for the honest work of an interpreter of the private law rule, which involves the correct use of different interpretation methods coming under consideration in a particular case. Otherwise, there would be considerable unpredictability of judicial decisions, and significant interferences in legal certainty and legitimate expectations of recipients. In this respect, we agree with Hurdík who does not think that fundamental rights should enter private law by way of eliminating barriers between public and private law; he rather holds the view that by entering into private law relationships, fundamental rights change their legal nature in accordance with the private law methodology.[101]

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[100] MASLÁK, M. Glosa k uzneseniu Najvyššieho súdu SR, ref. no. 6 Cdo 224/2016 of 31 October 2017 (R 68/2018). In *Súkromné právo*, 2019, vol. V, no. 1, p. 48–51.

[101] HURDÍK, J. Prolínání kategorií základních (ústavních) práv a zásad soukromého práva. In *Právnické listy*, 2017, no. 2, p. 28. Available on: <https://fpr.zcu.cz/export/sites/fpr/research/pravnicke-listy/2017/Pravnicke_listy_02_17-04-Prolinani-kategorii-zakladnich--ustavnich-prav.pdf>.

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2. INTEGRATION OF RULES WITH SOCIAL FUNCTION INTO THE GENERAL PART OF THE CIVIL CODE

2.1 General Part of the Civil Code as the Basis for Integration of Rules with Social Function

Without reference to the priority identified by *Eliáš* of private law over public law,[102] the general part of the Civil Code can be fairly regarded as the most essential part of the Civil Code. Unlike other parts of the Civil Code, the legislator was probably most confronted with a role to regulate human behaviour in property relations **as generally as possible**. The Civil Code governs the property relations of natural persons and legal entities, property relations between these persons and the state, as well as the relations arising from the right to the protection of persons, unless civil law relations are regulated by other acts. The concept of defining the substantive and personal scope of the Civil Code in its general part [Section 1(2)] implies that **the recipients of a legal rule being of a social nature are not solely the parties to obligation-law relationships**, but these rules serve the purpose of protecting the weaker party in general. Although rules for the protection of the weaker party place the stronger party at a disadvantage, this is a legitimate balance, as the stronger party is stronger in terms of economic strength, knowledge, or bargaining position (cf. Chapter 3.3). If a rule is to have a social function, the rules provided for in the general part of the Civil Code are those that are actually the most appropriate basis for integrating rules with social function. The reason for this is that **the social aspect of rules is mainly aimed at the protection of the weaker party**. The protection objective can be primarily accomplished by way of rules that are **general and mandatory** in nature (cf. Chapters 3.3 and 3.2.1). **The generality, or rather abstractness of rules frees** "courts' hands" in conflicting cases, where the social and protective aspect is

[102] ELIÁŠ, K. Soukromé a veřejné v právním světě. In MASLÁK, M. (ed) *Vybrané otázky implementácie európskych právnych predpisov reglementujúcich zvýšenú ochranu slabšej strany: zborník z cyklu diskusných seminárov uskutočnených v roku 2017 v rámci projektu APVV-14-0061.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2017, p. 32, available on http://publikacie.iuridica.truni.sk/wp-content/uploads/2018/05/Maslak-Zbornik-_WEB.pdf (24/03/2019).

to be manifested for the weaker party in a number of situations that the legislator has not foreseen or could not have foreseen in diversities of life situations. **The generality (abstractness)** of rules contained in the general part of the Civil Code (the "CC"), such as:

- the concept: "performance in gross disproportion"[103] in the event of usury;
- the concept: "legal acts that correspond in their nature to the rational and volitional maturity of the minor's age";[104]
- the concept: "other than a routine matter in handling the property of the represented";[105]
- the concept: "the usual meaning of an act of volition which is expressed in other ways than in words";[106]
- the concept: "distress under clearly disadvantageous conditions";[107]
- the concept: "provisions that cause a considerable imbalance between the rights and obligations of the parties to the detriment of the consumer";[108]
- the concept: "a maximum allowable consideration that can be claimed from the consumer in the provision of funds";[109]
- the concept: "good morals" in the provisions of Sect. 3(1) and Sect. 39 are a typical example of broader terms which, after assessing the circumstances of a particular case, allow justice to be obtained in a particular conflict.

In addition to the general nature of the rules stipulated in the general part of the Civil Code, most rules are **mandatory** in nature (cf. Chapters 3.3 and 3.2.1). In the area of civil law, mandatory rules apply in view of the need to ensure in some cases respect for the objectively justified interests of third parties or public interests. The degree of their legal binding effect implies that their application to civil law relations cannot be superseded, excluded or restricted by another contractual arrangement. Thus, civil law rules of a mandatory nature apply independently of the persons' volition.[110] *Fekete* rightly

[103] Sect. 39a of the CC.
[104] Sect. 9 of the CC.
[105] Sect. 28 of the CC.
[106] Sect. 35(3) of the CC.
[107] Sect. 49 of the CC.
[108] Sect. 53(1) of the CC.
[109] Sect. 53(6) of the CC.
[110] FEKETE, I. *Občiansky zákonník: veľký komentár.* 1st volume. Bratislava: Paneurópska vysoká škola; Žilina: Eurokódex, 2011, p. 96.

notes that mandatory rules especially apply in **the case of the protection of the weaker party's interests**.[111] As an example of this, *Fekete* states the provisions of Sect. 54(1) and (2) of the Civil Code, under which *contractual conditions regulated by a consumer contract may not depart from this act to the detriment of the consumer. In particular, the consumer may not waive his rights conferred upon him by this act or special regulations for the protection of the consumer in advance or otherwise impair his position under the contract*. These provisions lay down a mandatory legal rule, under which contractual arrangements in consumer contracts may not depart from the act to the detriment of the consumer. This applies to those non-mandatory rules that allow parties to a consumer contract to deviate from the act. Using an argument from the contrary (*argumentum a contrario*), *Fekete* concludes that a supplier may deviate from the act in favour of a consumer at any time.

2.2 General Part of the Civil Code: Legal Basis for the Legitimacy of Interference with Freedom of Contract due to the Protection of the Weaker Party

Nature of the rules in the general part of the Civil Code is the **basis for the legitimacy of interference with freedom of contract due to the protection of the weaker party**. It is not a unique and exceptional situation in private law when a public authority legitimately limits a person's freedom of contract in order to protect the consumer: the regulation of the status of minors to whom the CC does not grant full capacity to enter into legal acts is a perfect example.[112] This is because children's rational maturity and ability to understand the consequences of a legal act are reduced. The same applies to adults who are unable to enter into legal acts due to mental disorder or alcohol abuse.[113] Both categories of persons are not legally capable of creating and establishing their volition that would result in a legal act with legal consequences due to the **factual state of their weakness**. Therefore, for the sake of protecting the consumer or the weaker party through its legal orders, as well as **by modifying the fundamental principles of private law**, the legislator evens up the factual inequality (cf. Chapter 1.1).

[111] FEKETE, I. *Občiansky zákonník: veľký komentár.* 1st volume. Bratislava: Paneurópska vysoká škola; Žilina: Eurokódex, 2011, p. 96.
[112] Section 9 of the CC.
[113] Section 10(2) of the CC.

As mentioned above, the **principle of individual autonomy (freedom of will)**[114] is aimed at creating extensive and available opportunities for free economic initiative and other activities corresponding to market economy conditions in a democratic rule of law,[115] where the consumer satisfies his economic needs by realising his freedom to enter into contractual relationships with any person and for any lawful purpose.[116] A German civilian perceives such principle primarily as the non-interference of the rule of law with an individual's free and self-determined will.[117] In relation to freedom of contract, *Flume* alludes precisely to the issue of the relationship between consumer protection and private autonomy. He claims that *"the state should fundamentally stand aside from a contractual relationship between two parties and take a neutral stance in relation to the contract concluded."*[118]

We can agree with *Flume's* opinion only if the parties are aware of what is best for them. Best in the economic or market sense. We agree that the state should stand aside in terms of defining the subject-matter of a contract and its price. The Slovak legislator is also of the same opinion. In the Civil Code, it negatively defines the control activities of courts with regard to the contractual conditions that apply to **the main subject of performance and the adequacy of the price** provided that these contractual conditions are expressed in a specific, clear and comprehensible manner, or where unacceptable conditions have been individually negotiated. The state should not judge the case, i.e. the *"immediate economic reason for entering into a legal relationship"*,[119] which occurs in most civil law relations as being *"fundamentally causal"*.[120]

When we only consider an entity's legal framework for the possibility of concluding a contract, and not at the factual possibility of enjoying the freedom of contract, *Flume's* understanding of the essence of freedom of contract consists in the **formal component (concept) of freedom of contract**.

[114] Cf. VÍTOVÁ, B. *Nepřiměřená ujednání ve spotřebitelských smlouvách*. Olomouc: Iuridicum Olomoucense, 2011, p. 19.

[115] LAZAR, J. et al. *Občianske právo hmotné. [1st vol.]* Bratislava: Iuris Libri, 2018, p. 14.

[116] Cf. TOMANČÁKOVÁ, B. Ekonomické aspekty ochrany spotřebitele. In *Ekonomika management inovace*. 2009, vol.1, no. 1, p. 60–65.

[117] LORENZ, S. *Der Schutz vor dem unerwünschten Vertrag: Eine Untersuchung von Möglichkeiten und Grenzen der Abschlußkontrolle im geltenden Recht*. Munich: Beck, 1997, p. 15.

[118] FLUME, W. *Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band. Das Rechtsgeschäft*. 4th edition. Berlin, 1992, Section 1, marginal note no. 5.

[119] DULAK, A. In LAZAR, J. et al. *Občianske právo hmotné. 1st volume*. Trnava: Iura Edition, 2006, p. 120.

[120] Ibid., p. 120.

A German civilian no longer contents herself only with the formal definition of freedom of contract, because such definition does not correspond to the legislative reality. *Heinrich* requires that *"in addition to the formal recognition of parties' act of volition, it is increasingly necessary to examine whether there is, in fact, individuals' capacity to enter into a contractual relationship through an act of volition in an equivalent and fair manner towards the contractual partner."*[121]

A Czech civilian deems the principle of individual autonomy to be a specific reflection of human freedom and civil liberty in the sphere of private law relationships, enabling persons to establish private law relationships of their own free will.[122] Any unacceptable contract term or unfair business practice towards the consumer is not usually by chance. Such term or practice is prepared intentionally. Acting and conduct of an entrepreneur are based on his voluntary decision.[123]

Concepts, such as **objective adequacy, equivalence and fairness of contractual content,** which are to be an additional condition for the recognition of a contract by law, are increasingly highlighted today.[124] **A material concept of consumer's freedom of contract** guarantees that formally recognised freedom of contract does not serve the purpose of harming or disadvantaging the interests of a person who is realising its own freedom of contract. The material concept of freedom of contract is nothing other than an expression of civil law rules, serving as **a corrective to threatening the unlimited nature of the formal element of freedom of contract**.

In our opinion, freedom of contract is intended to enable both parties to regulate their factual or economic relationships in a free and fair manner. **Freedom and justice**, however, are disappearing in situations where one of the parties takes advantage of superiority over another party. This is the case, for example, when a consumer as a customer trusts a supplier that ordered tailor-made furniture will be delivered within four weeks. The consumer's will is focused on payment for a certain amount for the furniture, which will

[121] HEINRICH, CH. *Formale Freiheit und materiale Gerechtigkeit. Die Grundlagen der Vertragsfreiheit und Vertragskontrole am Beispiel ausgewählter Probleme des Arbeitsrechts*. Tübingen, 2000, p. 171.

[122] HURDÍK, J., LAVICKÝ, P. *Systém zásad soukromého práva*. Brno: Masarykova univerzita, 2010, p. 82–83.

[123] DRGONEC, J. Spotrebiteľské zmluvy v právnom poriadku Slovenskej republiky. In *Justičná revue*. 2007, vol. 59, no. 3, p. 315.

[124] COESTER-WALTJEN, D. Die Inhaltskontrole von Verträgen außerhalb des AGBG. In *Archiv für die civilistische Praxis*. 1990, vol. 190, no. 1–2, p. 1.

be delivered within four weeks from payment of the deposit. Apparently no more and no less has become part of the consumer's will. But if the supplier has incorporated a clause that the supplier may unilaterally extend the delivery time by another month without penalty into the general delivery terms referred to in the contract for work, the consumer would be unpleasantly surprised. The example above is only indicative, and illustrates a relatively inexpensive and harmless case of abuse of freedom of contract for a consumer. But if supremacy was abused in contractual relationships the subject of which is, for example, a consumer's dwelling, it could have significant consequences for the consumer.

2.2.1 Materialisation of Freedom of Contract

Civil law therefore naturally responds to the need to protect the weaker party,[125] even at the cost of pruning back the **formal concept of freedom of contract.** This tendency in civil law in recent decades is also observed by *Canaris*, who describes the **process of materialisation of freedom of contract**. In this process, formal freedom of contract is understood as a fundamental freedom that guarantees the removal of all legal obstacles to its exercise, and material freedom is understood as **factual freedom to make decisions** (tatsächliche Entscheidungsfreiheit).[126] Material freedom is conditioned by a situation where there are no obstacles of factual nature that may lie **in the characteristics of the party itself, namely because of its personal and economic inexperience, lack of information, lack of know-how, imbalance of power, inexperience in trade, or reliance on goods, property or market structure.**[127] If we compare the position of the consumer with that of the supplier, these obstacles exist specifically on the consumer's part. By pointing out the development of contemporary society, even *Hurdík*, whose work is already mentioned in Chapter 1.1, rejects a **purely formal** concept of the principle of equality of parties to private law relationships, and where the position of the parties is imbalanced (typical of consumer-professional relationships), he requires more rights to be conferred and less obligations imposed upon the consumer. He calls for a real balance to be achieved by legally adjusting initial eco-

[125] MÉSZÁROS, P. Zdanlivá vzdelanosť slabšej strany ako dôvod na jej diskrimináciu. In *Diskriminácia v zmluvnom práve.* Trnava: Typi Universitatis Tyrnaviensis, 2015, p. 213–220.

[126] CANARIS, C. W. Wandlungen des Schuldvertragsrechts. Tendenzen zu seiner "Materialisierung". In *Archiv für die civilistische Praxis*. 2000, vol. 200, no. 3–4, p. 273 and 275.

[127] Ibid., p. 277.

nomic, information and other differences.[128] *Medicus* lists three factors that undermine contractual equality: The first factor is **the party's reliance on the conclusion of a contract** (Angewiesenheit auf den Vertragsschluss), when we need to ask whether, in a particular case, the party had the option to refuse the contract or, in other words, whether the party could "presume" not to conclude the contract. The second factor is **the party's financial situation** (Vermögensverhältnisse). The party's financial situation is a decisive criterion, when it should be considered how a possible continuance in the contractual relationship could affect the party in terms of its property. The last factor is **the help of third parties and intellectual faculties of the party** (Hilfen der Partei bei Dritten und Intellektuelle Eigenschaften).[129] Factual freedom to make the decisions described by *Canaris* and the factors mentioned by *Medicus* that undermine the state of contractual equality are being dogmatically clarified and legitimised by legislative changes in Slovakia, concerning the materialisation of freedom of contract in the form of judicial control of the contents of consumer contracts. *Drexl*, who monitors the economic self-determination of the consumer in his work of the same name,[130] does not content himself only with distinguishing between the formal and material understanding of the concept of freedom of contract, but also refers to the correctness of a contract (*Vertragsrichtigkeit des Vertrages*), being derived from material justice (*materiale Gerechtigkeit*).[131] The material justice of a contract makes the contract contractual, because it establishes an exchange relationship of performances that are fundamentally equivalent, and controls the contract in respect of the **balance between the rights and obligations** contained therein. The control of such balance between rights and obligations can be found in Slovak law specifically in the case of the protection of the consumer, when the CC sanctions contractual conditions that cause a significant imbalance between parties' rights and obligations to the detriment of the consumer.

Lurger, whose work is already mentioned in mentioned in Chapter 1.1, finds a model of contractual solidarity (*Das Modell der vertraglichen Solidarität*) based on the principle of contractual equality (*Grundsatz der ver-*

[128] HURDÍK, J., LAVICKÝ, P. *Systém zásad soukromého práva*. Brno: Masarykova univerzita, 2010, p. 120–121.

[129] MEDICUS, D. *Abschied von der Privatautonomie im Schuldrecht? Erscheinungsformen, Gefahren, Abhilfen*. Cologne: O. Schmidt, 1994, p. 20.

[130] DREXL, J. *Die wirtschaftliche Selbstbestimmung des Verbrauchers*. Tübingen, 1998.

[131] Ibid., p. 282.

traglichen Gleichheit), contractual balance (*Grundsatz des vertraglichen Gleichgewicht*) and the principle of contractual solidarity in a narrower sense (*Grundsatz der vertraglichen Solidarität*).[132] She deems them to be the three basic conditions for recognising the validity of a contract without the need to review its content.[133] She understands **contractual equality** as the equality of contractual partners in their initial conditions. She links equality to the material understanding of the concept of freedom of contract, i.e. to the reciprocal, real and independent freedom to decide by an act of volition, resulting in the conclusion of a contract. Lack of equality can lead to incapacity to take advantage of freedom of contract, which, according to *Lurger*, requires *"material corrections of the concept of freedom of contract in both general contract and consumer law (*die Notwendigkeit materialer Korrekturen im Begriff der Vertragsfreiheit*)."*[134] But *Meller-Hannich*, in response to the model of contractual solidarity, questions the need to address the issue of contractual balance on the grounds *that "contractual balance must be taken into account irrespective of the existence of a state of initial inequality (Ungleichgewichtslage), which as such causes various defects in the act of volition requiring its control."*[135] With regard to contractual solidarity in a narrower sense, its function is fulfilled by the material concept of freedom of contract. *Heiderhoff* places the existence of *"a healthy egoism of both parties to act in a legally permissible framework"*[136] on the material concept of freedom of contract.

2.3 Domain of the General Part of the Civil Code: National and European Rules for the Protection of the Consumer and the Weaker Party

2.3.1 Consumer in the State of Contractual Reliance

In the process of drawing up the contract, consumers are also in the state of **weakness and power imbalance** similar to that of minors or mentally ill persons, where such state is not caused by a biological or medical circumstance.

[132] To discuss the rules and principles in private law, cf. Chapter 1.1.

[133] LURGER, B. *Vertragliche Solidarität – Entwicklungschance für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union*. Baden-Baden, 1998, p. 130.

[134] Ibid., p. 132.

[135] HANNICH-MELLER, C. *Verbraucherschutz im Schuldvertragsrecht. Private Freiheit und staatliche Ordnung*, Tübingen, 2005, p. 13.

[136] HEIDERHOFF, B. *Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts. Insbesondere zur Reichweite europäischer Auslegung*, München 2004, p. 359.

The consumer's situation becomes disadvantageous once the wording/text of the consumer contract **conditions is prepared (formulated) and drawn up by the supplier in advance**. The supplier prepares the content of the consumer's act of volition, which may be far removed from what the consumer actually wanted. In the case of consumer contracts, it is therefore a state of **so-called contractual reliance**. Reliance on the form and wording of general terms and conditions prepared by the supplier and which become part of the consumer contracts.[137] The wording of contract terms and conditions may not **express the consumer's true will (real volition) at all**. The theory of legal acts at their commencement assumes that **there is a correspondence between the party's true will and its materialisation by means of the act of volition**.

However, the reverse is true in most cases. In our opinion, the consumer's volition is often limited to **knowing the subject of performance and its price at the most**.[138] And only if the consumer's volition is not negatively influenced by an unfair practice[139] or misleading advertising.[140] The consumer **finds no certainty even in the mandatory provisions of contract law** in the Civil Code, which should serve the purpose of regulating balanced and fair relationships. In fact, the Civil Code leaves it to the freedom of the parties to agree on non-essential matters of the contract by way of departure from the law.

Although the state of true **will exists in the process of drawing up a consumer contract, it is mostly on the supplier's part**. As a rule, the supplier employs marketing, legal and economic staff who perfectly (pre-)formulate the supplier's true will, taking a form of non-transparent and often incomprehensible general terms and conditions to the consumer. When formulating, the supplier's interest is naturally primarily taken into account, which the employees preparing the wording of the general terms and conditions are financially and fundamentally dependent on. The terms and conditions are

[137] CSACH, K. *Štandardné zmluvy*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2009, p. 10.

[138] RAKOVÁ, K. Prieskum ceny v zmluvách o spotrebiteľských úveroch. In ŠTEFANKO, J. (ed.) *Prostriedky nápravy v zmluvnom práve [online]*. Trnava: Právnická fakulta TU, 2017, p. 95, 97. Available on: http://publikacie.iuridica.truni.sk/wp-content/uploads/2017/07/prostriedky-napravy-v-zmluvnom-prave.pdf, p. 103.

[139] ZAVADOVÁ, D. Generálne klauzuly v procese aplikácie práva. In *Právny obzor.* 2015, vol. 98, no. 4, p. 346.

[140] VÍTOVÁ, B. Nekalé obchodní praktiky ve světle novely zákona o ochrané spotřebitele č. 378/2015 Sb. In *Rekodifikace and praxe*. 2016, vol. 4, no. 7–8, p. 23.

tailored to the supplier's business model in the long term. This means that the supplier's true will is stabilised and created without the disrupting effects of everyday life that the consumer is otherwise exposed to.

Sometimes the consumer manifests his will within a few minutes, even seconds. It is a success if, in the case of bulk supply of goods and services, the consumer can contract the goods and services as advertised. If the advertisement is misleading, or even the process of drawing up a consumer contract has been attacked with aggressive and unfair business practices against the consumer,[141] **consumer's weakness and supplier's supremacy over the consumer** is deepening.

The use of unfair business practices in the process of drawing up a contract is regarded by *Budjač* as **questioning *lege artis* attributes of free will** (freedom of contract) in the performance of the consumer's legal act.[142] 'Creative' marketing,[143] misleading advertising and the consumer's inability to influence the text of the contract terms can be seen as a manifestation of a lack of the consumer's factual power against entrepreneurs **who are strengthening their favourable market position**.[144]

2.3.2 National (Non-European) Consumer Protection Rules in the General Part of the Civil Code

Regardless of the European regulation of consumer contracts, the rules contained in the general part of the Civil Code respond to the aforementioned state of contractual reliance. This is a regulation adopted by the national legislator in response to market phenomena, **without imposing an implementing or harmonizing obligation thereon** (Council Directive 93/13/EEC on unfair terms in consumer contracts). Although the legislator systematically

[141] JURČOVÁ, M. Unfair Commercial Practices and Unfair Contract Terms in the Slovak Republic and Their Reflection in Slovak Case Law. In *Societas et iurisprudentia*. 2017, vol. 5, no. 1.

[142] BUDJAČ, M. Stav presadzovania dobrých mravov v spoločnosti so zreteľom na spotrebiteľské záväzkové vzťahy a ochranu spotrebiteľa. In JURČOVÁ, M. – DOBROVODSKÝ, R. – NEVOLNÁ, Z. – ŠTEFANKO, J. (eds.). *Liber amicorum Ján Lazar. Pocta profesorovi Jánovi Lazarovi k 80. narodeninám*. Trnava: Veda, 2014, p. 148.

[143] JURČOVÁ, M. – MASLÁK, M. Country Report Slovakia. In ALLEWELDT, F. (ed.). *Study for the Fitness Check of EU Consumer and Marketing Law [online]. Part 3*. Brussels: European Commission, 2017.

[144] DOBROVODSKÝ, R. Aktuálne otázky občianskoprávnej ochrany spotrebiteľa v právnom styku s podnikateľmi. In *Zborník 16. slovenské dni obchodného práva*. Bratislava: Slovenská advokátska komora, [2010], p. 25 et seq.

included these provisions in Chapter Five, entitled "Consumer Contracts". In Art. 6(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts, the European legislator lays down the obligation to ensure that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, **not be binding on the consumer** and that the contract shall continue to bind the parties upon those terms if such contract can continue with the exclusion of the unfair terms. In respect of the issue of ensuring non-binding effect, the European legislator is shifting the role to the national legislator.

2.3.3 National Invalidity vs. European Invalidity of a Legal Act to Protect the Weaker Party

The obligation imposed by Art. 6(1) of Council Directive 93/13/EEC was transformed by the Slovak legislator into the strictest institute of sanction of a legal act, namely the **absolute invalidity** [Section 53(5) of the CC].[145] Regarding the question of the invalidity of consumer contracts, we are of the opinion that absolute invalidity comes under consideration not only for the reasons **prescribed by the European legislator, but also for so-called national reasons, such as: content deficiencies in the legal act, deficiencies in the form of the legal act, deficiencies in volition or the actual act of volition**. This fact certainly does not exclude that a consumer contract may be invalid **relatively**, but only when it concerns the legal reason referred to in Section 40a of the CC.

2.3.4 Examples of European Invalidity

It can be clearly stated that the **so-called European system of penalties** is shown in Section 52(2) of the CC, i.e. if, to the detriment of the consumer, the contractual provisions deviate from the provisions regulating consumer contracts or the obligations entered into with the consumer as such or if, in relation to the consumer, the supplier implements contractual clauses the content or purpose of which is intended to deprive the consumer of the protection guaranteed. This category of penalties can also include the provision of Section 53d of the CC, which provides for a situation where a contract contains an unacceptable contractual condition stated in the operative part

[145] VÍTOVÁ, B. *Nepriměřená ujednání ve spotřebitelských smlouvách.* Olomouc: Iuridicum Olomoucense, 2012, p. 188.

of the decision, and it was also concluded as a result of using an unfair business practice[146] or usury.

2.3.5 Example of a Special Procedural-substantive Legal Solution to the European Invalidity at National Level

Particular attention needs to be paid to the approach of the Slovak legislator, who established an original solution to **protection against the continued use of unacceptable contract terms and conditions**. We refer to the introduction of the provision of Section 53a of the CC.[147] Such provision stipulates that *(1) if the court determined some contractual condition in the consumer contract made in multiple cases, and it is usual that the consumer does not affect the content of the contract in a significant way, or held the general business conditions to be invalid due to the unacceptability of such condition, or did not award the performance to the provider due to such condition, the provider shall refrain from using such condition or any condition with the same meaning in contracts with all consumers. The provider shall have the same obligation even if the court ordered the provider to render the consumer unjust enrichment, compensate for damages, or pay adequate financial compensation on the grounds of such condition. The legal successor of the provider shall have the same obligation. (2) If the decision of the court under Subsection 1 only applies to a part of a contractual condition, the provider is obliged to fulfil the obligation stated in Subsection 1 to the extent of such part.*

Budjač describes the legal and political background of this special procedural-substantive solution. The adoption of the Act was preceded by the adoption of the Resolution of the Government of the Slovak Republic No. 480 of 1 July 2009, by which the Deputy Prime Minister and the Minister of Justice of the Slovak Republic was assigned the task "to establish, in cooperation with the Minister of Economy, regulations on the binding effect of a court decision concerning the invalidity of a form contract for all consumers". The drafting of such a task is related to the Concept of the Protection of Consumer's Economic Interests, where the main incentive to accept the task was to ensure the transposition of Art. 7(1) of Council Directive 93/13/EEC. Under Art. 7(1) of Council Directive 93/13/EEC, *"Member States shall*

[146] DOBROVODSKÝ, R. Aktuálne otázky občianskoprávnej ochrany spotrebiteľa v právnom styku s podnikateľmi. In *Zborník 16. slovenské dni obchodného práva*. Bratislava: Slovenská advokátska komora, [2010], p. 25 et seq.

[147] As amended by Act No. 575/2009 Coll. with effect from 1 March 2010.

ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers".[148] In connection with drafting the provision of Section 53a of the CC, the drafter set the goal of achieving effective means of preventing the continued use of unfair terms in contracts, thus broadly eliminating the use of unacceptable (unfair) terms in consumer contracts. The incentive to formulate the foregoing goal as well as the tasks specified above was the fact that the Ministry of Justice of the Slovak Republic **monitored tens of thousands of consumer contracts with immoral terms in application practice**.

Section 53a(1) of the CC as transposition of Art. 7(1) of Council Directive 93/13/EEC concerns the contract terms classified by law as unacceptable. These are contract terms that are unfair, inequitable,[149] grossly harmful to the consumer, and therefore the law sanctions their use by absolute invalidity. According to *Budjač,* the substance of the provisions in Subsection 1 consists in **the statutory prohibition of the use of unacceptable terms**, which gives rise to the final judicial decision. In our opinion, **the uniqueness of this procedural-substantive solution to European invalidity at the national level** is embodied in such decision not posing an obstacle to a matter already settled, i.e. res judicata *(res iudicatae)*.[150] But if, by bringing an action, the supplier reasserts its performance under the same unacceptable term, for which the court has already awarded it no performance under such contract term, **the court may *ipso facto* dismiss the action and may no longer repeat the justification of the inadequacy of the contract term**. It is sufficient to highlight the final judgement of the court.[151] A court cannot grant protection to a supplier if the supplier claims performance contrary to the law.

The legislator did not opt for a solution through an obstacle to a matter already settled (*res judicata*) and the legal binding effect of the judgement in the matter of an unacceptable contract term, such as in the protection of the consumer against unfair competition, specifically because no system of reg-

[148] BUDJAČ, M. *Občiansky zákonník*. Prague: C. H. Beck, 2015, p. 633.

[149] As regards equity in private law, cf. the work: ELIÁŠ, K. Právní slušnost (ekvita) a soukromé právo In *Právny obzor*. Vol. 100, no. 4 (2017), p. 337–360; ELIÁŠ, K. Právní slušnost (ekvita) a občanský zákoník In *25. Karlovarské právnické dny*. Prague: Leges, 2017, p. 21–46.

[150] BUDJAČ, M. *Občiansky zákonník*. Prague: C. H. Beck, 2015, p. 634.

[151] See also: ELIÁŠ, K. Příspěvek ke kultuře a precedentnímu působení civilních soudních rozhodnutí a právních vět In *Pocta Aleně Winterové k 80. narozeninám.* Prague: Všehrd, spolek českých právníků, 2018, p. 73–83.

istering judgements in consumer cases has been established at the time of adoption of the legislation in question.[152]

As stated by *Budjač*, the aim and purpose of the provisions in Section 53a(1) of the CC would not be fulfilled if, after a court decision, the supplier assigned the claim and the successor in title collected it even if such claim had been based on an unfair contract term. Therefore, the provision of the last sentence of Section 53a(1) of the CC also envisages such evasions of liability.[153]

2.3.6 Examples of National Invalidity

It can be clearly stated that the **so-called European system of penalties** is shown in Section 52(2) of the CC, i.e. if, to the detriment of the consumer, the contractual provisions deviate from the provisions regulating consumer contracts or the obligations entered into with the consumer as such or if, in relation to the consumer, the supplier implements contractual clauses the content or purpose of which is intended to deprive the consumer of the protection guaranteed. This category of penalties can also include the provision of Section 53d of the CC, which provides for a situation where a contract contains an unacceptable contractual condition stated in the operative part of the decision, and it was also concluded as a result of using an unfair business practice[154] or usury.

On the other hand, **the so-called national system of penalties** can be referred to in the case of a consumer contract, the subject of which is the provision of funds to consumers. In that case, the contract is invalid if it is **inconsistent with the rules of determining a maximum allowable consideration** or **contrary to good morals** [Section 53(6) of the Civil Code]. The consideration, details of its determination, criteria for its determination and its maximum allowable amount are laid down in the Regulation of the Government of the Slovak Republic No. 87/1995 Coll., implementing certain provisions of the Civil Code. These are sovereign powers of the national legislator, as the European legislator does not have the power to determine a consideration that can be claimed from a consumer in the provision of funds, or a maximum allowable amount of the consideration. This certainly does not exclude

[152] BUDJAČ, M. *Občiansky zákonník.* Prague: C. H. Beck, 2015, p. 635.
[153] BUDJAČ, M. *Občiansky zákonník.* Prague: C. H. Beck, 2015, p. 635.
[154] DOBROVODSKÝ, R. Aktuálne otázky občianskoprávnej ochrany spotrebiteľa v právnom styku s podnikateľmi. In *Zborník 16. slovenské dni obchodného práva*. Bratislava: Slovenská advokátska komora, 2010, p. 25 et seq.

the European legislator's power, in the form of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, to impose the obligation to inform about APR (information about the annual percentage rate of charge) upon the consumer. However, a different objective is pursued in this case, namely to enable consumers to compare products within the internal market.[155] Regulation of **the requirement for expression of volition in a legal act** leading to the conclusion of a contract was agreed to by the legislator in Section 53c of the CC. The Slovak legislator justified the change with the argument that the subject and price fall within **the category of the so-called essential elements of the contract, and it is preferred that such should not be written in smaller letters (font size) than the other parts of the contract**. The exception is justified only for the title of the contract and the headings of its parts. There is a non-negligible risk that if the essential elements of the contract are written in smaller font size, the consumer will not pay due attention to them, despite the fact that such elements are the most important parts of the contract.

Conflict (inconsistency) between a consumer contract and good morals is the most typical example of **the so-called national system of penalties.**[156] Section 39 of the CC sets forth grounds for absolute invalidity as conflict between content or purpose and the law, circumvention (evasion) of the law[157] or inconsistency with good morals.

An example of **purely national and non-consumer provisions that have a social dimension are rules *lex generalis* for all contract law**. This is the provision of Section 37 of the CC (if there are defects of will or if performance which is subject to a legal act is impossible from the beginning) or of Section 38 (if the legal act is made by a person who lacks the capacity to enter into legal acts or by a person acting with a mental deficiency that makes the person incapable of carrying out the given legal act).

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[155] MÉSZÁROS, P. Poskytovanie pôžičky spotrebiteľovi v minulosti a v súčasnosti In: *Súkromné právo v európskej perspektíve*. Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity v Trnave a Vedy, vydavateľstva Slovenskej akadémie vied, 2011. ISBN 978-80-8082-477-8. p. 95–107.

[156] ZAVADOVÁ, D. Generálne klauzuly v procese aplikácie práva. In *Právny obzor*, vol. 98, no. 4, 2015, p. 346, 353. ISSN 0032-6984.

[157] For more information about the topic, see also: ELIÁŠ, K. Porušení zákona oklikou: Fraus legis facta v civilním právu. In: *Právník*. ISSN 0231-6625. Vol. 157, no. 11 (2018), p. 897–921; ELIÁŠ, K. Obcházení zákona In: *26. Karlovarské právnické dny*. [Prague]: Leges, 2018. ISBN 978-80-7502-289-9. p. 13–29. Other related works: Obcházení zákona, 2018.

2.3.7 Usury: Quasi-consumer Regulation and Its Most Substantial Manifestation of the Social Function of Civil Law Rules

Enshrinement of usury in the CC[158] can be considered **one of the most significant legislative steps aimed at strengthening the social function of civil law rules in the Slovak Republic**. The enshrinement was not only motivated by the protection of the party in consumer relationships. This can be seen in terms, when the legislator does not use the term "consumer" but sets forth the protected person as follows: **physical person–non-entrepreneur**. The legislator thus defines that protection cannot be claimed by an entrepreneur.[159] The legislator specifies the social aspect of a rule in terms of status by that only a citizen–non-entrepreneur can get into a situation of usury and exploitation as a weaker party. The legal-systematic enshrinement of usury suggests that the legislator deems **usury to be special merits (legislative expression) of an act which is inconsistent with good morals**. The provision of Section 39a of the CC can be regarded as special merits of an act contrary to good morals. For example, this concept fully defines usury in the German Civil Code (Bürgerliches Gesetzbuch–BGB).[160]

With regard to **a personal element of usury**, a party to a usurious contract is a person affected by usury (a natural person affected by usury), a person enriched by usury (a natural person or a legal entity), and another beneficiary enriched by usury (i.e. when someone makes a promise of performance to him-/herself or another person).

Perhaps the most significant manifestation of the social function of civil law rules in the case of usury is how the legislator defines usury using **its objective and subjective element**: In these elements, the legislator describes a difficult situation of a person affected by usury, who is worthy of protection and may not be burdened with an obligation the person has assumed in

[158] With effect from 1 June 2014 and as amended by Act No. 106/2014 Coll.

[159] BUDJAČ, M. *Civilnoprávna úžera a odplata pri poskytnutí peňažných prostriedkov spotrebiteľom.* Bratislava: Wolters Kluwer, 2018.

[160] *Bürgerliches Gesetzbuch (BGB)* § 138 Sittenwidriges Rechtsgeschäft; Wucher
(1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.
(2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.

a situation that has negatively influenced the person's judgement or freedom of choice and making commitments through an act of volition.

The objective element is based on the existence of **gross disproportion** in the property value of mutual performances under a usurious legal act (contract). Such is to be assessed in the light of a usual objective property **value of performance in the market**. The criterion of being normal (common, usual) in the market is a fixed criterion set out in the CC, e.g. in Section 618 (normal price), Section 671 (common rent), Section 729(2) (usual remuneration). The existence of gross disproportion in performances is only the first indicator (suspicion) of the immorality of a legal act.[161] The existence of the gross disproportion in performances *per se* is not sufficient to mean usury, since the determination (assessment) of the property value of a performance shall be decided by the parties to the contract.

Usury can be referred to when value determination is negatively accompanied by **subjective elements in the situation** in which the contract is concluded. On the part of a person enriched by usury, it is sufficient if the person has indirect intention (*dolus eventualis*) or active (conscious, wilful) negligence. The cognitive component of which applies at least to the knowledge of subjective elements of usury: **distress, inexperience, intellectual maturity, agitation, credulity, frivolity, financial dependence, or the inability to fulfil obligations**. That a person enriched by usury could have recognised the situation of a person affected by usury is sufficient. According to Austrian court practice (case law), exploitation can also be made through negligence (OGH: 1Ob532/85). There is no prerequisite that a person enriched by usury must induce (or otherwise cause) a situation of distress, credulity, etc.

Distress is a particularly difficult situation for a person affected by usury (or another person whose distress is experienced by the person affected by usury as their own distress), induced by a certain, though only temporary,

[161] According to foreign court's practice (case law), a gross disproportion existed, for example, in the following situations:
The purchase of land at twice the price by an elderly man whose emotional relationship was exploited by a female buyer who gave him a promise of marriage and was the object of his affections (BGE 61 II 34–37); a loan agreement at 29 per cent interest rate concluded by an agricultural cooperative worker with a cooperative owner in a situation where the worker waived his claim for pain and suffering damages and compensation for the treatment costs for his three fingers cut off at work in the cooperative (BGE 44 II 186/7); a refusal by a court to award damages to a trader who sold a car wash for DEM 41,000 to an inexperienced and poor student and failed to fulfil his obligation under the purchase contract (BGH NJW 66, 1451); a buyer purchased land with market value of DEM 53,000 for only DEM 16,000 from a weak-minded seller (RG 67, 393).

urgent need which the person affected by usury is unable to satisfy. As a rule, these are economic difficulties, maturity of a debt which, if not repaid, may seriously jeopardise the social status of the person affected by usury. These may also include other difficulties, such as an interest in retaining the title to a flat to solve a problematic social situation. When in distress, a person affected by usury may also act when the person has sufficient means to eliminate such distress, but which are not available to him/her immediately (loss or theft of documents and the need for cash far from home, etc.). A proportion of dependency as such does not mean a state in which a dependent person is in distress, but dependency may, among other circumstances, contribute to inducing a state of distress. According to German court practice (case law), the person affected by usury may not find him-/herself in distress (Zwangslage), but this may be the case of a third party, e.g. a close person (BGH NJW 80, 1575).

Inexperience consists, for example, in a lack of knowledge of prices or purchasing options, usually in conjunction with credulity. Thus, it mainly concerns inexperience in dealing with property matters. This may result from inexperience in a broader sense, or from inexperience in a certain area of human activity with an impact on human property. Inexperience can be a side effect, especially typical of minors. According to German court practice (case law), inexperience (Unerfahrenheit) may reside in a lack of life experience in economic (financial) transactions. Inexperience is to be examined in its entirety, not only in relation to a particular transaction (i.e. a usurious contract the validity of which is under review). The reasons for inexperience may lie, for example, in the young age of an aggrieved party (BGH 1957, 433) or recent immigration from a country where other economic standards predominate (OLG Hamm, 1974, 32).

When judging and examining **intellectual maturity**, the courts focus on the (in)ability of the person affected by usury to recognise the value of their performance or of the promise made in relation to the value of the mutual performance. The reasons may include weak-mindedness, loss of intellectual abilities and other mental disturbances due to a mental disorder or illness, or delayed development, being manifested mainly in the incapacity for logical reasoning and thinking. The level of adult intellectual maturity can border on the level of "corresponding intellectual and volitive maturity" of a minor (Section 9 of the CC), which is considered in relation to the capacity to enter into legal acts.

Agitation is a state of extreme disturbance of the mind induced by an immediately preceding event that had particularly intensely affected the emotions and the mental life of a person affected by usury to the extent that, in that state, the person was unable to consider whether the value of their performance or a promise of the performance corresponds to the countervalue performance.

Credulity means the state and conduct of a person who is not circumspect to such an extent that would guarantee the person protection of their right in the case of economic control by a person enriched by usury. A person affected by usury is thus prone to believe and susceptible to all the facts presented, since the person has objectively no disposition to competently and duly consider the facts provided.

Frivolity is always associated with other elements of usury, manifesting itself in a situation where a person affected by usury, as a result of their reduced level of perception or intellectual maturity, does not attribute to their actions such consequences which should actually be attributed to such actions. The said element can also be explained by the fact that a person affected by usury makes light of their actions, for example, such person can easily take out 10 loans in a row. As a rule, control by a person enriched by usury also approaches the frivolity as defined above; for example, by neglecting the assessment of creditworthiness or abusing its stronger position, the person enriched by usury benefits from the weaker party's frivolity. According to Austrian case law, frivolity (Leichtsinn) is given and exists when the consequences and implications of own actions are treated with indifference. At the same time, not too strong boundaries should be set among the terms of inexperience, frivolity, credulity, and weak-mindedness (OGH 5Ob142/72). Frivolity is caused by a lower level of mind weakness, which results in the state of being legally incapacitated (OGH 3Ob592/77).

Financial dependence or the inability to fulfil the obligations imposed by the other party point to recurring relationships when a person affected by usury is actually already economically dependent on the lender, for example, by having a chain of credit, too many loans, being indebted to the lender who is thus capable of indirectly controlling their actions. The second element is abuse of the inability to fulfil the obligations, while neglecting the assessment of creditworthiness.[162] Neglecting the assessment of creditwor-

[162] The conduct of entrepreneurs in relation to financial consumers and to the examination of maintaining the level of professional care (due diligence) is also a special issue associ-

thiness and its abuse are very closely related to financial dependence, where the existence of one subjective element is sufficient to determine the state of being affected by usury.

2.3.8 Initial Notes to the First Stage of the Recodification of Civil Law–Amendments to the Provisions in the General Part of the Civil Code

The aforementioned proposal of the Ministry of Justice of the Slovak Republic for the first stage of the recodification of civil law (cf. Chapters 3.1.1, 3.1.2 and 3.1.3) also affects to some extent the general part of the Civil Code in the area of consumer protection. It should also be noted that we welcome the introduction of new institutes that increase the level of consumer protection and are not provided for in the applicable law. A brief look at the submitted proposal for the first stage of the recodification of civil law shows that the recodification could come up with new institutes, such as the institute of surprising provisions.[163] On the other hand, legitimate questions are arising, namely whether or not the recodification will lead to reducing the level of consumer protection. For the purposes of illustration, some examples are listed below:

- Section 2a[164] can relativise the legal definition of the consumer. This means that the consumer as a natural person will be seen through the prism of being able to think and feel as a human being of average capability.
- Section 52[165] can clash with the concept of the so-called relative invalidity of a legal act and the absolute invalidity of a legal act. If, under the

ated with financial usury. For more information about the topic, see also: KRŠKOVÁ, J. Právny rámec ochrany finančného spotrebiteľa v časoch hospodárskej krízy. In: *Zborník príspevkov z medzinárodnej vedeckej konferencie 10. – 11. októbra 2013 Bratislavské právnické fórum 2013*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2013, p. 121–125.

[163] Section 74: Surprising provisions. The standard contract terms which the other party could not reasonably expect, taking into account their location in the text, content or manner of expression, shall not become part of the contract unless expressly accepted by such party.

[164] In civil law relations, it is understood that everyone is able to think and feel as a human being of average capability.

[165] (1) In the case of grounds for the invalidity of a legal act based on inconsistency with a provision of the act which is aimed at protecting a certain person, such legal act shall be deemed valid unless the person invokes the invalidity of the legal act; this shall not apply if there is inconsistency with a provision of the act which is directly aimed at protecting consumers.

general part of the CC, the consumer is clearly protected by the concept of absolute validity, then the provision of Section 52(1)–the sentence after the semicolon–will raise doubts about that.

- Section 99e[166] does not clearly indicate or imply why the translator deviated from the concept of valid provisions in the CC, but also in the European acts. A reference to the conclusion and performance of a consumer contract is lacking in the definitions.
- Section 99h(2)[167] does not clearly indicate why the translator deviated from the concept in the CC, i.e. why the requirement of good faith is incorporated as a criterion.[168]
- From Section 99h(3),[169] it is not clear why the translator deviated from the concept in the CC, i.e. why the criteria of distinctly, clearly and concisely have been deleted.[170]

(2) The right to invoke the invalidity of a legal act on the grounds referred to in Section 140, Section 145(1), and Section 1042(1) shall extinguish if the entitled person fails to exercise such right within six months from the day the person became aware of the mistake, but in any event within three years from the date of entering into the legal act.
(3) The right to invoke invalidity on grounds of a mistake shall extinguish if the party fails to exercise it within six months from the day the person became aware of the mistake but in any event within three years and in the case of fraud within ten years from the date of entering into the legal act.
(4) Invalidity cannot be invoked by a person to whom it is attributable.

166 (1) A consumer is a person who, when concluding a consumer contract, acted with an aim not relating to their business.
(2) A supplier is a person who, when concluding a consumer contract, acted with an aim relating to their business.

167 (2) An unacceptable term under Subsection 1 shall mean a condition which, despite the requirement of good faith, causes a significant imbalance between the parties' rights and obligations under the consumer contract to the detriment of the consumer.

168 The criterion of good faith is lacking in the valid provisions of Section 53(1) of the CC.

169 (3) Subsection 2 shall not apply if such is the condition that
a) refers to the main subject of the consumer contract provided that it is expressed in a concise manner;
b) refers to reasonability of the price provided that it is expressed in a concise manner; or
c) has been agreed individually.

170 The valid text of the second sentence in Section 53(1) of the CC is worded as follows: *This shall not apply if such are contractual conditions that refer to the main subject of performance and reasonability of the price, if such contractual conditions are expressed* ***distinctly, clearly and concisely****, or if the unacceptable conditions have been agreed individually*.

2.4 Pre-contractual Information Obligations and Transparency of Contractual Relationships

Although pre-contractual information obligations are not covered by the general part of the CC, it is a phase or moment which is directly related to the most important step of the consumer, i.e. **entering into the contract**. Consumer's act of volition (i.e. expression of will) gives rise to the consumer's rights and obligations. Upon concluding the contract using the wording provided in the general part of the CC [Section 2(1)], the consumer establishes a *civil law relation which arises from legal acts or from other circumstances with which the law associates the establishment of such relations*. Irrespective of **the current criticism of pre-contractual information obligations**, especially in terms of scope, content and timing (cf. the reference to behaviouralism in Chapter 3.2.3), we can agree with *Jurčová* that the pre-contractual information to be provided by the supplier to the consumer is of great importance in consumer protection.[171] The reason is that the consumer encounters several offers of goods and services in the market. These offers are often confusing and misleading. A consumer's volition in the selection of goods followed by concluding a contract **is often limited to knowing the characteristics of the goods or services and the price at the most**. However, it is often the case that in the process of concluding a contract, the consumer gets "the short end of the stick" and has to rely on information that is distorted in the form of unfair or misleading advertising.[172] In this unfair way, the sup-

[171] JURČOVÁ, M. in LAZAR, J. et al. *Občianske právo hmotné. Záväzkové právo. II. volume.* Bratislava: Iuris Libri, 2018.

[172] The assertion about a factual market disadvantage of the consumer can be documented not only by legal but mainly by economic considerations. Economists also perceive the consumer's position through the premise of the existence of a restrictive monopoly of large companies' power and their potential, which can, e.g. with advertising, weaken the consumer's judgement on what is in their best interests. SCHÄFER, H. B. – OTT, C. *Lehrbuch der ökonomischen Analyse des Zivilrechts.* 3rd edition [S. l.]: Springer Verlag, 2000, p. 321–322; with regard to consumers, *Drexl's* work dealing with consumer behaviour on the market highlights the distance between neoclassical market theory and the practical needs and knowledge of market competition policy and consumer protection. *Drexl* directly observes the behaviour of a market participant and creates a hypothesis about a "rational egoistic man (rational egoistischen Menschen–REM-Hypothese)". This is a *homo oeconomicus* (an economic man) who, by his awareness and continual thinking and recalculation, achieves the best for himself. *Drexl* states that it is almost impossible to find such an acting and thinking consumer in today's circumstances. The problem lies in that there are many emotional and misleading factors on the market which, together with incomplete information, lead to the restriction of a rational egoistic man's activities. Here we understand *Drexl's*

plier obtains agreement with the contract and also gains a **disproportionate market advantage over other suppliers**. Due to a negative impact on consumer decision-making, economists also call for the need to **create a consumer information model**, where the consumer is sovereign (independent) and the producer (supplier) should not be limited. *Simitis* understands consumer protection as part of competition rules,[173] which he illustrates by the example of the prohibition on both deceptive advertising and misleading consumers. He mentions the competition law that prohibits the use of an interchangeable mark on goods as an illustration. In this case, the law protects competitors (i.e. producers) on the one hand, and consumers on the other. The example of the prohibition of deceptive advertising protects producers from loss of buyers as well as consumers from being misled.[174] The fact is that the supplier sets out the contract terms under which the consumer's conception differs from that of the supplier.[175] The reason is that the supplier employs marketing, legal and economic staff who **perfectly (pre-)formulate the supplier's true will, presenting a form of non-transparent and often incomprehensible general terms and conditions to the consumer**. When formulating, the supplier's interest is naturally primarily taken into account, which the employees preparing the wording of the general terms and conditions are financially and fundamentally dependent on. The terms and conditions are tailored to the supplier's business model in the long term. This means that **the supplier's true will is stabilised and created without the disrupting effects of everyday life that the consumer is otherwise exposed to**. In order to redress the **aforementioned information asymmetry**, the European consumer law lays down pre-contractual information obligations in

concern and scepticism, especially about the incompleteness of information for the consumer. (DREXL, J. *Die wirtschaftliche Selbstbestimmung des Verbrauchers*. Tübingen, 1998, p. 97).

[173] Cf.: CSACH, K. (Niektoré) Zmluvnoprávne aspekty práva proti nekalej súťaži. In: *Časopis pro právní vědu a praxi*. ISSN 1210-9126. Vol. 23, no. 1 (2015), p. 9–13; VARGA, P. Súkromnoprávne vymáhanie komunitárneho súťažného práva In: *Acta Universitatis Tyrnaviensis – Iuridica*. Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity v Trnave a Vedy, vydavateľstva Slovenskej akadémie vied, 2009. ISBN 978-80-8082-328-3. – p. 59–77.

[174] SIMITIS, K. *Verbraucherschutz – Schlagwort oder Rechtsprinzip?* Baden-Baden, 1976, p. 146.

[175] JURČOVÁ, M. – NOVOTNÁ, M. Šedý alebo čierny, to je otázka (Grey or black – that is the question) In: *Právo, obchod, ekonomika*. Košice: Univerzita Pavla Jozefa Šafárika, 2016. ISBN 978-80-8152-443-1. ISSN 2453-921X. p. 286–294.

the form of Directive 2011/83/EU on consumer rights.[176] According to the model of the Directive based on full harmonization, Act No. 102/2014 Coll. on Consumer Protection sets forth in more detail the provision of information prior to the conclusion of a distance contract or a contract entered into off the seller's premises (i.e. an off-premises contract) when selling goods or rendering services under such contracts (Section 3 of the Act).

2.4.1 The Reality of the Slovak Market

The practice of the so-called door-to-door selling, which aggressively limited and distorted the will of older consumers–the elderly in particular, became rampant in the Slovak market. As documented by *Budjač*, especially in 2015 companies organising sales events behaved in the described manner in the system of door-to-door selling (in the Czech language, such companies are called "šmejdi", which can be translated as "con artists"). Such behaviour had the form of:

a) deceiving the consumer into thinking they had won goods, however, of low quality and overpriced which they actually had to buy, even at the cost of taking out consumer credit;
b) aggressive pressure on the consumer in order to ensure that they conclude a contract and purchase the goods presented, whether by separating the consumer from a group of their related persons attending the sales event, withholding the consumer's personal belongings or even restricting their personal freedom (e.g. not allowing the consumer to leave the venue of the sales event, forcing the consumer to personally withdraw funds from a bank or an ATM in the vicinity of the venue of the sales event in the personal presence of the seller's representatives);
c) making a draft consumer contract or an already concluded consumer contract available only when the goods were delivered to the consumer, resulting in the consumer only becoming aware of the nature of the consumer contract only after the end of the sales event, and only at that point the consumer became aware of the actual amount of consumer credit provided to them to pay the purchase price, however, such cred-

[176] Cf.: DOBROVODSKÝ, R. in WELSER, R. *Der Einfluss des EU-Rechts in den Jahren 2007–2017 auf die Privatrechtsordnungen der CEE-Staaten*. Wien: MANZ Verlag. VIII, 298 Seiten, Band 13, 2019 978-3-214-14793-8; DOBROVODSKÝ, R. Legislative Zersplitterung des slowakischen Verbraucherrechts in Sondergesetzen. In NOVOTNÁ, M. (ed.) *Zásady európskeho súkromného práva v aplikačnej praxi Spotrebiteľský kódex: áno či nie?* Prague: Leges, 2018.

it was paid by the creditor directly to the seller–for this purpose, it was common that the creditor providing consumer credits was commercially represented by the seller acting in a capacity of the creditor's business agent who had significant interest in selling the goods and being paid the purchase price;

d) restricting, impeding the exercise of, and even actual deprival of, the right of withdrawal from the contract, which were manifested, for example, in misleading consumers about their right of withdrawal from the contract, preventing the right of withdrawal from being exercised by the companies intentionally re-registering their place of business or not collecting postal items, etc.[177]

2.4.2 The Reaction of the Slovak Legislator as an Example of an Above-standard Solution

Since the model of providing pre-contractual information as set out by the European legislator (Directive 2011/83/EU on consumer rights) turned out to be of little effect in the cases above (cf. Chapters 2.4 and 4.2), the Slovak legislator introduced the term **"sales events"** in Act No. 102/2014 Coll. (Section 11) beyond the scope of the directive, and in connection with them it made significant **dogmatic regulations affecting the theories of legal acts**. The reaction of the Slovak legislator as an example of above-standard solution reaffirms *Jurčová's* thesis that directives only affect and complete the private law of the Member States, but the basic building blocks, such as the concepts of legal act, contract, and responsibility from the legislation of the Member States.[178] Therefore, the Slovak legislator first legislatively defined the term **"sales event"** as *an event intended for a limited number of consumers held upon an invitation or other consumer-addressed notice, clearly indicating that it is an invitation primarily aimed at presenting, offering or selling goods or rendering services, whereby a contract is concluded with a consumer in the process of such event or within 15 business days after its end*. Subsequently, the Slovak legislator imposed certain obligations upon the organisers of a sales event, such as the obligation **to notify in writing** the Central Inspectorate of the Slovak Trade Inspection and the Inspectorate of the Slovak Trade In-

[177] BUDJAČ, M. *Občiansky zákonník*. Prague: C. H. Beck, 2015. ISBN 978-80-7400-597-8. p. 663–664.

[178] JURČOVÁ, M. Európske zmluvné právo v systéme európskeho súkromného práva. In HURDÍK, J. et al. *Evropské soukromé právo v čase a prostoru*. Brno: Masarykova univerzita, 2018. p. 57–76.

spection that has local competence about the place **of the organisation of a sales event** no later than 20 days prior to the date of such sales event. In addition to notification of the organizer's or seller's identity, it is necessary to notify in writing the said authorities of the exact place, date and time of the sales event, including the address and designation of venues where the sales event will take place, the proposed sales event schedule, the aim of the sales event, including the marking of the goods or services to be presented and sold there, the price at which such will be offered to consumers, the expected number of attendees, and if the sales event is intended for a particular group of consumers, its designation, **precise designation of contracts and identification of all sellers** with which a consumer can enter into a contract, the place, date and time of arrival, and type and conditions of transport (if the transport of consumers to the sales event venue is included). Moreover, such notification must be accompanied by a copy of the invitation and **all draft contracts** that consumers can enter into at the sales event.

2.4.3 Protection of Sales Event Attendees with the Strictest Sanction for the Contract

In order to release consumers from an unfair contract concluded with a 'con artist' at a sales event, the legislator decided to **"punish" such contract with the most severe sanction–specifically that the contract has not actually been entered into (fiction of non-existence of the contract)**. It is provided for that a contract concluded at a sales event, including a contract dependent thereon, **is not entered into** [Section 11(8) of Act No. 102/2014 Coll.] if:

a) an organiser or a seller fails to fulfil their obligation;[179]
b) the Central Inspectorate does not publish the written notification on legal grounds;[180]
c) the organiser or the seller holds the sales event contrary to the written notification and its prescribed details, delivered within the time limit required by the law; or

[179] An organiser of a sales event or a seller is obliged to notify in writing the Central Inspectorate of the Slovak Trade Inspection (the "Central Inspectorate") and the Inspectorate of the Slovak Trade Inspection with local competence about the place of the organisation of the sales event no later than 20 days prior to the date of such event.

[180] The Central Inspectorate shall publish the full text of the written notification on its website no later than five days prior to the date of the sales event. If the organiser or the seller fails to deliver the written notification to the extent required and with the prescribed details within the said time limit, the Central Inspectorate will not publish the written notification on its website.

d) the subject of such contract is the sale of goods or the provision of a service contrary to the law.[181]

The aforementioned sanction was not new in the applicable law. Regulations for promoting the principle of transparency of contractual relationships and open government in the Slovak Republic (cf. Chapter 2.4.4) were used as the model.

2.4.4 Transparency of Public Sector Contractual Relationships as a Model of the Strictest Sanction in the General Part of the Civil Code [Section 47a(4)]

Since 2011, the general part of the CC has played an important role in enshrining **the principle of transparency of public sector contractual relationships and open government.** The civil-law regulations governing the system of mandatorily published contracts are primarily based on the provision of Section 47a(1) of the CC which binds the effectiveness of an legal act, i.e. a contract with its publishing (its text). A mandatorily published contract shall become effective as of the day following the day of its publishing. It is precisely for the sake of transparency that a dogmatic deviation has been incorporated in the general part of the CC by **binding the commencement of the effects (effectiveness)**[182] **of the contract with the publishing thereof**.

Perhaps the most significant way to enhance the transparency of public sector contractual relationships and the widest intersection of private law and the right to information is that while standard contractual relationships are characterised by **contract formation (contract perfection)** and its effectiveness usually occurring at the same time, in the case of a mandatorily published contract they will never occur simultaneously. The wording of Section 47a(1) of the CC, specifically the part *"the day following the day of its publishing"* provides for that in the case of a mandatorily published contract, such shall not take effect until its formation, i.e. the contract shall become effective no earlier than in the first second of the day following the day of its

[181] Only goods and services that have been reported in accordance with the law may be presented, offered for sale, sold, and rendered at a sales event.

[182] In general, the effectiveness of a contract means that the contract started to cause desired legal consequences. As soon as the contract takes effect, it is possible to successfully demand that the contract be performed and its respective provisions have become included (contained) in the contractual-legal relationship which is established by the mandatorily published contract. The effectiveness of the contract is a legal moment as of which time the parties to the contract are bound thereby in such a way that they can relevantly claim the performances thereunder.

publishing. Even in this case, the legislator makes a departure when using, according to *Novotná*, the shortest legal time unit permissible.[183] If the contract is perfect and free of any errors or mistakes that would make it absolutely invalid, then the contract exists until it comes into effect. Dogmatically, **Section 47a(1) of the CC** has also led to the need to classify this **atypical figure in the theory of legal acts**. In our opinion, this provision can be considered to be a statutory suspensive condition (condition precedent) (*conditio legis*). This statutory suspensive condition, unlike the standard (contract) terms and conditions, links legal consequences (i.e. effectiveness) to reality, i.e. to its publishing, and is valid by law. This is subject to compliance with the condition within the sphere of influence of the liable person or the contractual partner who can exercise the legal right to publish the contract. The legislator very suitably highlighted the mandatory effect of the provision to prevent the exclusion of the application of the provision of Section 47a(1) of the CC. He expressed such fact by the wording that the parties to the contract may agree that the contract shall take effect subsequent to its publishing.[184] By way of interpretation, it can be concluded that the parties cannot agree that a mandatorily published contract shall take effect either upon its conclusion, upon its publishing or prior to its publishing. The parties to the contract are unable to reverse the course of legal events associated with a mandatorily published contract, and have to rely on objective and fair rules for the passage of time. This means that the contract becomes effective only upon the imaginary stroke of the first second of the day following the day of its publishing.[185]

The so-called Sword of Damocles which, so to say, is hanging over the contractual-legal relationship between the liable person under Act No. 211/2000 Coll., **is the provision of Section 47a(4) of the Civil Code which, by creating a fiction, links the state of non-existence of the contract to the expiry of the three-month period.** The **fiction** of non-existence of the contract is, in addition to its absolute invalidity, one of the severe civil-law sanctions,

[183] NOVOTNÁ, M. Všeobecná časť. In: LAZAR, J. et al. *Občianske právo hmotné. [1st vol.]* Bratislava: Iuris Libri, 2018, p. 209.

[184] Section 47a(2) of the Civil Code.

[185] For the specifics of the relationship between the Civil Code and the legal regulations governing the effectiveness of a collective agreement, cf. interpretation – DOBROVODSKÝ, R. Commentary on Section 47a. In: ŠTEVČEK, M. – DULAK, A. – BAJÁNKOVÁ, J. – FEČÍK, M. – SEDLAČKO, F. – TOMAŠOVIČ, M. et al. *Civil Code I. Sections 1–450. Commentary*. Prague: C. H. Beck 2015, p. 382.

which favours the principle of transparency to the principle of freedom of contract.[186] Since in practice there may be situations where contractual relationships are more than bilateral, and multiple liable persons may enter into multilateral contractual relationships, the legislator has prudently enshrined the rule that after the liable person ensures the first publishing of the contract, albeit in another way (i.e. in another place where another liable person being a party to the contract should publish the contract), the contract shall become effective pursuant to Section 47a(1) of the CC upon its first publishing. In the event that the other contracting party being a liable person fails to publish the contract **within three months of the conclusion of the contract, the fiction referred to in Section 47a(4) of the CC shall not occur**.

In the sphere of private law, **the fiction of non-existence of the contract is the most severe sanction**. From the civil-law perspective, the consequences of the non-disclosure of a mandatorily published contract are provided for in Section 47a(4) of the CC. Although a legal act is entered into according to this construction, the rights and obligations thereunder subsist throughout the period of maintaining the state of non-disclosure. While the rights and obligations exist during this period, they produce no effects. Such rights and obligations have not yet become, so to say, law between the parties. In terms of legal dogmatics, after the expiry of the three-month period, a legal act, even if perfect, is viewed as if it has not existed, i.e. as if it has never been entered into. In respect of a civil-law consequence of the performance that would be provided, despite the ineffective or extinguished contract, the provisions on liability for unjust enrichment shall apply. Such state is an element of unjust enrichment.

As a summary conclusion, the provision of Section 47a(4) of the CC as a basis for the principle of transparency of public sector contractual relationships has been borrowed by the legislator within the *coherentism* mentioned by *Twigg-Flessner* (cf. Chapter 3.2.1) in seeking a protective effect of the weaker party in Section 11(8) of Act No. 102/2014 Coll. on Consumer Protection in the case of selling goods or rendering services under a distance contract or off-premises contract. The legislator has appropriately strived to address the challenges and problems encountered by means of existing institutes in the general part of the Civil Code.

[186] Ibid., p. 376.

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3. SLOVAK LAW OF OBLIGATIONS AND SOCIAL NORMS

3.1 Current General Determinants of Obligation Law Regulations

Obligation law is part of civil or private law, which regulates obligation-law relations, i.e. relations between debtors and creditors. A claim (amount receivable) and debt (amount payable), as well as a creditor and debtor, are the key concepts of obligation-law relations. The creditor is entitled to demand settlement of a claim, and the debtor is obliged to pay off a debt. A claim means a subjective right of the creditor to demand a certain performance from the debtor; such performance may be an obligation to give something, act, not to act, or acquiesce.[187] Obligation-law relations between the two parties to a legal relationship are usually of a synallagmatic nature if the parties are creditors and debtors towards each other and their obligations are mutual.[188] Legal grounds for the establishment of obligations are mainly contracts, less often unilateral legal acts; obligations also arise from unjust enrichment or incurred damage, and we also know other binding reasons or their combination. The substance of legal regulations governing obligations is contained in the Civil Code and the Commercial Code; moreover, obligations are also provided for in the Labour Code, as well as other special regulations. The term "obligation law" is not commonly used in European private law. The boundaries of European obligation law *de lege lata* are delimited by the EU's powers and a functional approach, which is rather correlated with the usual categorisation into general and specific contract law and tort law, where contract law is undoubtedly a core industry for the development of European private law. Obligation law was dominant only in the soft law project DCFR.[189] European obligation law that enters into Slovak legislation can

[187] KIRSTOVÁ, K. Všeobecná časť záväzkového práva. In LAZAR, J. et al. *Občianske právo hmotné 2.* Bratislava: Iuris Libri, 2018, p. 7.

[188] CSACH, K. Synalagmatické záväzky a ich uplatňovanie. *Právny obzor*, 2018, vol. 101, no. 5, p. 475–492.

[189] VON BAR, C., CLIVE, E. a SCHULTE-NÖLKE, H. (red.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, Munich: Sellier, 2009. See also JURČOVÁ, M. "The Common Frame of Reference (CFR)" – perspektívny zdroj na ceste k rekodifikácii občianskeho práva. *Právny obzor,* 2006, Vol. 89, no. 3, p. 227–238.

be divided into two parts. Soft law instruments, such as PECL,[190] DCFR or CESL[191] serve as an inspiration. However, Slovak obligation law *de lege lata* is mainly formed by primary and secondary EU law, more specifically EU directives and regulations in particular. It remains true that directives only affect and complete the private law of Member States, but the basic building blocks, such as the concepts of legal act, contract, and responsibility, stem from the legislation of Member States.[192]

The submission of current proposals for the systematic integration of rules with social function into Slovak obligation law is subject to an evaluation of the current state and trends in law, other disciplines, as well as throughout society.

3.1.1 The First Stage of the Recodification of the Civil Code

The Ministry of Justice's proposal for the first stage of the recodification of civil law, which should be aimed precisely at drafting new obligation law,[193] represents a significant factor on the road to new and modern obligation law in the Slovak Republic. According to the Statement of Reasons: "*Thus, the submitted proposal is the first partial implementation of the new Civil Code. As it proceeds through partial changes, it does not formally concern a new code, but rather an amendment to the current Civil Code. But in terms of content, it is a new amendment to the obligation part of the Civil Code and the Commercial Code, as well as related provisions of the general part of the Civil Code*."[194]

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[190] LANDO, O., BEALE, H. (eds). *Principles of European Contract Law*, Parts I and II. Hague/London/Boston: Kluwer, 2000. LANDO, O., CLIVE, E., PRUM, A., ZIMMERMANN, R. (eds.). *Principles of European contract law*. Part III. Hague/London/Boston: Kluwer, 2003. See also *Princípy európskeho zmluvného prá*va. Bratislava: Iura Edition, 2010.

[191] Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; A common European sales law to facilitate cross-border transactions in the single market. (COM/2011/0636 final).

[192] JURČOVÁ, M. Európske zmluvné právo v systéme európskeho súkromného práva. In HURDÍK, J. et al. *Evropské soukromé právo v čase a prostoru*. Brno: Masarykova univerzita, 2018. p. 57–76.

[193] Available at https://www.justice.gov.sk/Stranky/Ministerstvo/Aktuality-obcianskeho-zakonnika.aspx (15/01/2019).

[194] Draft Statement of Reasons, available ibid.

3.1.2 EU: A New Deal for Consumers

At the European level, it is necessary to take account of the proposals for the modernisation of EU consumer protection law under the programme made available mainly by the Communication titled "A New Deal for Consumers".[195] In this Communication, the European Commission summarises the current status as follows: *"The rights the EU has put in place for consumers give predictability and confidence both to citizens and businesses, and include the right to safe products, the right to return a product bought online within 14 days, and the right to have a product repaired or replaced within a guarantee period. These are just some of the tangible rights that make a difference to people's lives every day. European consumer policy has delivered real benefits through major pieces of legislation that govern passenger rights, consumer rights, unfair commercial practices, and unfair contract terms. This has given both European citizens and businesses a high level of protection and certainty, but the marketplace is changing fast."*

The New Deal for Consumers is to be aimed, *inter alia*, at modernising the existing rules and filling the gaps in the current consumer *acquis*, providing better redress opportunities for consumers, supporting effective law enforcement and greater cooperation of public authorities in a fair and safe Single Market, ensuring equal treatment of consumers in the Single Market, and guaranteeing that national competent authorities are empowered to tackle any problems concerning the dual quality of consumer products. The legislative package of the New Deal for Consumers consists of two instruments:

- Proposal for a directive amending Council Directive 93/13/EEC on unfair terms in consumer contracts, Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, and Directive 2011/83/EU on consumer rights.
- Proposal for a directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. This proposal is targeted at making it easier for consumers to obtain redress, as in so-called mass damage situations, many consumers are victims of the same infringement.[196]

[195] See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of 11/04/2018, COM (2018) 183 final.

[196] Ibid., p. 3–4.

In relation to the aforementioned materials presented by the European Commission, the assumption may be based on the Commission's proclaimed objectives: to achieve more consumer protection, more justice, and transparency. These involve measures that should be considerably social in nature with regard to weaker parties, although all such measures go hand-in-hand with removing barriers to trade.[197]

Presentations of the partial proposal for the recodification of civil law also promise better consumer protection.[198] These legislative initiatives, along with other determinants, are taken into account when making proposals *de lege ferenda*.[199]

3.1.3 Consumer Code: Yes or No?

The conception of the form of legal regulations governing private law relations must take into account the Consumer Code and its existence, need, and potential benefits, since consumer protection law constitutes a significant portion of the area reserved for the protection of the weaker party, and its overwhelming part has been incorporated into the national law of EU Member States in the transposition of EU law (directives in particular). A discussion on whether to create a special consumer code or incorporate part of consumer protection rules into the Civil Code and part thereof into special regulations is unlikely to ever be definitively resolved.[200] In summary, it can be stated that every given argument for a special law (or even a code) is balanced with an argument against its existence. The arguments for its existence usually include: clarity manifested by concentration in one regulation, inviolability, stability of the Civil Code, link to EU law; these arguments can

[197] Ibid., p. 5.

[198] Available at https://www.pravnenoviny.sk/rekodifikacia-obcianskeho-zakonnika-konecne (16/03/2019)

[199] It is necessary to allow for the fact that the aforesaid proposal of the Ministry of Justice is still at an early stage of the legislative process, and its future is uncertain; many conceptual questions of this opinion are subject to substantial professional criticism; see mainly the monothematic edition of the professional journal "Súkromné právo" (in English: "Private Law") dealing with this issue, *Súkromné právo*, 2018, no. 6, Bratislava: Wolters Kluwer SR.

[200] For topical subjects under this discussion, see the outputs of the international scientific conference "Zásady európskeho súkromného práva v aplikačnej praxi. Spotrebiteľský kódex, áno alebo nie?" (in English: "Principles of European Private Law in Application Practice. Consumer Code: Yes or No?") held in Brno on 30 May – 1 June 2018 in the collection: NOVOTNÁ, M. (ed.) *Zásady európskeho súkromného práva v aplikačnej praxi Spotrebiteľský kódex: áno či nie?* Prague: Leges, 2018, ISBN 978-80-7502-324-7.

be negated by arguments with regard to the inability to include all of the consumer protection law in a special act, by breaking the link to individual civil-law institutes, and by the artificial inanimateness of the Civil Code free of frequently-used consumer institutes.

In relation to the consumer code, Zoll asks representative questions, such as:

1) What does the term "consumer code" mean? Is it a code in the sense of a coherent systematic law providing for the issue or a compilation, a collection of consumer regulations?
2) To what extent do we need to allow for the division into private and public law if we are considering the creation of the consumer code?
3) Does the existence of the consumer code cause the loss of the Civil Code's importance?
4) Is it technically possible to maintain the coherence of the Civil Code alongside the current existence of the consumer law? Is it possible to base an area of law on the problematic concept of the consumer?
5) What is the impact of the consumer code on the process of law application and legal thinking?
6) And is it currently topical to deepen the particularisation of the legal system, as it also seems that the term "consumer" is losing its importance?
7) To what extent is this question significant at the time of the Fourth Industrial Revolution? And in respect of the last question, the author concludes that it is too late. This comment is probably very topical for Slovakia in addressing the issue of whether to start working on the consumer code at this time.[201]

Twigg-Flessner points to the role of legal science in the systematisation of consumer law, which, unlike legislation, holds the tools to create a work in the form of the American *Restatements of the Law* (the "Restatements"). Making such Restatements can be great help to application practice. A collection of consumer-law regulations, coherently structured in connection

[201] ZOLL, F. The sense of the Consumer Code at the end of the concept of the consumer. In NOVOTNÁ, M. (ed.) *Zásady európskeho súkromného práva v aplikačnej praxi Spotrebiteľský kódex: áno či nie?* Prague: Leges, 2018, ISBN 978-80-7502-324-7, (in the press). See also ZOLL, F. At the end of the concept of consumer. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 87–99.

with interpretation and decision-making practice, including multimedia links, would make a significant contribution to consumer law. This author refers to the characteristics of the American *Restatements* by the American Law Institute: "Restatements are addressed to courts and others applying existing law. Restatements aim at clear formulations of common law and its statutory elements or variations, and reflect the law as it presently stands or might plausibly be stated by a court. Restatement blackletter formulations assume the stance of describing the law as it is."[202] Twigg-Flessner considers the *Restatements* to be a model which is worth following, even in the current state of the continental legal system in consumer protection law.[203] Especially Hans Micklitz provides arguments for singling out and separating consumer law, and stresses the need for new dogmatics.[204]

In 2016, the Draft Legislative Intent of the Consumer Code was officially submitted in the Slovak Republic.[205] Also in the light of the conclusions drawn at the meetings of the Commission for Recodification of Private Law, dated 3 December 2015 and 13 January 2016, on cooperation with the Ministry of Economy of the Slovak Republic and the tendencies of the Commission Presidency to regulate the private law aspects of this legal area in the new Civil Code and to work together on a single model of future legislation of this area in the new Civil Code,[206] it seems that ultimately, the work on the Consumer Code has dampened down, with the new proposal for recodification of civil law of 15 October 2018 essentially maintaining the status quo in

[202] American Law Institute, Capturing the Voice of the American Law Institute: *A Handbook for ALI Reporters and Those That Review Their Work (*ALI: Philadelphia, 2005), p. 4, cited according to TWIGG-FLESNER, CH. A UK Perspective on the Consolidation or Codification of Consumer Law. In NOVOTNÁ, M. (ed.) *Zásady európskeho súkromného práva v aplikačnej praxi Spotrebiteľský kódex: áno či nie?* Prague: Leges, 2018, ISBN 978-80-7502-324-7, (in the press).

[203] TWIGG-FLESNER, CH. A UK Perspective on the Consolidation or Codification of Consumer Law. In NOVOTNÁ, M. (ed.) *Zásady európskeho súkromného práva v aplikačnej praxi Spotrebiteľský kódex: áno či nie?* Prague: Leges, 2018, 978-80-7502-324-7 (in the press).

[204] MICKLITZ, H. W. Potrebujú spotrebitelia a obchodníci novú architektúru spotrebiteľského práva?: podnet na zamyslenie (translated by Monika Jurčová). *Právny obzor,* 2015, Vol. 98, no. 3, p. 285–302.

[205] Available at https://www.najpravo.sk/clanky/pripravuje-sa-novy-kodex-spotrebitelsky-zakonnik.html (21/01/2019).

[206] Available at https://www.justice.gov.sk/Stranky/Nase-sluzby/Nase-projekty/Obciansky-zakonnik/Obciansky-zakonnik.aspx.

a systematic (and problematic)[207] distribution of consumer law in the Slovak Republic.[208]

According to Eliáš, *"What is private and what is public, we do not qualify by the nature of the facts, but by the nature of the legal rule related to certain facts. It is evident that relevance is assigned to legal rules, not laws."*[209] Connecting private and public-law elements in a single regulation governing consumer protection law should not be an argument against its adoption in itself. In relation to the effort to create a common consumer code, the arguments for and against remain rarely mutually balanced.

3.1.4 Industrial Revolution 4.0, Globalization

We live in a period of technological revolution that is radically changing how we live, work and communicate with each other. It is argued that in terms of level, extent and complexity, this transformation will be more fundamental to humanity than any other previous technological change. The fourth stage of the Industrial Revolution is based on the Internet of Things. The Internet of Things and the technological progress are also deciding factors that allowed the sharing economy to be developed through a digital platform.[210] In addition to the Industrial Revolution factor, we need to take account of glo-

[207] DOBROVODSKÝ, R. Legislative Zersplitterung des slowakischen Verbraucherrechts in Sondergesetzen In NOVOTNÁ, M. (ed.) *Zásady európskeho súkromného práva v aplikačnej praxi Spotrebiteľský kódex: áno či nie?* Prague: Leges, 2018, ISBN 978-80-7502-324-7, (in the press).

[208] For evaluation of the proposal available at https://www.justice.gov.sk/Stranky/Ministerstvo/Aktuality-obcianskeho-zakonnika.aspx (15/01/2019), see in this part mainly FUSEK, R. BORKOVIČOVÁ, V. Niekoľko poznámok k návrhu veľkej novely Občianskeho zákonníka z hľadiska ochrany spotrebiteľa. *Súkromné právo*, 2018, no. 6, p. 235–240, ROHLÍČKOVÁ, J. Novela Občianskeho zákonníka – niektoré otázky z pohľadu ochrany spotrebiteľa. *Súkromné právo*, no. 6, 2018, p. 241–245.

[209] ELIÁŠ, K. Soukromé a veřejné v právním světě. In MASLÁK, M. (ed) *Vybrané otázky implementácie európskych právnych predpisov reglementujúcich zvýšenú ochranu slabšej strany: zborník z cyklu diskusných seminárov uskutočnených v roku 2017 v rámci projektu APVV-14-0061*. Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2017, p. 36. Available at http://publikacie.iuridica.truni.sk/wp-content/uploads/2018/05/Maslak-Zbornik-_WEB.pdf (20/01/2019).

[210] JURČOVÁ, M. Úlohy práva v kolaboratívnej ekonomike. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 262–279.

balization, bringing the need for openness of the legal system and the need to reflect different factors of an international nature, with an increasing number of legal relationships with a foreign element. The development of civil law in one country must not be, so to say, separated from foreign legal systems; although this assertion does not apply equally to all private law subsystems, globalization and migration have already affected family, property and succession law. The European Union is also responding to these incentives under the New Deal for Consumers. In relation to platform law at the EU level, we are noticing various communications, proposals for instruments, as well as judgements from the Court of Justice of the European Union:

- May 2016: Online platforms in the digital single market, COM(2016) 288
- June 2016: European agenda for the collaborative economy, COM(2016) 356
- Dec. 2017 CJEU, C-434/15 – Uber Spain
- April 2018: New deal for consumers, COM(2018) 185 Proposal for a Regulation on fairness and transparency for business users of online intermediation services, COM(2018) 238
- Sept. 2018 Expert group for the observatory on the platform economy[211]

Some aspects of the digital economy need to be addressed in legislation as a matter of urgency, whilst also highlighting the need for moderation and an emphasis on conceptuality in lawmaking when society is in a period of revolutionary changes.[212]

Industry 4.0 (also referred to as the "Fourth Industrial Revolution") and the development of sharing economy place new demands on the role of law and the reassessment of the status of entities operating in new economic conditions (two-sided market economy).

From a regulatory perspective and in relation to the social aspects of private law relations, at least the following must be taken into consideration:

[211] Prepared according to Busch, Ch. *Towards a European Regulatory Framework for Online Intermediary Platforms.* Available at https://www.cao.go.jp/consumer/kabusoshiki/online_pf/doc/007_181016_shiryou1_1.pdf.

[212] TWIGG-FLESSNER, C. Disrupted Technology – Disrupted law. How the Digital Revolution Affects Contract Law. In FRANCESCHI, A. *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution.* Cambridge: Intersentia, 2016, p. 11–47.

– liability of entities, in particular the liability of an intermediary platform;[213]
– self-regulating role of platforms;[214]
– reputation systems that are, in some opinions, capable of replacing traditional market access control mechanisms;[215]
– status of entities on the platform, consumer protection and service provision by non-professionals, market access.[216]

Thus, economists' assertions about the general benefits of the collaborative economy are contradictory. On the one hand, it is argued that the collaborative economy offers opportunities and has the potential to reorganise economic activities through a digital platform that can ultimately lead to equality between entities and a reduction of property disparities between people, as it gives market access to those who would not otherwise have it. The platform provides the right of access for both users and suppliers of goods and services, and is therefore in line with the requirements of ensuring formal equality between entities, as the right of access to the platform is widely available and is not inherently dependent on the status of a person and their property status.

Other authors emphasize the benefits of the sharing economy (in general, not limited to the digital platform) in the areas of efficient use of resources, networking, reducing transaction costs and expanding the scope of business, and creating reputation systems. Circumventing (deceiving) regulatory authorities is also regarded as advantageous, where such authorities are held by current producers "in captivity", allowing suppliers to create value for customers who have long been delivered services of poorer quality by the pres-

[213] See also the Discussion Draft of a Directive on Online Intermediary Platforms, available at https://www.elsi.uni-osnabrueck.de/fileadmin/user_upload/Slovak.pdf (25/01/2019).

[214] See for example, JURČOVÁ, M., NOVOTNÁ, M. Zodpovednosť prevádzkovateľa kolaboratívnej platformy vo svetle diskusného návrhu smernice o online sprostredkovateľských platformách. In *Právo, obchod, ekonomika*. Košice: Univerzita Pavla Jozefa Šafárika, 2017. ISBN 978-80-8152-528-5. ISSN 2453-921X. p. 211–224.

[215] BUSCH, CH. Towards a "New Approach" in European Consumer and Market Law: Standardization and Co-Regulation in the Digital Single Market, *EuCML Journal of European Consumer and Market Law,* 2016, no 5. P. 197.

[216] HUČKOVÁ, R., BONK. F., RÓZENFELDOVÁ, L. Zdieľané hospodárstvo – otvorené problémy a diskusia (najmä s prihliadnutím na obchodnoprávne a daňovoprávne súvislosti). *Studia Iuridica Cassoviensia*, vol. 6, no. 2, 2018. Available at: Http://sic.pravo.upjs.sk/files/12_huckova_kolaborativna_ekonomika_revizia.pdf> (22/01/2018).
JURČOVÁ, M. Ubytovanie vs. nájom, podnikateľ vs. nepodnikateľ. *Súkromné právo.* 2017, Vol. 3, no. 3, p. 93–98.

ent providers who have become inefficient and unable to respond to new challenges due to their regulatory protection. On the other hand, in connection with the last argument, critics of the sharing economy and platforms collectively point out that the real competitive advantage of these platforms is their ability to avoid the costs borne by other (business) entities as a result of compliance with regulatory measures – measures aimed at protecting third parties. They consider it nonsensical to exclude whole categories of business activities from the scope of regulatory measures solely for their implementation via the Internet. The critics demand that legislation promotes genuine innovations, but not business schemes through which cheating intermediaries are blatantly getting rich.[217] In this respect, the problem of some aspects of the social responsibility of actors in the sharing economy is also aptly characterised by Morávek: *"A welfare state with a system of social security must be based on the principle of forced solidarity and cannot accept fare dodgers. It must ensure the collection of taxes and social insurance contributions through legal regulations and its application"*.[218]

3.2 Rules with Social Function in Private Law

The debate on rules with social function has countless dimensions. We can discuss the appropriateness of using rules compared to the principles in order to achieve a socially fairer model of the functioning of social relations, we can question the social role of law as such, and we can question the role of private law compared to public law in promoting social justice. According to Hurdík, *"But if we examine a set of norms called 'social', we find out that the social dimension is neither enshrined, nor even implied in the structure of individual legal rules that are normative in terms of content. It* ***is their function and the goals pursued by these norms*** *that are social. Therefore, to assess social norms means not to study isolated legal rules, their structure and nature, but to study the entire normative package that has the social mission."*[219]

[217] JURČOVÁ, M. Úlohy práva v kolaboratívnej ekonomike. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 262–279.

[218] MORÁVEK, J. Limity právního řádu a sociální stát v dôbe moderních technologií. In PICHRT, J., BOHÁČ, R., MORÁVEK, J. (eds.) *Sdílená ekonomika – sdílený právní problém?* Prague: Wolters Kluwer, 2017, p. 246.

[219] HURDÍK, J. Sociální normy soukromného práva a jejich místo ve struktuře soukromého práva. *Právny obzor*, 2018, vol. 101, no. 5, p. 431–454.

If social nature is assigned to some norms, as they pursue the objectives of protecting the weaker party and establishing a fair solution to the balanced distribution of rights and obligations of entities, and based on the existence of this assumption, proposals for the incorporation of the norms of social nature into private law, civil law, or the Civil Code are considered, we cannot avoid answering the key question, also asked by Hurdík: *"Principles or rules?"*[220] At this point, we should clarify that the term "principle" is here deemed to be identical with the term "standard", and as a fundamental distinction between principles and standards on the one hand, and norms on the other hand, we perceive the concept of principles and standards as an expression of values, purpose and aim of legislation, as opposed to the norms constituting the rules of conduct. Standards and principles play an essential role in the interpretation of norms/rules[221] and are also determinants of the social aim of a norm/rule in its application. In this regard, Jančo highlights A. von Bogdandy's claim that ethical, political or economic conflicts can be understood as conflicts of principles. Although legal principles do not provide specific solutions to these conflicts, they serve as a basis for proposing their solutions.[222] But even without principles, norms cannot be considered socially neutral; norms as the rules of conduct are intrinsically capable of reflecting and reflect the legislator's value preferences.[223] Obligation law is a private law. And as such, it is preferably based on the principles of equality (or equality fiction)[224] and freedom of will. To what extent we can interfere in the freedom of will of civil law entities in order to promote the protection of the weaker party or protection against discrimination,[225] and yet argue that

[220] HURDÍK, J., ibid. argues *"The question whether the social model can be implicated in the system of legislation only by means of standard legal rules, or whether the same or similar effect can be achieved through legal principles and values that are the source of law, even without being explicitly incorporated into a code or an act, has been studied several times with conclusions that seem to be increasingly coherent: The problem of changing legislation in the continental legal system is the problem of the rigidity and poor flexibility of written law."*

[221] See also Chapter 1 of this publication.

[222] JANČO, M. Zásady súkromného práva všeobecne. Úvodné poznámky. In JANČO, M., JURČOVÁ, M., NOVOTNÁ, M. *Európske súkromné právo.* Bratislava: Euroiuris, 2013, p. 149.

[223] For example, usury, checking the content of a contract through unfair terms.

[224] BEJČEK, J. Rovnost a slabost v soukromém právu: jako vule a predstava. In LAZAR, J. GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 186.

[225] For penetration of non-discrimination into contract law, see also JURČOVÁ, M., OLŠOVSKÁ, A., ŠTEFANKO, J. *Diskriminácia v zmluvnom práve.* Trnava: Typi Universitatis Tyr-

we are still within the sphere of private law, is a matter under discussion. Are private law entities obliged to tolerate restrictions in the sphere of private law, is private law as such scope for the enforcement of rules of a social nature? And this is followed by debates on publicising private law[226] or creating a system between private and public law. Hurdík with his statement indicates that we can currently observe efforts to create a hybrid, systemically third area of law, which is usually designated as the so-called quasi-public-private sphere.[227] To what extent is it socially acceptable to enforce in private law the observance of rules with a social function without creating individual injustice in order to achieve more general justice?[228] Discussions on whether or not to incorporate rules of a social nature into neutral private law persists, and doubts as to whether it is right to seek social justice remain as well. On the one hand, relevance of the social model and its effectiveness are challenged by Hayek's arguments: *"While an equality of rights under a limited government is possible and an essential condition of individual freedom, a claim for equality of material position can be met only by a government with totalitarian powers"*, in The Mirage of Social Justice[229] or *"Justice is an attribute of individual action. I can be just or unjust towards my fellow men. But the conception of a social justice; to expect from an impersonal process – which nobody can control – to bring about a just result is not only a meaningless conception, it's completely impossible."*[230]

On the other hand, we can mention a lecture on the social function of private law delivered by Otto von Gierke in 1889 as part of the criticism of the German codification of *Bürgerliches Gesetzbuch – BGB* (i.e. the German Civil Code). Nowadays, growing wealth inequality in society reinitiates discus-

naviensis, spoločné pracovisko Trnavskej univerzity v Trnave a Vedy, vydavateľstva Slovenskej akadémie vied, 2015. 247 p, ISBN 978-80-8082-835-6.

226 BEJČEK, J. "Privatizace" veřejného a "publicizace" soukromého práva. In LAZAR, J., BLAHO, P. *Základné zásady súkromného práva v zjednotenej Európe. Zborník IX. Lubyho právnické dni*. Bratislava: Iura Edition, 2007, ISBN 9788080781842, p. 101–131.

227 HURDÍK, J., ibid. p. 431–454.

228 In this respect, the ongoing discussion on the execution amnesty in Slovakia is interesting, see "Gálove exekúcie vyvolali vlnu kritiky, denník Pravda, 14.1. 2019. Available at https://spravy.pravda.sk/domace/clanok/498377-galove-exekucie-vyvolali-vlnu-kritiky/ (20/01/2019).

229 Available at http://thecollegeconservative.com/2013/05/29/f-a-hayek-and-the-totalitarianism-of-equality/ (28.5.2019).

230 Available at https://www.austriancenter.com/fallacy-social-justice/ (28.5.2019).

sions on the social function of law,[231] and the scope of its regulatory function. Lazar outlines the use of specific legal institutes to overcome social problems. This author, like many others, primarily points to the possibilities of public law regulations, but also speaks in favour of perfecting and deepening social elements in private law (e.g. the nature and concept of the social function of ownership, consumer protection law).[232]

Even long after their ideas came to light, legal science in Europe is dealing with the following key issue: *"What if Gierke, Holmes, Maitland, Sinzheimer, the Webbs, and Berle were right? If the public/private divide is wrong, what could replace it? If the law is not to be divided but united, how should it best be explained? Could the law benefit from theories of economic, social or political science on structure and relationships in human associations? Or should a public-private divide be left alone, but continue its internal transformation and be supplemented in light of new social change?"* And notwithstanding the publishing of Gierke's work more than a hundred years ago, when answering the questions, we re-return to his The Social Role of Private Law.[233]

It should be noted that some of the works dealing with the social role of private law rules may have unpleasant, even controversial connotations for a Slovak reader affected by the controversial period of 1945–1989. By way of illustration, we can mention Karl Renner's work on the *Institutions of Private Law and their Social Function* which is characterised as an attempt to utilise the Marxist system of sociology for the construction of a theory of law.[234]

Private law has limits that need to be respected and boundaries that should not be crossed, yet we cannot fully renounce its social role. The fundamental principles on which private law is based can also be subjected to an interpretative onslaught, when contemplating whether to give preference to the freedom of will or the principle of equality. In this respect, Tryzna considers to what extent equality of opportunities can be replaced by equality of out-

[231] See the collection by LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018.

[232] Ibid, p. 48–54.

[233] McGAUGHEY, E. The Social Role of Private Law (Otto von Gierke, 1889) (2018) 19(4*) German Law Journal 1017*; King's College London Law School Research Paper. Available at SSRN: https://ssrn.com/abstract=2861875 (20/01/2019).

[234] KAHN-FREUND, O. Introduction. In RENNER, K. *Institutions of Private Law and their social function.* Originally published in 1949, London: Routledge & K. Paul. Published 2010 by Transaction Publishers. Available at https://legalform.files.wordpress.com/2017/11/renner-institutions-of-private-law-and-their-social-function.pdf (20/01/2019).

come.[235] Other research projects are exploring the capability of private law to respond to new incentives.[236]

Globalization, digitization, Industry 4.0, sharing economy are appearing on the scene of classical obligation law. The role of legal science is also to test new situations, and consider whether the current knowledge in legal science as well as effective legislation and its institutes are sufficient, or whether it is the right time to bring new solutions.[237]

3.2.1 Legal Regulation Methods

The issue of the capability of private law can also be seen through a prism of the need for a new methodology to remove deficiencies in legal regulations in order to balance and strengthen the social model. Twigg-Flessner tests methodological models in relation to the capability of the legal system to respond to technological developments represented by the digital economy. In respect of this phenomenon, the author outlines the existence of various procedures, seeing two rather different approaches at the edges of the utilised spectrum. On the one hand, it involves so-called *coherentism*, and on the other hand, *"regulatory instrumentalism"*. *Coherentism* characterises the efforts to address encountered challenges and problems by means of existing mechanisms and institutes; the second approach seeks new procedures, institutes, and solutions. Neither approach can be regarded as diametrically opposed to the other. It should be noted that as long as coherentism is aimed at maintaining the current form of legislation in order to improve it and adapt it to the new social order, regulatory instrumentalism is less considerate of

[235] TRYZNA, J. Faktické a právní limity práva pri prosazování principu rovnosti. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 300.

[236] See the research project by the Tilburg Institute of Private Law – Research programme 2014-2018 titled "The responsiveness of private law in times of globalization". available at https://www.tilburguniversity.edu/upload/a9a9ee7d-3d0d-4e49-aa54-226ba45660cc_TIP%20onderzoeksprogramma%202014-2018.pdf.

[237] NOVOTNÁ, M., JURČOVÁ, M. Zodpovednosť za škodu spôsobenú autonómne a poloautonómne riadenými vozidlami podľa slovenského právneho poriadku. In *Právo, obchod, ekonomika*. Košice: ŠafárikPress UPJŠ v Košiciach, 2018. – ISBN 978-80-8152-649-7, p. 260–272, or JURČOVÁ, M. Úlohy práva v kolaboratívnej ekonomike = Tasks for law in collaborative economy. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 262–279.

existing schemes of thought. Although inherently progressive, new solutions may pose a threat due to their inability to coexist with the original structure of the legal system.[238] These facts are arising in proposals for the incorporation of social norms (rules) into law of obligations, especially non-mandatory contract law. The question is whether the extent to which the transposition of consumer protection directives has caused and causes problems is comparable with the implications and needs of amendments required by today's digital era. The method of legal regulation is closely related to the use of mandatory and non-mandatory rules, which, in some opinions, are integral to the legal (and juristic) language, but in a more detailed examination we can discover surprising differences in the definitions of these terms, mainly when distinguishing between individual rules in terms of their nature. Csach differentiates two types of mandatory rules. Mandatory legal rules, the violation of which invalidates a legal act and the second group of mandatory rules include those the violation of which results in a legal act not being invalid, but its content is changed in favour of the statutory wording of a mandatory rule compared to a deviating arrangement (a mandatory rule supersedes a contractual arrangement). Legal rules are essentially non-mandatory. They are becoming unalterable in nature only if there is a sufficient reason for their mandatory effect. A sufficient reason may be the protection of public order, other public interest, the protection of a certain person, or legal certainty.[239] For our purposes, we are considering the application of mandatory rules to promote social justice in contract law. Provisions of non-mandatory rules embody the legislator's idea of a fair balance between the parties. The role of non-mandatory rules is not negligible, as these rules replace a frequent deficiency in arrangements between the parties. Unilaterally mandatory rules that give preference to one party are on the boundaries of this typology. Slovak private law provisions on consumer contracts are regulated by unilaterally mandatory rules, which means that the terms and conditions stipulated by a consumer contract may not depart from statutory provisions to the detriment of the consumer. Under the wording of the Civil Code [Section 54(1)], this requirement appears to be strict only in relation to the provisions set forth in the Civil Code, but the second sentence of this provision ("this law or

[238] TWIGG-FLESSNER, CH. 'The EU's Proposals for Regulating B2B Relationships on online platforms Transparency, Fairness and Beyond'. *Journal of European Consumer and Market Law*, 2018, Vol 7, no. 6, p. 223.

[239] CSACH, K. Zmluvná sloboda a kogentné právne normy. In *Naděje právní vědy*. Available at http://www.upjs.sk/files/0fbe811ee9e49cc33cff5a81398803d9.doc.

special regulations") suggests that the nature of unilaterally mandatory rules can be essentially assigned to the entire legislation applicable to consumer legal relations. The requirement for unilateral mandatory effect is based on the legislator's assumption that legislation in the form of non-mandatory rules constitutes an ideal model of the balanced and equitable arrangement of the rights and obligations of the parties. The act stresses that the consumer may not waive his rights conferred upon him by the Civil Code or special regulations for the protection of the consumer in advance, or otherwise impair his position under the contract. Consumer protection which is so broadly understood and a considerable limitation to freedom of will of the parties to a consumer contract shall apply to all consumer contracts, even those with individually negotiated terms and conditions.[240]

The use of mandatory rules is likely to be considered the most controversial in contract law of all civil law subsystems, albeit for the purpose of promoting social justice, when compared to property, succession and tort law, since these subsystems are characterised by a greater predominance of mandatory rules in contrast to contracts, and therefore some social elements are likely to be more easily enforced in these subsystems.[241] In contract law, parties' expectations tend to focus on guaranteeing the freedom to decide to enter into a legal relationship and the freedom to determine its content and scope of binding effect.

The right degree of directiveness and use of mandatory rules also needs to be sought with regard to the warning of Eliáš: *"But even those who share efforts to help people with a directive, need to ask themselves how much they're really supporting the benefits of others by contributing to the creation of what appears to be a safety net to protect those in need, or whether they're merely contributing to creating new forms of serfdom."*[242]

[240] JURČOVÁ, M. Záväzky vznikajúce zo spotrebiteľských zmlúv. In LAZAR, J. et al. *Občianske právo hmotné 2*. Bratislava: Iuris Libri, 2018, p. 58–59.

[241] See, for example, Lazar's reflections on the social role of property right, op. cit.

[242] ELIÁŠ, K. Soukromé a veřejné v právním světě. In MASLÁK, M. (ed) *Vybrané otázky implementácie európskych právnych predpisov reglementujúcich zvýšenú ochranu slabšej strany: zborník z cyklu diskusných seminárov uskutočnených v roku 2017 v rámci projektu APVV-14-0061*. Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2017, p. 38. Available at http://publikacie.iuridica.truni.sk/wp-content/uploads/2018/05/Maslak-Zbornik-_WEB.pdf (20/01/2019).

3.2.2 The Role of Public Law

The state should be the guarantor of the economic, social, and cultural rights guaranteed by the Constitution of the Slovak Republic. Public law traditionally encompasses administrative law which, in order to ensure the performance of the tasks of the state, also oversees the protection of the disadvantaged and weaker parties, and provides protection against discrimination. And it is precisely the area of consumer protection where there are significant penetrations of private and public law regulations. In view of the fact that the monitoring of compliance with consumer protection regulations falls primarily within the competence of the Slovak Trade Inspection and other administrative bodies, it is ensured that the issues associated with the relationship between public and private law and with the consequences of violations of public law rules for private law relations, or vice versa, are addressed.[243]

3.2.3 Taking Account of Behaviouralism in Order to Achieve Real Effectiveness of Legislation

Behaviouralism emphasises empirical research on the behaviour of individuals or groups of individuals, and also focuses on the behaviour of a person coming into contact with powerful authorities. It can be observed that legal experts have recently been showing increased interest[244] in linking consumer protection with behaviouralism, and this trend can also be simply indicated by the question: "Why don't consumer protection instruments actually work and achieve the targeted effect?"[245]

Behaviouralists highlight the obvious deficiency in consumer protection law made in relation to a fictitious consumer who reads contracts and product markings and has time to review contract terms. But the reality, as

[243] See also, for example, MASLÁK, M. (ed) *Vybrané otázky implementácie európskych právnych predpisov reglementujúcich zvýšenú ochranu slabšej strany: zborník z cyklu diskusných seminárov uskutočnených v roku 2017 v rámci projektu APVV-14-0061.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2017. 226 p, ISBN 978-80-568-0082-9.

[244] GÁBRIŠ, T. et al. *Nedogmatická právna veda. Od marxizmu po behaviorálnu ekonómiu*. Praha: Wolters Kluwer, 2017, ISBN 978-80-7552-951-0 (e-book), See e.g. the interdisciplinary project by Prof. Brigitta Lurger at Graz University, Austria: Contract Decisions of Consumers between Law and Psychology, available at https://consumer-law-and-psychology.uni-graz.at/.

[245] See also MICKLITZ, H. W., SIBONY, A. L., ESPOSITO, F. *Research Methods in Consumer Law, A Handbook*, Edward Elgar, 2018, ISBN 9781785366604.

also pointed out by legal experts,[246] is different. An average consumer, also preferred in the decision-making of the Court of Justice of the European Union,[247] comes from a "distorting mirror". However, it would be an obvious simplification to claim that EU law disregards and does not seek to apply the knowledge of other sciences, psychology, or sociology. Thus, the stronger involvement of behaviouralism findings in future processes of EU lawmaking can be called a 'reform' rather than a 'revolution', because EU law already uses behaviouralism.[248] Experts stress the need to improve the methodology and form of linking knowledge.[249] The basic message of behaviouralism, i.e. to simplify decision-making processes for the consumer, simplify the information process, and reduce the scope of information provided to consumers, can be realised only if such simplification and scope reduction are on the right track.

Other knowledge of behaviouralism in relation to consumer protection can also be summarised as follows:

– the EU's endeavour to favour consumers' choice and freedom of will by guaranteeing choice of law is misguided; protection needs to be fo-

[246] BEN-SHAHAR, O. The Myth of 'Opportunity to Read' in Contract Law. *European Review of Contract Law.* 2009, no. 5 or BEN-SHAHAR, O., SCHNEIDER, C. E. *More than you wanted to know. The Failure of the Mandated Disclosure.* Oxfordshire: Princeton University Press, 2014.

[247] For the categorisation of consumers and their characteristics, see e.g. REICH, N., MICKLITZ, H. W., ROTT, P., TONNER, K. *European Consumer Law.* 2nd Edition, Intersentia, 2014, p. 45–50, MAK, V. Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive'. *European Review of Private Law* 2011, no. 1, pp. 25–42 or according to sources available at https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.showArticle&elemID=15 *"The Court of Justice of the European Union has declared in Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657, para 31 as follows: 'when weighing the risk of misleading consumers against the requirements of the free movement of goods, it has held that,' ... in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect".*

[248] See also the Fitness Check of consumer and marketing law, available at https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332 (21.1.2019), JURČOVÁ, M., MASLÁK, M. Country report Slovakia In *Study for the fitness check of EU consumer and marketing law*. Brussels: European Commission, 2017, ISBN 978-92-79-68439-5, p. 1023–1074. Available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332. (22/01/2019).

[249] Twigg-Flessner is critical of the requirement for transparency and its effectiveness in the current proposal for a regulation on promoting fairness and transparency for the business users of online intermediation services COM(2018) 238 final. TWIGG-FLESSNER, CH., 'The EU's Proposals for Regulating B2B Relationships on online platforms Transparency, Fairness and Beyond' *Journal of European Consumer and Market Law,* 2018, no. 6, p. 230.

cused on those choices the consumer is actually interested in (In this respect, reference is made to the proposals for a Common European Sales Law as doomed to failure; it was a major project which, however, has not received the support of Member States but, even if it had gained such support and the regulation on a Common European Sales Law (CESL)[250] had been adopted, such would only have been enforced if this system had been set as a priority, and a return to national law enabled on an opt-out basis.

– criticism of information obligations in terms of scope, content and timing of providing information to consumers. Historical reasons highlight the background of the institute of pre-contractual information obligations. At the time of their introduction there were no empirical studies on their low efficacy, and overcoming information asymmetry in this way was accepted by Member States without major opposition, i.e. it was accepted unanimously as it did not constitute significant interference with Member States' contract law;
– behaviouralists speak in favour of redefining the basis of what is normal, usual, and common. The paradigm of expectations linked to an average consumer needs to be surmounted. Behaviouralists wonder whether an average consumer may actually be regarded as someone who has had the opportunity to read a contract's small print, and whether the fact that such person is actually bound by such terms may be considered normal provided that the person accepts the risk and does not read such small print.[251]

In relation to the social nature of rules that constitute obligation (and especially contract) law, behaviouralists ask a clear question: Are the lawmakers really interested in the resulting effect of the rules that they have proposed? If so, individual recommendations should be allowed for in terms of the method, context, content and timing of information obligations. In addition, empirical findings favour the use of an opt-out rather than an opt-in selection mechanism, and a method of black list to grey list.[252]

[250] Proposal for a regulation of THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Common European Sales Law /* COM/2011/0635 final - 2011/0284 (COD) */.

[251] SIBONY, A., HELLERINGEREU, G. Consumer Protection and Behavioural Sciences: Revolution or Reform? In ALLEMANNO, A., SIBONY, A. (eds) *Nudge and the Law, A European Perspective. Modern Studies in European Law*, Hart Publishing, 2015, p. 209.

[252] Ibid.

In respect of the social character of rules, it should be noted that we cannot unilaterally assign social nature only to those measures that are primarily aimed at protecting the consumer, or the weaker party. Equitable support for entrepreneurs can also be social in nature,[253] since such is capable of bringing balance and benefits to a wider range of entities. Behaviouralists' findings must also be considered from this point of view, i.e. that the requirements for transparency and simplification of market access have so far reflected entrepreneurial needs rather than the interests of *consumers.* Several examples are mentioned to illustrate this fact, especially the introduction of the euro currency, the unification of product labelling requirements, and the unification of some EU sales rules. These measures have created conditions for traders to offer goods and services within the EU. Promoting the Single Market is primarily a tool for trade promotion and only secondarily a tool for consumer protection.

3.3 Parties to an Obligation-Law Relationship

The recipients of a legal rule being of a social nature are the parties to an obligation-law relationship.[254] This rule serves the purpose of protecting the weaker party and also frequently disadvantages the other party, which is considered stronger in terms of economic strength, knowledge, or bargaining position.[255] Recently, there have been tendencies in literature to question the need for consumer preference,[256] and a special position of entities on the platform (two-sided markets) also opens up the question of recognisability and opportunities for consumer protection.

[253] OLŠOVSKÁ, A. Uplatnenie práva na štrajk a vznik škody u zamestnávateľa. In *Olomoucké dny soukromého práva.* Olomouc: Iuridicum Olomoucense, 2018. ISBN 978-80-88266-13-6, p. 211–220.

[254] The following chapters deal with the integration of rules of a social nature into commercial and labour law relationships; the interpretation hereinafter will be limited to parties to legal relationships between non-entrepreneurs and the relationships between entrepreneurs and consumers (consumer contracts in particular) (author's note).

[255] For example, according to the judgement in Case C-110/14 Horațiu Ovidiu Costea v SC Volksbank România SA, consumer protection applies not only to the level of a consumer's knowledge (professionalism in the field), but also to his bargaining power.

[256] ZOLL, F. At the end of the concept of consumer. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 99.

Civil law is based on rules that establish fair solutions and a fair balance between the rights and obligations of the parties. Even with regard to the protection of legally protected interests, some rules are mandatory in nature. If a legal relationship is governed by mandatory rules without the possibility of changing or excluding statutory provisions, in most cases protection will be provided to the recipient of this rule automatically by applying such rule. The main risk for weaker parties is the circumvention of the law and its identification[257] or special factual circumstances that will frustrate the purpose of the law to achieve fair solutions, resulting in the establishment of injustice in isolated cases. Weaker parties require a higher degree of protection. These traditionally include consumers, tenants, small and medium-sized businesses, and patients. In labour law employees, in family law: women, mothers, minors. In terms of integrating protection rules into civil law, we distinguish two types of protection:

a) conversion of an otherwise non-mandatory rule into a mandatory rule in general legal regulations governing contractual relationships; or
b) making special regulations with regard to the interests of the weaker party.

3.3.1 Consumer

According to the current definition in the Civil Code, a consumer only means a natural person who, when concluding and performing a consumer contract, does not act within the scope of his trade activity or other business activity. The fact that consumer protection is limited to natural persons is in line with the trend outlined in Directive 2011/83/EU and also *de lege lata* excludes discussions as to whether non-profit legal entities should also enjoy protection as consumers. Consumer contracts are normally referred to as B2C ("business-to-consumer") contracts, and are based on the assumption that the supplier (business) provides goods or services and the consumer accepts/receives them – usually for a consideration. Options for consumer protection are also discussed abroad in C2B ("consumer-to-business") relationships, where the parties' position is opposite, i.e. the goods or services are provided by the consumer and the supplier pays the price therefor. The Slovak legal definition applies to both alternatives above (B2C and C2B)

[257] ELIÁŠ, K. Obcházení zákona. *Právní rozhledy*. 2018, Vol. 26, no. 15–16, p. 515–521, ELIÁŠ, K. Porušení zákona oklikou. Fraus legis facta v civilním právu. *Právník,* 2018, no. 11, p. 897–921.

without exception (if the consumer sells his car to a used car dealer, it is a consumer contract). The Consumer Protection Act also defines the terms consumer, seller, and supplier. For private law purposes of protection in consumer contracts, definitions in the Civil Code should be decisive and prevail. The definitions in the Civil Code and those in the Consumer Protection Act are not entirely identical. At first glance, the definition of consumer in the Consumer Protection Act appears to be narrower and does not provide protection to such a wide range of natural persons as the Civil Code, since the consumer is a natural person who, when concluding and performing a consumer contract, does not act within the scope of his business, employment or profession. The Consumer Protection Act emphasises that the consumer is a non-professional in a given area, i.e. he does not act within the scope of his profession or employment; the Civil Code only focuses on the non-business nature of a natural person's conduct. It is debatable whether this could result in the different status of a person if, for example, the purchase of fabrics by an apprentice female dressmaker employed in a clothing factory could be assessed by way of derogation. If she buys fabrics for her personal use, under the Civil Code it is sufficient for the consumer nature of the contract that she does not act within the scope of her trade activity or other business activity; however, under the Consumer Protection Act, we could argue that she acts within the scope of her profession or employment. Consumer protection applies not only to the level of the consumer's knowledge (professionalism in the field), but also to his bargaining power in relation to terms and conditions that are prepared in advance by the seller or supplier and the content of which may not be influenced by the consumer. Therefore, it would probably be wrong to focus only on professionalism (a correspondence between the subject-matter of the contract and professional qualifications of the individual), i.e. preference should be given to interpretation in which we focus only on whether or not the person acts within the scope of his trade activity or other business activity. The Consumer Protection Act defines the seller as a person who, when concluding and performing a consumer contract, acts within the scope of his business or profession, or a person acting on his behalf or account. In our opinion, this legal definition is incorrect in the section "a person acting on his behalf or account" and is not in line with the definition in Directive 2011/83/EU. The Consumer Protection Act erroneously leads to a presumption that the seller also means a person of his representative, which cannot be accepted. It is necessary to support an interpretation consistent with the said directive, under which "trader" means any person

who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession. In accordance with the principles of representation laid down in the Civil Code [Section 32(2): If an attorney acts on behalf of the principal within the limits of the authorisation to represent, then rights and obligations shall ensue directly to the principal], the representative's acts within the scope of the authorisation to represent shall be attributed to the person represented (seller). The Consumer Protection Act also specifically defines the supplier; this definition is inconsistent with the definition in the Civil Code and is given for other purposes.[258] Unlike these (relatively) simple categorisations of persons, legal science[259] deals with the issues of defining the concept of consumer in more detail by highlighting the significant differences between individual consumers that should be taken into account in at least two categories: on the one hand a responsible and circumspect consumer, and on the other a vulnerable consumer. In developing the concept of consumer, Micklitz also draws attention to frequent cases of extending consumer protection to other entities (both natural persons and legal entities, founders of start-ups, passengers), or possible exclusions of certain entities from protection. Particular account should be taken of the concept of customer that goes beyond the concept of consumer, and is often used in sectoral arrangements (telecommunications, energy supply).[260]

According to Bejček, we are facing two contradictory tendencies. On the one hand, there is particularisation of law in which persons are mechanically divided into entrepreneurs, consumers and others, and these groups can be further differentiated (small and medium-sized entrepreneur or vulnerable consumer). On the other hand, it concerns calling for single obligation law, regardless of personal status. *"Thus, the importance of general correctives to content accuracy and assessment in each individual case increases"*.[261] Similar-

[258] JURČOVÁ, M. Záväzky vznikajúce zo spotrebiteľských zmlúv. In LAZAR, J. et al. *Občianske právo hmotné 2.* Bratislava: Iuris Libri, 2018, p. 58.

[259] See LECZYKIEWICZ, D., WEATHERILL, S. *The Images of Consumer in EU law.* Oxford and Portland, Oregon: Hart Publishing, 2016.

[260] MICKLITZ, H. W. Potrebujú spotrebitelia a obchodníci novú architektúru spotrebiteľského práva?: podnet na zamyslenie (translated by Monika Jurčová). *Právny obzor,* 2015, Vol. 98, no. 3, p. 285–302.

[261] BEJČEK, J. Rovnost a slabost v soukromém právu: jako vule a predstava. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 217–218.

ly, Zoll also advocates a return to "classical" contract law based on the formal equality of the parties. This development can be supported by extending the scope of mandatory legal rules and regulations in contract law, and public law instruments to maintain fair competition.[262] Other authors also avow the need to reconsider consumer protection law with regard to the digital age. According to Twigg-Flessner: "*In short, the time has come to rethink EU Consumer Law. It is possible to design consumer law in a better way than that used over the last 30 years. It is time to be brave and bold: to wipe the slate clean and start from first principles, and then design a consumer law system which is truly fit for the digital age (but not limited to the digital environment).*"[263]

Civil law, obligation law, and contract law in particular have traditionally been considered to be liberal law based on the principle of freedom of will. Compared to its initial form enshrined in the liberal codes of the 19th century, contract law has changed and evolved; it is no longer neutral, rather there are beliefs that it is to fulfil and fulfils the distributive function of wealth in society. There is no unanimity of views on this issue, and the distributive function of contract law is largely the result of EU lawmaking in this area.[264]

The creation of a special category of consumer as a weaker party in order to achieve material equality is a long-standing experiment which should be carefully evaluated, in consideration of whether it is sustainable to create a category that is intrinsically regarded as stratified and problematic.[265] All special provisions of contract law stipulated to protect consumers deepen undesirable legal particularism. The technique of using mandatory rules in relation to special groups of persons can be seen as a compromise proposal towards progress. However, the abandonment of special regulations govern-

[262] ZOLL, F. At the end of the concept of consumer. In LAZAR, J., GAJDOŠOVÁ, M. *Sociálna funkcia práva a narastajúca majetková nerovnosť.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2018, p. 99. See also SCHULTE-NÖLKE, H. 'The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?' *Journal of European Consumer and Market Law,* 2015, no. 4, p. 135–139.

[263] TWIGG-FLESNER, CH. Editorial: From Refit to a Rethink: Time for Fundamental EU Consumer Law Reform? *Journal of European Consumer and Market Law*, 2017, no. 6, p. 185–189.

[264] SEFTON-GREEN, R. European Contract Law and Social Justice. In TWIGG-FLESSNER, CH. (ed) *Research Handbook on EU Consumer and Contract Law.* Cheltenham: Edward Edgar Publishing Inc, 2016, p. 535–565.

[265] See, for example, CARTWRIGHT, R. The consumer Image within EU law In TWIGG-FLESNER, CH. (ed) *Research Handbook on EU Consumer and Contract Law.* Cheltenham: Edward Edgar Publishing Inc, 2016, p. 199–220.

ing private law consumer relationships can be recommended only when other relevant instruments have been identified. The concept of consumer is also exposed to relativisation within relationships on online intermediary platforms. Service providers and customers are both professionals and non-professionals, entrepreneurs and non-entrepreneurs; rather than creating special rules for another emerging category of *prosumers (provider-consumer*), we speak in favour of efforts to maximize options to unify rules for obligation-law relationships. The unification and overcoming of particularism is a desirable instrument for simplification, which has repeatedly emerged as a significant behaviouralists' argument.

Marginal note. A consumer is inextricably linked to consumption. Support for consumption to develop the economy of Europe has secondarily led to promoting the interests of consumers under Article 169(1) of TFEU, where the EU is committed to ensuring a high level of consumer protection and contributes to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. With regard to the insistent questions of sustainable development, it is also necessary to look at consumer issues from this perspective. The sharing economy can be a certain factor in supporting an ethical consumer.

3.4 Summary of General Recommendations for the Integration of Rules of Social Nature into Obligation Law

According to Havel, the public-law organisational conception of private law manifested in the detailing of legislation and the marginalisation of general principles has led to positivism, which has publicised private law and removed its esprit. Havel questions the fact that positivism has made a major contribution by guaranteeing and concretising the rights of the weaker or otherwise disadvantaged, as it argues that the proclaimed contribution of *consumer law* could also be replaced by a creative interpretation of "old" in the sense of universal, non-consumer law.[266] In agreement with him, Eliáš re-

[266] HAVEL, B. Zlomky o stavu soukromého a veřejného práva. In HAVEL, B., PIHERA, V. (eds) *Soukromé právo na cestě. Eseje a jiné texty k jubileu Karla Eliáše*. Plzeň. Aleš Čeněk, 2010 p. 177.

gards the preservation of private law vitality as respect for the freedom of the individual.[267]

Affiliation with private law needs to be taken into account as part of the proposals for implementing social nature rules into a model of legal regulations governing obligation law relationships. The principle of proportionality must be allowed for in the process of decision-making by courts and other entities authorised to authoritatively decide on the rights and protected interests of private law entities, and settle disputes arising from private law relationships. The role of private law principles in decision-making practice is of particular importance for the settlement of disputes; building trust in the judiciary requires creating flexible legal rules to the extent that such leave scope for judicial reflections. Flexibility does not mean uncertainty in terms of fluctuating solutions. Rules of conduct should be as certain as possible; it is not appropriate to unreasonably leave scope for ambiguous interpretation. Flexibility should be targeted, not random. Open legal concepts should be used where appropriate, reasonable, and suitable. Legislation must also respect the fact that membership of the European Union imposes significant constraints, because it is not permissible to transpose directives by means of generalisation, i.e. by making the principles general. Král emphasizes that the first basic criterion for the proper transposition of directives is that the content of a transposition measure must precisely correspond to the content of the directive in terms of meaning (i.e. semantically). The second criterion is that the transposition measure adopted must be effectively applicable. The only careful and well-targeted transposition analysis resulting in the right knowledge and determination of which provisions of the directive need to be transposed word-by-word, and which need to be appropriately reformulated in terms of adaptation.[268] We recommend careful consideration of when to apply "gold plating", by means of which an EU Member State imposes addi-

[267] ELIÁŠ, K. Soukromé a veřejné v právním světě. In MASLÁK, M. (ed) *Vybrané otázky implementácie európskych právnych predpisov reglementujúcich zvýšenú ochranu slabšej strany: zborník z cyklu diskusných seminárov uskutočnených v roku 2017 v rámci projektu APVV-14-0061.* Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity a Vedy, vydavateľstva Slovenskej akadémie vied, 2017, p. 38. Available at http://publikacie.iuridica.truni.sk/wp-content/uploads/2018/05/Maslak-Zbornik-_WEB.pdf (20/01/2019).

[268] KRÁL, R. Náležitá normativní implementace spotřebitelského práva EU jako předpoklad jeho správné a efektivní aplikace v ČR./Proper normative implementation of EU consumer laws as a prerequisite for their proper and effective application in the Czech Republic In NOVOTNÁ, M. (eds) *Zásady európskeho súkromného práva v aplikačnej praxi. Spotrebiteľský kódex, áno alebo nie?* Prague: Leges, 2018, 978-80-7502-324-7 (in the press).

tional obligations and constraints on private law entities beyond the scope of obligations arising from the transposition of the directive.

The private-law nature of rules and the obligations arising from membership of the EU are the bases of proposals. With regard to these bases, the deciding tools for promoting the social model of private law are as follows:

- guaranteeing the right of access to goods and services that are essential for finding dignified personal fulfilment in society (a basic service in energy supply, telecommunications and Internet access, banking); the purpose of protection justifies restricting the freedom of contract in the provider's decision on whether or not to conclude a contract with regard to the system of incentives, support and guarantees;
- where necessary and justified, to use unilaterally mandatory legal rules to protect the weaker party.[269]
- not to promote particularism. If it is suitable and appropriate to apply the institute to all private-law relationships, preference should be given to general rules, and according to the factual circumstances and the nature of entities, the interpretation is capable of guaranteeing (even with regard to the relevant principle, e.g. good morals vs. fair trade) the limits of application differentiation [e.g. checking the content of all contracts with both traders and non-traders (B2C B2B C2C)],[270] and unfair contract terms (the option to differentiate a review *ex-officio* and upon objection);
- to promote a suitable optional system on an opt-out, not an opt-in basis;
- to respect the findings of behaviouralists, examine the actual effectiveness of legal rules in legal practice;

[269] In this respect, we urge the need for a clear expression of mandatory effect and the consequences of violation of a mandatory rule and possible problems with application related thereto; for example, CSACH, K. Vymedzenie kogentnosti pravidiel súkromného práva v návrhu novelizácie Občianskeho zákonníka. *Súkromné právo*, no. 6, 2018, p. 2–9.

[270] HESSELINK, M. Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive, *European Review of Private Law,* Vol. 18, No. 18, pp. 57–102, 2010. Hesselink states: "*This raises the question as to whether a rigid, categorical distinction between rules governing B2C and those governing B2B contracts is desirable. No substantive ground justifies such a categorical distinction. Non-consumers, especially small businesses, often encounter situations identical to those usually invoked to justify consumer protection. In such cases, the equality principle requires that the legislator extend the protection prescribed for consumers to include this group by transposing the directive as general contract law. In the past, the Dutch and other legislators (notably the German one) have done so in part for unfair contract terms and sales.*"

- to allow a consumer to choose the system when it concerns easy-to-understand questions and does not threaten his interests to a considerable extent; to enable a consumer to consider an economic advantage, e.g. the option of a money-back guarantee for defects within two years or withdrawal from a contract within 14 days with refunds (exceeding the EU system);
- to put any measure to the test of adaptation to the digital environment.

We cannot propose social rules only with regard to the promotion and protection of individual interests; we consider sustainable development to be a prerequisite for guaranteeing all individual interests. Using the advantages of the digital economy should not only be a market support tool, such should also be used to promote sharing to protect natural resources. Suppressing unlimited consumption is in stark contrast to market support, but the simple consumerism of individuals is supported by the consumer nature of private law. This leads to the circular flow of disposables, rectification of defects is made by exchange rather than repair. Conformity and its criteria should be aimed at promoting quality and durability. New requirements of environmental law need to be reviewed with an open mind. Promoting the Single Market must not jeopardise support for local production and consumption which, when meeting the requirement of safety and profitability, do not lead to the incurrence of contingent expenses of testing, market admissibility, transport and advertising. Promoting subjective rights and obligations should be enhanced by increasing the individual responsibility of private law entities. Although the environmental law pioneers Mattei and Capra also criticise individual ownership and tend to promote "commons", i.e. common ownership of goods and resource sharing,[271] we are convinced (also thanks to the personal experience of socialist Czechoslovakia) that a creative interpretation of Article 20 of the Constitution of the Slovak Republic is sufficient. "*The ownership is binding. It shall not be misused causing injury to others or contrary to the public interests protected by the law. The exercise of right in property must not be detrimental to the health of other people, nature, cultural sites or the environment beyond the margin laid down by a law.*" This principle should also apply to individual legal acts establishing, altering or terminating obligation law relationships. Obligations are binding upon the parties to an obligation law relationship. The exercise of rights and obligations arising from civil law relationships must not, without a legal reason, interfere with

[271] See CAPRA, F., MATTEI, U. *The Ecology of Law: Toward a Legal System in Tune with Nature and Community*. Berrett-Koehler Publisher, 2015**,** ISBN: 978-1626562066.

the rights and legitimate interests of others and must not be inconsistent with good morals. Action against good morals is an open legal concept that evolves and reflects the demands of the times. Sustainable development is included in such demands, and even private law entities should not be protected and encouraged to limitlessly consume, leading to the destruction of life on Earth. In that case, such luxury as a social model of private law and the protection of the weaker party could no longer be promoted.[272] To what extent the sharing economy and the adaptation of human behaviour to sustainable development demands can be the answer is also the subject of the latest studies on the protection of consumer rights and the sharing economy.[273]

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ELIÁŠ, K. Porušení zákona oklikou. Fraus legis facta v civilním právu. *Právník*, 2018, No. 11, p. 897–921

[272] See also discussions on the role of private law in promoting sustainable development requirements https://www.maastrichtuniversity.nl/blog/2018/02/sustainability-and-private-law (21/01/2019).

[273] *Behavioural Study on Consumers' Engagement in the Circular Economy.* Final Report, Prepared by LE Europe, VVA Europe, Ipsos, ConPolicy and Trinomics. October 2018. Available at https://ec.europa.eu/info/sites/info/files/ec_circular_economy_final_report_0.pdf.

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4. CONTENTS OF THE CONTRACT – GENERAL STARTING POINTS FOR CONTRACTING

The age-old "disagreement" between iusnaturalism and legal positivism (considering them as key streams of both legal theoretical and practical thinking) always determines the conception and function of legal principles at a specific point in time.[274]

In the sense outlined, an effective normative text can be seen (in terms of force/effect of a law, and not as actually *effective* in terms of solving all situations of ordinary life) as a result of the "struggle" indicated.[275]

The normative text of a law based on supra-statutory principles also constitutes a fundamental framework for contractual relationships, where we can also highlight the principle of individual autonomy, freedom of contract and correctives thereto, such as good morals,[276] fair trade or business practices.[277] The imperative of *good morals and long-term practices* was already accentuated by Iulianus: *De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine indictum est.*[278]

Statutory mechanisms for determining the content of contracts in the form of mandatory (as well as unilaterally mandatory) and non-mandatory rules, the recognition of which according to the criteria in Section 2(3) of the Civil Code is designed for a person capable of mature legal thinking rather than a layman, represent another way of limitation in contracting. It is to be hoped (as clear standardization is not explicitly expressed) that the application of mandatory rules is reflected in what the legislator, when making fair

[274] HOLLÄNDER, P. *Filosofie práva*. První vydání. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2006, mainly p. 17–63, 139–176.

[275] Statutory rules laid down by legislation constitute a model of social relations, and the standards/principles of law represent that enshrined and primarily intended therein. In VON BAR, CH. – CLIVE, E. – SCHULTE-NÖLKE, H. – BEALE, H. – HERRE, J. – HUET, J. – SCHLECHTRIEHM, P. – STORME, M. – SWANN, S. – VATUL, P. – VENEZIANO, A. – ZOLL, F. (eds.), *Principles. Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Munich: Sellier. European Law Publisher, 2008.

[276] And also general limits in the form of the content and purpose of an act under Section 51 of the Civil Code.

[277] For example, in Sections 263, 264, 265 of the Commercial Code.

[278] Digest 1, 3, 32 – Iulianus.

laws, considers to be immutable and important to the extent that those *essential* parts of agreements may not be altered within the scope of freedom of contract.

The explicit materialization of legal principles in a normative text is made up of so-called general clauses: *"It is evident that in practice both categories (values and model relationships) are applied promiscue (i.e. interchangeably) in various forms of mutual positions, from inclusion to exclusion. A remarkable intersection is formed by general clauses as a legislative method of functional incorporation of principles into the text of a legislative work."*[279] An example of a general clause is the provision of Section 53 of the Civil Code regulating unacceptable contract terms.[280]

The principles which form the basis of law are also sources of law, since it is necessary to assume that written law is their materialization or individualization with regard to time-specific circumstances (periods). According to Brostl, a principle means *"a standard which is not to be followed because it will help achieve or secure some economic, social or political situation considered desirable, but because it is required by justice, fairness, or some other dimension of morality."*[281] The requirements of justice and fairness should always be superior to principles, being placed above the level of "common" principles and representing a *sui generis* category, as can also be seen from the ancient Roman principle: *Ius est ars boni et aequi* (Ulpianus) or *Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem*.

When getting beyond the scope of the foregoing spirit, it is reasonable to think about the sources of law as such, which include (among other things) legal standards/principles. According to Káčer, the source of law can be perceived in the following metaphors: *"A source is a source unless it dries up, i.e. it is a source of something that is not exhausted by filling up the first jug; a source is capable of quenching the thirst of every person coming to it; it is a lasting source and one can repeatedly return to it with the same reason. This corresponds to the basic formal condition of all kinds of sources of law consisting in the general nature of legal rules: the source of law does not dry up with the one-*

[279] HURDÍK, J., LAVICKÝ, P. *Systém zásad soukromého práva*. Brno: Masarykova univerzita, 2010. p. 35. Available at: https://science.law.muni.cz/dokumenty/21777.

[280] For more information about this issue, see e.g. JURČOVÁ, M., NOVOTNÁ, M. Šedý alebo čierny, to je otázka. In *Právo, obchod, ekonomika*. Košice: Univerzita Pavla Jozefa Šafárika, 2016, p. 286–294.

[281] BROSTL, A. *Právne princípy ako prameň práva*. Available at https://www.upjs.sk/public/media/16719/PRAVNE%20PRINCIPY%20AKO%20PRAMEN%20PRAVA%20(3).doc.

time application of a rule contained therein; this source is accessible to everyone and one can repeatedly return to it with an individually different matter which is, however, the same in terms of kind. Almost the entire objective law which does not correspond to the formal condition described above is justifiably criticised by both legal scientists and constitutional courts."[282]

4.1 Contractual Liability in Consumer Relations in Terms of Selecting the Contractor

Concluding a contract is a process regulated by law. In this process, emphasis is primarily placed on the form and content in terms of general legal regulations (Sections 43 – 47 of the Civil Code). The subject remains neglected, which is largely substituted by legal theory (even though not in the context outlined in this part of the work), e.g. in the case of elements of a legal relationship[283] or requirements for the subject of a legal act.[284]

In this respect, we consider the *neglected* subject perceived by us as an important category that is not given enough attention in terms of theory or principles.

The subject itself is the primary one without which it would not be possible to think about the content, form or object of a legal relationship or legal act. The subject is also the primary "subject-matter" of protection in view of a private law general regulation, when Section 1(1) prefers a natural person (a legal entity as an artificial legal construct for facilitating trade in this context means only a certain group of natural persons, because a legal entity cannot ultimately exist without a natural person) and their protection to ownership from among civil rights and freedoms.

Under each contract, there are two subjects (and ultimately "only" natural persons) who contract with each other to meet their certain needs.

Therefore, the answer to the question of who is entering into a legal relationship (a contract in a narrower sense) is important, and only then the issue of content, object, and form *respectively* should be addressed. The view in

[282] KÁČER, M. *Prečo zotrvať pri rozhodnutom. Teória záväznosti precedentu*. Prague: Leges, 2013, p. 13.

[283] LAZAR, J. et al. *Základy občianskeho hmotného práva*. Druhé prepracované vydanie. I. volume. Bratislava: Iura Edition, 2004. p. 130 et seq.

[284] LAZAR, J. et al. *Základy občianskeho hmotného práva*. Druhé prepracované vydanie. I. volume. Bratislava: Iura Edition, 2004. p. 113.

which the exact content of a contract is important only when *problems* occur is nothing innovative, which is also true of such *problems* in extralegal terms, implying that it is the contracting entity that is the most important "part" of the contract.

Each contract necessitates (at least) two parties, i.e. two entities (subjects), i.e. two natural persons (ultimately), and these persons have their own characteristics (distinctive elements) and are defined thereby.

4.2 The Level of Identification of the Entity, Pre-contractual Obligations

When considering the extent to which an entity is to be identified for general contractual purposes it is necessary to abstract away from data, such as forename and surname, date of birth, permanent address. Such data is necessary for identifying the entity, but it does not have ipso facto any information value for making an assumption about the fulfilment of the contract, which is (perhaps the main) logical goal of contracting.

In our view, legislation does not usually contain provisions placing *qualitative* requirements (not having in mind legal capacity and similar categories that are duly formulated and set forth) upon the contractor. Exceptions can be found, for example, in commercial law, where a certain contractual type can only be entered into by an entity possessing a certain required attribute in a particular contractual position as a contracting party (e.g. bank – bank authorisation – current account contract, etc.).

In terms of European Union law, there is a fundamental influence in this respect, especially in the case of consumer contracts at the (pre-)contracting level. Numerous and extensive information forms are often subject to criticism, and we cannot disagree with the fact that they are becoming very burdensome for both parties.

However, we do not agree with the views in which pre-contractual information to be provided by the supplier (creditor) to the consumer shall serve the consumer's interests only. On the contrary, we are of the opinion that the primary reason for its existence is for the supplier's benefit, as explained below.

4.3 Information Obligations in Consumer Law – Cui Bono?

In the case of granting credit to the consumer,[285] the creditor is not only entitled, but also obliged, to collect, in addition to *natural* identifiers, other relevant and privacy-invading information about the consumer, more specifically (using the lexicon of the Data Protection Act) on the basis of a statutory licence: information on revenue, expenditure and the economic situation (which can be considered reasonable for the question of assuming creditworthiness as a priority framework of the assessment, whether the consumer will be required to repay the funds provided along with a consideration for their provision), as well as information on family status, the cost of life necessities of the consumer and his dependants [*in concreto* in the provisions of: Consumer Credit Act – Section 7(1), (20), (27), Section 11(2); Housing Loans Act – Section 8(10), (25), Section 15(2)], even from *external sources*: *"Information on revenue under the first sentence shall be documented and verified through internal or external sources independent of the consumer."* without its final specifications.

It goes without saying that the creditor will collect information about the debtor before the creditor enters into a contract with him. For the purposes of determining (not only) creditworthiness, it has available means at its discretion, because it is solely up to the creditor, what specific information it will collect from the consumer, because in this respect, the law offers the creditor only a generally defined and mainly broad framework. The said conclusion is supported by the decision-making practice of the Union:

"... The provisions of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC must be interpreted to the effect that: first, they preclude national rules according to which the burden of proving the non-performance of the obligations laid down in Articles 5 and 8 of Directive 2008/48 lies with the consumer; and secondly, they preclude a court from having to find that, as a result of a standard term, a consumer has acknowledged that the creditor's pre-contractual obligations have been fully and correctly performed, with that term thereby resulting in a reversal of the burden of proving

[285] In this regard, we would like to draw attention to the fragmentation and opacity of legislation governing *common* legal relationships, such as current consumer loans: Commercial Code – (at least) in the part dealing with the contract type "credit agreement", the Civil Code, Consumer Credit Act, Housing Loans Act, Building Savings Act, where the list of these laws is not exhaustive, they constitute only basic regulations.

the performance of those obligations such as to undermine the effectiveness of the rights conferred by Directive 2008/48.

2. Article 8(1) of the directive must be interpreted to the effect that, first, it does not preclude the consumer's creditworthiness assessment from being carried out solely on the basis of information supplied by the consumer, provided that that information is sufficient and that mere declarations by the consumer are also accompanied by supporting evidence and, secondly, that it does not require the creditor to carry out systematic checks of the veracity of the information supplied by the consumer.

3. Article 5(6) of Directive 2008/48 must be interpreted to the effect that, although it does not preclude a creditor from providing the consumer with adequate explanations before assessing the financial situation and the needs of that consumer, it may be that the assessment of the consumer's creditworthiness means that the adequate explanations provided need to be adapted, and that those explanations must be communicated to the consumer in good time before the credit agreement is signed, without this, however, requiring a specific document to be drawn up."[286]

It is legally *fair* that the creditor cannot shift to the consumer the burden of proving whether the creditor has collected the necessary information before the conclusion of the contract. In respect of decision-making practice, it is also necessary to ensure that the creditor does not content itself with the documents received from the consumer, because it has sufficient legal options to verify the necessary information, so to say, on its own.

In the overwhelming majority of cases, creditors' endeavour to determine the consumer's creditworthiness remains inadequate, where it is usual to only ask for proof of income and completing a questionnaire regarding consumer spending, including a question regarding with whom the consumer shares a household. Thus, the assessment is rather formal, and not sufficient at all.

Notwithstanding the *careless* approach to determining creditworthiness (i.e. failure to comply with the obligation clearly imposed by law), the sanction for taking such approach is relatively moderate – the impossibility of requiring one-time credit repayment [Section 11(2) of the Consumer Credit Act or Article 15(2) of the Housing Loans Act], i.e. the consumer is still under the obligation to repay credit granted and pay the creditor a consideration therefor, including all related fees, and it is reasonable to assume that

[286] Judgement of the Court of Justice of the European Union in Case C-449/13 of 18 December 2014.

such consideration/fees will also include the cost of determination of the consumer's creditworthiness, which is to be carried out by the creditor with due diligence, and for which a consideration will still be paid to the creditor despite its *common carelessness*, and the only sanction is that it cannot proceed to recover the remainder of the debt, which it, however, did not expect when concluding the contract, as it is presumed that the consumer will agree to repay credit in instalments.

Only if the creditor is *grossly careless* about determining the consumer's creditworthiness (which means, when using the lexicon of the act, a gross breach of the obligation to act with due diligence in determining the debtor's ability to repay the loan), the sanction is somewhat stricter – the loan granted is deemed to be interest-free and free of charge [Section 15(2) of the Housing Loans Act, Article 11(2) of the Consumer Credit Act].

The obligation to act with due diligence is a legal obligation that involves the necessity (rather than the option) to act in a certain way, i.e. not in a different way: *"A legal obligation is characterised by an order to act in a certain way (to act or refrain from acting), which also constitutes a prohibition of acting in any other way (as opposed to a right which is an option, but not an obligation). An obligation may be defined more narrowly or broadly, but with prerequisite certainty – a legal rule defines an obligation more broadly, as it applies to all cases of the same kind and indeterminate number."*[287]

Significant shortcomings in creditors' activities in the assessment of the consumer as a debtor who is to repay the loan granted did not remain unnoticed by the constitutional authorities: *"Conversely, the courts of general jurisdiction – i.e. including the regional court in the present case under consideration – should lead the lender (even through possible suspension of distraint in relation to the liable person's motion) to convincingly verify whether it is not obvious that the (future) debtor will be unable to repay his loan. According to the Constitutional Court, this is not a particularly strict or even inappropriate requirement; assessing whether the debt will be repaid in fact is, after all, a fundamental principle that courts should take into account as a general principle, regardless of whether it is explicitly enshrined in a law or not. However, in its ruling contested by a constitutional complaint, the Regional Court does not sufficiently address the question of whether and how the enjoined party assessed – using the words of the case law of the Court of Justice – 'the complainant's*

[287] Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic 6/2017 in criminal cases no. 6/2017, opinion 51 (Tpj 28/22017).

creditworthiness'",[288] which, beyond the scope of legal assessment, emphasize that courts need to educate lenders, which would obviously not be the case if the lenders did not neglect their obligations on a regular basis.

The legal doctrine perceives the question of the obligation to assess the debtor's creditworthiness in relation to his options and abilities to repay the loan, as given in favour of the debtor: The purpose of enshrining consumer credit providers' obligations to assess consumer's creditworthiness [Section 9 (1) of the Consumer Credit Act] is primarily to protect consumers against risky loans and to solve the problem of increasing household indebtedness (see the Explanatory Report for the Consumer Credit Act). The creditor's obligation to assess the consumer's creditworthiness before the conclusion of the contract is also a guarantee for the consumer that the creditor will act in lending in such a way that will, to a certain extent, protect the consumer from being unable to repay. In this case, the primary protected interest is consumer protection against irresponsible lending, which would lead to his insolvency with all negative consequences, i.e. both economic in the form of loss of property and social in the form of social stigmatisation.[289]

The decision-making practice shows a rather neutral approach to assessing for whose benefit the pre-contractual obligations are imposed: *"First, the Supreme Administrative Court dealt with the alleged inconsistency of the contested judgement, which, according to the complainant, was to be consisted in that the Regional Court, on the one hand, stated that 'if the concept of suspicion is relevant to the correct procedure lege artis, it is irrelevant whether the person who was supposed to act with due diligence had such suspicion, but whether such person should and could have it with regard to all circumstances', and, on the other hand, stated that 'due diligence does not mean to rely on assumptions based on unsubstantiated communications of the business partner or unverified copies of documents'. According to the Court of Cassation, the conclusions of the Regional Court must be understood in mutual connection so that due diligence used in the assessment of the consumer's creditworthiness also includes the assessment of relevant documents and the appropriate efforts supported by expertise and professionalism in order to identify all the unavoidable facts to the necessary extent. Therefore, it is also necessary to infer the requirement to substantiate the debtor's allegations of his financial situation. The*

[288] Decision of the Constitutional Court in the case under ref. no. III.ÚS/4129/2018 of 26 February 2019.

[289] WACHTLOVÁ, L., SLANINA, J. *Zákon o spotřebitelském úvěru. Commentary*. 1st edition. Prague: C. H. Beck, 2011, p. 99.

unsupported statement of the consumer itself cannot lead to proper verification of his ability to repay the loan, as, according to the Regional Court, it is a situation where a person acting with due diligence should and could have doubts about the truth of the alleged facts.",[290] although the decision cited refers to the immediately cited opinion of the legal doctrine, it is nevertheless not clearly the case in the actual parts of the decision containing the court's own conclusions.

The benefit of the above-cited decision-making practice also lies in expressing the purpose of the obligation to determine the consumer's creditworthiness, while emphasising the principle of trust in legal relationships, which is, however, limited by the principle of prudence: *"Of course, the Supreme Administrative Court agrees with the complainant on the fact that debtors should not be regarded as liars a priori, and that the debtors themselves should bear a certain degree of responsibility for fulfilling their obligations under the credit agreements concluded. Therefore, the Consumer Credit Act also obliges the creditor to provide the consumer with timely and complete information about the loan, so that the consumer can assess whether the offer meets his needs and is proportional to the current situation (see the Explanatory Report for the Consumer Credit Act). However, it should be noted that the Consumer Credit Act places great emphasis on protecting consumers from irresponsible indebtedness, which currently poses a serious social problem for which, apparently, the debtors shall not be solely responsible for solving. Creditors should contribute to addressing this problem by careful assessment of the consumer's ability to repay credit before they conclude credit agreements, thus eliminating possible consumer's tendencies to misrepresent their financial situation in an attempt to get consumer credit, regardless of prior consideration of their ability to repay it. Thus, these are legal regulations aimed at protecting the consumer as the weaker party, which, in turn, entails a greater burden in the form of obligations imposed upon the entrepreneur who is, in this case, the consumer credit provider."*[291]

Determination of the consumer's creditworthiness is equally necessary in the case of so-called refinancing loans.[292]

[290] Decision of the Supreme Administrative Court of the Czech Republic in the case under ref. no. As/30/2015 of 1 April 2015.

[291] Decision of the Supreme Administrative Court of the Czech Republic in the case under ref. no. As/30/2015 of 1 April 2015.

[292] *"Therefore, although when using the procedure referred to in Section 1(6) of the Consumer Credit Act, the creditor is basically under no obligation to assess the consumer's ability to repay this new credit to the extent envisaged in Section 7 of the Consumer Credit Act, at*

In respect of the provision of funds, the Union legislator also justifies the need to determine the consumer's ability to repay credit on grounds existing on the creditor's part – to ensure that it is competitive in the internal market: *"To assess the credit status of a consumer, the creditor should also consult relevant databases; the legal and actual circumstances may require that such consultations vary in scope. To prevent any distortion of competition among creditors, it should be ensured that creditors have access to private or public databases concerning consumers in a Member State where they are not established under non-discriminatory conditions compared with creditors in that Member State."*[293] This is an important argument that is not perceived by the professional public. Through the creditor's obligation to determine the creditworthiness of the consumer and its explicit obligation to collect information about the consumer to the necessary extent also from *external* sources which are not further specified by a final calculation, the creditor is not only allowed but even ordered to fulfil its obligations in a due and proper manner.

In addition, the Union legislator does not abstract away from the creditors' preventive obligation, who should, on their own initiative, seek to educate consumers, which will ultimately also contribute to achieving their (earning) goals: *"Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important*

least a rough assessment of the consumer's ability to repay credit under a new instalment agreement will be required to bear the burden of proving the fulfilment of this condition. If the consumer has been unable to repay the consumer credit with a monthly repayment of EUR 170.00, and therefore the creditor has proceeded to recover the remainder of the debt, under unchanged circumstances it is impossible for the consumer to achieve that a new loan with a repayment of the same amount meets the condition for preventing judicial proceedings. The creditor's current information regarding the consumer's creditworthiness is that the consumer is unable to make such repayments." In Stanovisko Odboru ochrany finančných spotrebiteľov Národnej banky Slovenska z 13. augusta 2018 k niektorým otázkam dohôd o splátkach, uzatváraných so spotrebiteľmi v procese vymáhania splatného dlhu. Available at https://www.nbs.sk/_img/Documents/_Dohlad/Ochrana_spotrebitela/Stanovisko_OFS_20180814.pdf.

[293] Recital 28 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. Without prejudice to the credit risk provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long-standing commercial relationship. The Member States' authorities could also give appropriate instructions and guidelines to creditors. Consumers should also act with prudence and respect their contractual obligations."[294] It is regrettable that already in the process of adopting EU legislation, it is known that creditors are lending irresponsibly, and yet there are legal mechanisms set out to restrict such practices (explicitly only in relation to expanding markets) rather than to create financial market conditions that ensure the irresponsibility of creditors is sanctioned more strictly, which should primarily in our view be done – for example by a ban on the activity, which is only possible in exceptional cases and is actually used to a limited extent.

What is the consequence if the creditor grants credit irresponsibly ('irresponsibility' is here understood to mean a failure to determine the consumer's creditworthiness)? The creditor must wait for the funds provided (e.g. due to judicial proceedings); in the worst-case scenario, it has to allow for the fact that the funds provided will not be repaid to the creditor. In respect of the creditor, it is part of its business which is characterised by risk; this form of risk can be prudently included in the amount of consideration (across the board) the creditor requires from the debtors, or it can offer the consumers an appropriate insurance product (we do not comment on the issue of insurance in more detail).

On the other hand, the consequence for an irresponsible debtor is that, in the worst-case scenario, he loses his property, i.e. his home, since the creditor cannot be ultimately satisfied from the debtor's assets.

[294] Recital 26 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

The highest loss incurred by the consumer is thus incomparable with that on the creditor's part (the loss of home compared to the loss of money[295]).

[295] Upon deeper reflection, we cannot compare, as corresponding countervalues, money as a value arising from social habits with the value of home, which itself is an essential part of human dignity. The value of money has been questionable over a long period: The fact that money (irrespective of its form – paper, metal) was previously covered by gold = real value (directly individual currencies or derived from the dollar exchange rate, which as a world reserve currency was firmly linked to gold, even though only until 1934 – the end of the Great Depression) was true until 1971 (the "Bretton Woods Monetary System"). Therefore, after the end of World War I the view of money was different from the current one. The initial linking of Czechoslovak currency to the dollar was laid down by Act No. 102/1925 Coll. of Law and Regulation, and then (in 1929) the currency link changed to a direct link to gold – Act No. 166/1929 Coll. of Law and Regulation. The so-called "Bretton Woods Monetary System" no longer exists; it has been replaced by the "Kingston Monetary System", which is not based on gold as a convertible value for each existing banknote or coin, but rather on market conditions that are a mixture of ambiguities. More about financial systems: JANKOVSKÁ, A. et al. *Medzinárodné financie*. Bratislava: Iura Edition, 2003. 238.

In the past (especially since the Great Industrial Revolution), some countries (Germany, the Netherlands, France, Switzerland, Belgium, the USA, Austria-Hungary, Japan, Russia, etc.) have used the monetary system "monometallism" (a monetary system in which legal tenders are minted from only one metal). The precisely determined (and mainly respected) share of a precious metal in each particular coin enabled improvement of international trade, as real value was present directly in money (paper notes could be exchanged for their coin equivalent and were (mostly) covered by gold in a given state). In the past, the money was real value exchangeable for a precious metal (gold – gold standard). As a result of the economic crisis, the US came off the gold standard, which largely caused exponential growth in inflation (one of the benefits of the gold standard is also a slowdown in inflation). After World War II, the gold exchange standard developed. The United States of America assumed responsibility for fixing the value of the dollar in relation to gold, and other countries have committed themselves to fixing the value of their currencies in relation to the dollar. These commitments derived from the Bretton Woods Monetary Conference (in fact, it was a situation where the dollar was no longer covered by gold and other currencies were covered by the dollar, i.e. ultimately by nothing; the situation continues, with consequences as financial crises being noteable). See DUFALA, V. *Bankovníctvo (vybrané problémy)*. [online] Banská Bystrica: DUMA Banská Bystrica, 2006. Available at: http://is.bivs.cz/el/6110/leto2010/B107BCR/um/417253/Bankovnictvo1.rocnik.txt.

In the case of reader's doubts about the exclusive academic nature of these reflections, we would like to add that in the past it was common practice to use so-called "gold clauses" in loan agreements (i.e. the relation between real value and value of money was accentuated): In the past, the relation of money to gold as real value had an impact on loans to the extent that when entering into loan agreements, gold clauses were concluded in some cases cumulatively. The conclusion of such gold clause meant that the amount to be repaid could be higher or lower than the amount borrowed, because the loan amount was linked to the real value of a certain agreed thing that could change from the time the money was borrowed until it was returned. This ensured that both the creditor and the debtor were protected

4.4 Reflection of the Impact of Principles in the Regulation of Lending as a Driving Force for Economy

One might come to a simple conclusion about the essence of credit/loan: it is about giving money to someone who does not have it, just because he pledges that at some time in the future he will have the money he doesn't have today, and that such future amount of money will be sufficient to repay the creditor the monetary debt plus interest. The absurdity of the simplified, but correct interpretation fully supports the inclusion of a loan (credit) in risky contracts. It is really risky to give someone something that he does not have (if he had it, there would be no reason to give it to him and he would not want it) and expect him to have it later.

From an economic point of view, it is the creditor who is primarily interested in being repaid the loan amount, which is absolutely logical. In terms of justice, the consumer is equally interested in repaying money owed. However, the primary objective of determining the consumer's ability to repay money owed is to satisfy the creditor, hence all the instruments contained in the law for this purpose pursue the interests of the creditor. We also understand the arguments that the obligation to determine the debtor's creditworthiness is also for the consumer's benefit, because it is necessary for the debtor to consider whether or not he is (will be) able to repay money owed. However, if there is a situation in society where consumers unreasonably take out loans (which we do not question in any way), this is mainly due to imprudent lending by creditors, because the said situation is caused by an offer resulting from the creditors' erroneous intention of lending money to anyone interested – in the absence of such an offer, it could certainly not be accepted.

An average-minded person would not be able to borrow with the hope of returning money to someone unless he had the conviction based on real reasons in advance that he would return the money. And if he did so, with a rea-

against economic influences, such as inflation and devaluation. It also highlighted the purchasing power of money as an important factor in determining its value. Such an approach to determining the returned amount is called adjustment. Elaborated according to SEDLÁČEK, J. – ROUČEK, F. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Part IV*. Prague: ASPI, 2002. p. 534–537. Designating a contractual clause as "gold" cannot be confused with a "gold value clause" that means *"despite the fact that the banknotes are owed, the number of currency units is determined by the relationship to gold coins or gold currency, and this relationship may be different from a legal relation."* Ibid. p. 537.

sonable amount of reasoning he would have to consider the possibility that the money would not be repaid to him.

It is the freedom of each of the contractors to choose not only the type of contract, but mainly with whom to conclude the contract. In this regard, we are considering the concept of responsibility for the choice of contractor, which involves the need for prudence and also reasonable thinking (further intensified in the presence of a business entity obliged to act with due diligence). So far, we have not encountered this concept in our study, so we deem it to be something novel and a contribution to solving this grant.

Consumer legal relationships predominantly comprise form contracts, where the same entity is one party and a larger number of consumers represent other parties. If there is such a business construct, it is certainly a matter of due diligence to assume that it will be more difficult to identify the circumstances needed to assess the consumer as a *suitable business partner*. This is also proportional to the expected profit rate – *more deals and higher earnings.* However, it also entails a higher level of risk. Not everyone can be expected to fulfil his contractual obligations, so to say, like a machine, because of different life situations (both positive and negative), and precisely large companies (such as banks) are those that make contracts with many people and expect each to behave in the same manner. The need for general legal regulations and establishing the same rules is clear to us, but we must consistently accentuate the individuality of a particular case, which already needs to be perceived from the pre-contractual stage. Even more so at a time when trading companies at the transnational level have a significant impact on the overall social situation.

The need to address the outlined reflections is also due to the monstrosity of the consumer credit market, which in Slovakia has reached European levels from its original low point (for complexity and content compactness we mention a wider range of the original source text): *"Household indebtedness has a short history in the Slovak Republic. In the 1990s, during the transformation of our economy banks in Slovakia focused on lending to businesses rather than to households. A high unemployment rate, relatively low household income, and relatively high interest rates acted against household indebtedness too. Loans to households accounted for only 3 – 4% of GDP in the second half of the 1990s. A more significant increase in Slovak household indebtedness began in 2003, due to increased mortgage lending. Since 2003, the volume of loans granted to households has grown steadily, even during and after the financial crisis. The highest increases were recorded between 2003 and 2008, when*

the number of loans grew by an average 34% year-on-year, after which period growth slowed. (GULKA 2013) Nevertheless, Slovak households were the least indebted in the European Union. This is also reflected in the three-yearly European Central Bank's Household Finance and Consumption Survey in the euro area, with two surveys so far in 2010 and 2014. In 2010, only 26.8% of households were in debt in Slovakia, i.e. the second lowest percentage in the euro area (25.2% was observed in Italy, while the euro area average was 44%). In 2014, the percentage of indebted households in the euro area fell to 42.4%, while in Slovakia it rose to 36.7%; in this respect, Slovakia 'beat' Greece and Austria in addition to Italy. A similar trend was also seen in the number of households with a mortgage loan. In 2010, only 9.6% of households had a mortgage loan in Slovakia, representing the lowest percentage of the euro area countries (euro area average was 23.5%). In 2014, the percentage of households with mortgage loans for the euro area fell to 23.3%, while in Slovakia it increased to 16.2% - higher than in Greece, Italy, and Slovenia. If we compare household indebtedness in the euro area with the Slovak Republic, it should be noted that while the percentage of indebted households and households with mortgage loans has declined in the euro area, the percentage of both household categories has increased in Slovakia. This is a result of the favourable conditions for getting loans, which have been prevalent in Slovakia for a longer time."[296]

The already existing rapid increase in indebtedness could also cause destabilisation of the financial market as such, if the overall economic situation worsens: *"The National Bank of Slovakia points out that the rapid growth in household indebtedness is risky not only for the households themselves, but also for the financial sector as a whole. Households are at risk of not having enough funds to repay loans in the event of a future economic downturn, and growth in non-performing household loans may in turn jeopardise the stability of the financial sector."*[297]

[296] FABOVÁ, Ľ. Príčiny a dôsledky rastu zadlženosti slovenských domácností. *Časopis znalostní společnosti* no. 1/2017, vol. 5. p. 37–39. Available at http://jks.euin.org/sites/default/files/jks_2017_01_034-043_Fabova.pdf.

[297] Ibid., p. 42. The same conclusions regarding the risks of this trend also follow from private banks' internal studies in Slovakia, such as Tatra banka, a. s.: *"For consumer loans, the ratio of lending to household consumption is similar in all Central European countries, and we do not see an acute problem in Slovakia in this segment. But when looking at housing loans, we observe significant differences between countries. The total amount of debt per employee is much higher in Austria than in Slovakia, but the level of income per Austrian employee is higher too. The ratio of housing loans to employee income is much higher in Slovakia than in the Czech Republic or Austria. Moreover, if the trend does not change, then this ratio will*

4.4.1 From Interest up to Usury

The issue of lending is directly related to the issue of interest. Similarly, there is a direct link between interest, good morals and usury, where good morals represent a significant value framework.

In the first two months of 2019, the average interest rates on consumers' credit are about three percent (1.5% on property purchase loans and 6% on "consumer" loans).[298]

In this respect, we can observe a positive development compared to the "wild" zero years of the 21st century, when interest rates were normally four- to six-fold higher.

However, these figures are distorted because a true picture of the actual cost of credit will only be given by another indicator: the annual percentage rate of charge.

We cannot agree with this approach in which the long-established meaning of the term *interest* is rather identical with that of the new concept of *annual percentage rate of charge*. It is about relativising the legislation, and making it unclear to the detriment of an ordinary person (consumer) and for the benefit of the creditor. By introducing different terminology, the legislator contributes to the creation of ambiguities.

We do not consider this approach to assigning different meanings to common terms and creating new ones to be consistent with the principle of decency (fairness) in law, and for whom legal regulations are intended. Not even the legislator's efforts to educate consumers can alter the said fact: *"The EU has organised consumer education actions at various stages, such as the gradual inclusion of consumer education in primary and secondary school syllabuses. The Europa Diary is a school diary aimed at students in secondary school (aged 15-18 years). It contains information for young people on EU-related issues, including their rights as consumers. The Commission has also piloted teacher training schemes and supported the creation of Master's degree courses on consumer policy. The interactive and online consumer education tool 'Dolceta' (http://www.dolceta.eu) is available in all Member States and in all the official EU languages. It is aimed at trainers and teachers but also at the*

continue to grow disproportionately, which can cause major problems in the future." https://www.tatrabanka.sk/files/sk/att/5394675/TB_mesacnik_feb2017.pdf.

[298] For more information about average interest rates on mortgages and "consumer" loans, please visit the National Bank of Slovakia website: https://www.nbs.sk/sk/statisticke-udaje/financne-trhy/urokove-sadzby/priemerne-urokove-miery-z-uverov-bank.

informed consumer, and covers, inter alia, basic consumer rights, product safety and financial literacy. To stimulate university-level education in consumer policy, the Commission has awarded start-up grants to set up Master's degree programmes."[299]

Interest has long been perceived as a consideration for the provision of funds, and if the creditor decides to apply, in addition to such a contribution, various other benefits due to different charges, costs, etc., we perceive it merely as a departure from good faith (honest intentions) in the form of ambiguous obfuscation. The level of *annual percentage rate of charge* is not so familiar to ordinary people (if at all) to say that it would be a satisfactory substitute for the fairly clear term *interest.*

At the time of the application of canon law in secular life, there was a ban on receiving interest with the exception of Jews. In the context of the Old and New Testaments as recognised historical sources (while serving as the moral authority for most of the population), interest is mentioned in these verses: Exodus – Chapter 22:25 *"If you lend money to my people, the poor among you, you must not be like a money lender! You must not demand interest from them!"* Leviticus – Chapter 25:36 *"Do not exact interest in advance or accrued interest, but out of fear of God let your kindred live with you."* Leviticus – Chapter 25:37 *"Do not give your money at interest or your food at a profit"* Deuteronomy – Chapter 23:19 *"You shall not demand interest from your kindred on a loan of money or of food or of anything else which is loaned"* Deuteronomy – Chapter 23:20 *"From a foreigner you may demand interest, but you may not demand interest from your kindred, so that the Lord, your God, may bless you in all your undertakings on the land you are to enter and possess."* Psalms – Chapter 15:5 *"... lends no money at interest, accepts no bribe against the innocent. Whoever acts like this shall never be shaken."* Proverbs – Chapter 28:8 *"Whoever amasses wealth by interest and overcharge gathers it for the one who is kind to the poor."* Ezekiel – Chapter 22:12 *"There are those in you who take bribes to shed blood. You exact interest and usury; you extort profit from your neighbour by violence. But me you have forgotten—oracle of the Lord God."* Matthew – Chapter 25:27 *"Should you not then have put my money in the bank so that I could have got it back with interest on my return."* Luke – Chapter 19:23 *"why did you not put my money in a bank? Then on my return I would have collected it with interest?"* The common feature of the

[299] Mariusz Maciejewski. SPOTREBITEĽSKÁ POLITIKA: ZÁSADY A NÁSTROJE. Informačné listy o Európskej únii (Fact Sheets on the European Union) – 2019. p. 4. Available at http://www.europarl.europa.eu/ftu/pdf/sk/FTU_2.2.1.pdf.

above cited parts is the generalisation of the ban on receiving interest for the provision of a monetary loan (except for the relationship between a Jew and a Gentile).

Taking into account the belief that the Old Testament has not been annuled by the New Testament in the sense of Christian tradition, and also based on the philosophical origins of contemporary law from Roman and canon law, the fundamental principles of which also formed the beginnings of European integration – *" ... in geographical terms, European legal thinking is primarily the thinking of those countries of Europe that have shared a common legal heritage based on subscribing to Roman and canon law." ... European integration, which is so much discussed today, also has its spiritual dimension, i.e. what makes Europe European (distinct from other countries) is care of the soul, that it is spiritually formed by values that have been born somewhere between ancient Olympus, Jewish Sinai and Christian Golgotha. ... when Europe forgets that, it will no longer be Europe."*[300] we can come to a relevant conclusion that interest is undesirable.

Moreover, interest is (even now) regarded as undesirable in so-called Islamic banking, and yet an increasing trend towards this "kind of finance" can be seen in world markets: *"Islamic banking is one of the fastest-growing areas of finance in the world. It comprises practices that are in line with Islamic belief, placing emphasis mainly on socially responsible investments (ethical basis) and the ban on so-called 'Riba' (interest) or 'Usury' – including any form of guaranteed interest on loans. Over the past decade, Islamic banking has had global growth of 10–15 per cent per year, breaking into an increasing number of conventional financial systems at such a rate that it is currently present in more than 51 countries ... Islamic or Shariah-compliant banking can be defined as providing and using financial services and products that correspond to Islamic religious practices and laws. Islamic financial services are characterised by a ban on paying and receiving interest at a fixed or pre-determined rate. Contracts are based on profit and loss sharing arrangements, agreements on the purchase and sale of goods and services, and the provision of services at a charge."*[301]

[300] KRSKOVÁ, A. *Stát a právo v evropském myšlení*. 2nd edition. Prague: Eurolex Bohemia, 2003. p. 26.

[301] MUSA, H., MUSOVÁ, Z. *Islamské financie a bankovníctvo – výzvy a perspektívy. 5. mezinárodní konference Řízení a modelování finančních rizik*. Ostrava: 2010. p. 1. Available at: https://www.ekf.vsb.cz/export/sites/ekf/rmfr/.content/galerie-dokumentu/2014/plne-zneni-prispevku/Hussam.Musa.pdf.

From the point of view of older literature, interest can be understood to mean a proportion of the principal to be repaid in addition to the principal as such; it is calculated on the basis of the hundredths of the principal in proportion to the period of use and term of the loan; it is a consideration for the use of the principal or a risk premium if the debtor fails to repay the principal – i.e. the economic function of interest, which need not play an important role in the legal sphere.[302]

In terms of the deregulation of interest rates, the free market, in addition to the general corrective to good morals (and therefrom ensuing/therein contained (prohibition) of usury), was assessed as a bad solution at the turn of the millennium, even from the perspective of the legislator that took a radical approach to this issue: *"The proposer is of the view that a legally unlimited amount of interest on loan agreements (the 'usury limit') – despite the arguments about the principle of freedom of contract and that ignorance of the law is no excuse or 'vigilantibus iurascripta sunt' – did not prove to be useful in practice."*[303] In that regard, he took into account other principles of private law – freedom of contract, vigilantibus iura scripta sunt, but nevertheless came to the conclusion that good morals alone were insufficient to regulate the market, which necessitated the introduction of a specific limit.

According to Fischer, to understand interest as such, it is primarily necessary to comprehend real income to cover basic costs: *the shelter of a home, the music of a Victrola or radio, the use of clothes, the eating of food, the reading of a newspaper, and all those other innumerable events by which we make the world about us contribute to our enjoyments. We metaphorically sometimes refer to this, our real income, as our "bread and butter". In summary, these are the cost of living and earning a living. The said needs as such cannot be measured, but the money to be paid to get them can be measured.*[304]

If basic goods are not secured (due to family death, theft, fire or other unexpected events), the need for a loan can be considered. The second op-

[302] SEDLÁČEK, J. – ROUČEK, F. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Part IV*. Prague: ASPI, 2002. p. 550.

[303] An interest rate ceiling on loan agreements was introduced only by Act No. 568/2007 Coll., altering and amending Act No. 527/2002 Coll. on Voluntary Auctions and on Amendments to the Act of the Slovak National Council No. 323/1992 Coll. on Notaries Public and Notarial Activity (Notary Public Code), as amended. The reference part is cited from the Explanatory Report therefor.

[304] FISHER, I. *The Theory of Interest. As Determined by Impatience To Spend Income and Opportunity To Invest It*. New York: The Macmillan Company, 1930. s. p.

tion for which someone decides to take out a loan is his prodigality (*"Similar principles apply to the spendthrift, who, though not a victim of midental misfortune, brings misfortune upon himself. He borrows in order to supplement an income inadequate to meet his present requirements, while he trusts to future resources for repayment."*[305]).

Interest is thus perceived as the amount of cost that a debtor is willing to bear for what he decides to invest in the money he does not have. It is up to each potential debtor to decide whether he is willing to pay for goods with funds provided over instalments, yet significantly increased by interest.

To conclude the issue of interest, while respecting the Roman tradition, we add Ulpianus's words: *Supra duplum usurae et usurarum usurae nec in stipulatum deduci nec exigi possunt et solutae repetuntur*,[306] which are also used in a current normative text (provision of Section 1a of the Regulation of the Government of the Slovak Republic No. 87/1995, implementing certain provisions of the Civil Code: *"... a consideration for the provision of funds to the consumer shall not exceed twice the average annual percentage rate of charge ... for a similar loan or credit annually.").*

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[305] FISHER, I. *The Theory of Interest. As Determined by Impatience To Spend Income and Opportunity To Invest It*. New York: The Macmillan Company, 1930. p. 357.

[306] Digest 12, 6, 26, 1.

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5. COMMERCIAL LAW AND SOCIAL NORMS

Issues of the social dimension of private law, including commercial law, resulting in the need to introduce social justice into private law, are becoming increasingly accentuated in European projects, approved legal documents, and recommendations. Theoretical concepts, various projects, and mainly specific legal documents for Member States of the European Union which are binding or recommending in nature reflect the European Union authorities' efforts to ensure that the harmonization of private law under new conditions is based on genuine European values, with an increasing emphasis on the social dimension of private law relationships.[307]

In the event of each codification of private law, it is necessary for the optimal application of legal rules being enshrined thereby to determine the values to be pursued by the legislation and express them as a set of principles designed to create a stable legal basis and play a key role in the interpretation and application of any provision that allows for different interpretations. An important role of the principles of private law lies in their flexibility. Such principles can flexibly react to social changes that are then embedded in law through its interpretation. They are characterised by their consistency and independence from changes in legislation.[308]

However, defining the values and principles of a civil code is very complicated, as it must take into account different societal views and trends.[309] The business relationships themselves have certain specifics. The social aspect of the fairness of a relationship is more difficult to apply in a system of business relations. Given the prevailing professionalism of commercial law relationships, the sensitivity to aspects of social justice is somewhat poorer in the system of commercial law (allowing for the specifics of business ethics). Under given circumstances, even practices which could already be con-

[307] LAZAR, J. Hodnotová orientácia navrhovaného slovenského kódexu súkromného práva a zásada ochrany slabšieho. *Právny obzor*, 2015, no. 3, p. 207.

[308] ELIÁŠ, K. Osnova nového občanského zákoníku z hledisek systematických a strukturálních. In ŠVESTKA, J., DVOŘÁK, J., TICHÝ, L. *Sborník statí z diskusních fór o rekodifikaci občanského práva konaných 20. října 2006, 24. listopadu 2006, 9. února 2007 a 30. března 2007 na Právnické fakultě Univerzity Karlovy*. Prague: ASPI, 2007, p. 157.

[309] JANČO, M. Zásady súkromného práva v národnom a európskom kontexte. *Justičná revue*, 2009, no. 8–9, p. 1066.

sidered immoral in general civil law can be regarded as fair in commercial law (for example, under Section 267(2) of the Commercial Code, the possibility of objecting to distress and clearly disadvantageous conditions in commercial law relationships is excluded).[310] In commercial law, we therefore need to be particularly prudent when integrating rules with social function into a legal system. The protection of the weaker party, fair practices of businesses and issues of loyalty in company law can be considered one of the key issues in the integration of rules with social function in commercial law.

5.1 General Determinants of Legislation

5.1.1 Protection of the Weaker Party

Reflections on the social role of private law frequently raise the question of the protection of the weaker party in private law at the European level. Both the position and function of the protection of the weaker party to private law relationships are changing, and such protection is becoming increasingly important in the system of principles that define private law in general. The question arises to what extent it is necessary to balance the rights and legitimate interests of the parties. These reflections also penetrate into commercial law, i.e. into company law as well as commercial obligation relationships. Protecting the weaker party is a principle related to both freedom and equality. Private law guarantees everyone the broadest possible freedom of action, but precisely because it does so, it must also restrict some persons' freedom to make it guaranteed to everyone. In this respect, equality and freedom are inextricably linked to each other, because if freedom was not equal freedom (i.e. if everyone was not guaranteed the same freedom to behave at will), there would be no point in thinking about freedom or the principle of individual autonomy (freedom of will).[311] The principle of protecting the weaker party is therefore the result of a conflict between freedom (the principle of freedom of will) and equality. Private law uses it to rectify the inequality of starting positions. Under the influence of the principle of protecting the weaker party, the positions of individual entities are balanced, differences

[310] Judgement of the Supreme Court of the Czech Republic of 20 January 2009, ref. no. 29 Cdo 359/2007.

[311] HURDÍK, J., LAVICKÝ, P. *Systém zásad soukromého práva*. [online]. Brno: Masarykova univerzita, Právnická fakulta, 2010, p. 120. [cited on 21/03/2019]. Available at: https://science.law.muni.cz/dokumenty/21777.

are compensated, and weaker parties have the option to fulfil the principle of freedom of will.

5.1.1.1 Protection of the Weaker Party in Company Law

The issue of the protection of the weaker party also resonates in company law (especially the law of capital companies).[312] Corporate law should balance the inequalities between a company as such and those associated with it – partners, members of the bodies, employees, etc., as well as the inequalities between such persons.

One of the areas in which the protection of the weaker party in company law plays a major role is the protection of minority members' rights. The current legislation contains no definition of the term "minority member" as such. Nor does it contain a definition of the term "majority member".[313] It is understandable that whether majority or minority members seek to pursue their interests, it is the legislator's task to regulate the relationships arising therefrom in such a way that the exercise of the rights of each of these groups corresponds to the fundamental principles and values on which the law is built.

The Commercial Code confers respective rights upon all members, regardless of whether they are majority or minority members. However, it gives certain special powers to so-called qualified members.[314] At first glance, the special protection of minority members' rights breaks the principle of equal treatment by a company of its members, but it is precisely its existence that should ensure that all the members have really equal positions. On the other hand, it should be emphasised that the members who have a minority

[312] For more information about the protection of the weaker party in company law, see ČERNÁ, S. (ed.) *Obchodní korporace a ochrana slabší strany*. Prague: Wolters Kluwer ČR, 2017, 188 p. ISBN 978-80-7552-555-0.

[313] For example, the definition of a majority member is contained in Section 73(1) of Act No. 90/2012 Coll. on Commercial Companies and Cooperatives (Business Corporations Act), as amended, under which a majority member means a member who has the most votes arising from his or her participation in the business corporation.

[314] Qualified members in a limited liability company are members whose investment contributions represent at least 10% of the registered capital, and qualified shareholders in a joint-stock company are shareholders who hold shares with an aggregate par value corresponding to at least 5% of the registered capital. With regard to the issue of minority shareholders, we can also encounter the concept of "small shareholders" – shareholders whose participation in the company is so small that they only have shareholders' general rights, and who may not, on their own or in conjunction with other small shareholders, have the rights belonging to minority qualified shareholders.

of votes in the company may not exercise their rights by means of malpractice. The prohibition of misuse of rights is one of the fundamental principles of private law. Section 56a(1) of the Commercial Code explicitly prohibits the misuse of a majority as well as a minority of votes in a company. Similarly, Subsection 2 of the said Section prohibits any conduct which is intended to place some of the members at a disadvantage by means of malpractice.[315] For a joint-stock company, it is explicitly stated that a shareholder may not exercise a shareholder's rights to the detriment of the rights and legitimate interests of other shareholders, and the company must treat all shareholders equally under the same conditions.[316]

As mentioned above, in general terms, minority members shall have the same rights as majority holders. Such have all the fundamental rights of a member (for example, the right to vote at a general meeting, the right to a share of profits, the right to a settlement share, the right to a share in the liquidation balance), as well as supplementary rights (e.g. the right to file a petition with a court to declare a resolution of a general meeting invalid; the right to request information about company matters from the members of a statutory body, the right to inspect company documents). In addition, the Commercial Code confers upon them a very limited choice of minority members' special rights.

These include, for example, the right to request the convening of a general meeting. Pursuant to Section 129(2) of the Commercial Code, each member of a limited liability company whose investment contribution amounts to at least 10% of the registered capital may request the convening of a general meeting. If the executive directors do not convene a general meeting to be held within one month of the delivery of their request, the members are entitled to convene the general meeting by themselves. It is not possible for a member whose investment contribution does not reach the legally required share of the company's registered capital to request the convening of a general meeting. Similarly, in a joint-stock company pursuant to Section 181(1) of the Commercial Code, a shareholder or shareholders who hold shares with a nominal value attaining at least 5% of the registered

[315] The provision of Section 56a of the Commercial Code is based on the principle that the exercise of rights and fulfilment of obligations must not, without legal reason, interfere with the rights and legitimate interests of others and must not be contrary to good morals. It is also based on the general prohibition of misuse of rights in commercial relations referred to in Section 265 of the Commercial Code, under which the exercise of a right that is contrary to the principles of fair trade shall not enjoy legal protection.

[316] See Section 176b of the Commercial Code.

capital may make a written request stating the reasons for convening an extraordinary general meeting in order to discuss proposed matters.[317] If the board of directors fails to convene the general meeting, the court shall decide upon the petition of the shareholder or shareholders that it entrusts with convening the extraordinary general meeting. From the foregoing it is evident that by means of the aforementioned provisions, the legislator seeks to protect minority members/shareholders as the weaker party by allowing them to convene a general meeting if they believe that a company's interests are threatened or feel discriminated against. But does this right contribute to the protection of a minority member/shareholder to a significant extent? In our opinion, it does not. Attendance at a general meeting is a right and not an obligation of a member/shareholder, so it can easily happen that only the member or shareholder who convened a general meeting will attend such meeting. On the other hand, minority members/shareholders may also misuse such right to bully company representatives, or impede the performance of its activities or the implementation of its development plans. In order to avoid such a risk, following the example of Act No. 90/2012 Coll. on Commercial Companies and Cooperatives (Business Corporations Act), the legal regulations governing a limited liability company should be amended at least by supplementing Section 129(2) of the Commercial Code with the sentence below: "Any costs related to convening a general meeting shall be borne by the company, unless the convening of the general meeting was clearly unfounded."[318] In a joint-stock company, protection against misuse of the given right is ensured by the fact that if the board of directors assesses the convening of the general meeting as unnecessary and does not convene such meeting, the court shall decide on the possibility of convening it.

For example, minority members' special rights include the right of minority members of a limited liability company to submit a draft resolution to other members (thus seeking to assert their own will or pursue their own interests) by letter. Under Section 130 of the Commercial Code, a member or members whose investment contributions amount to 10% of the registered capital shall have the right to submit a draft resolution to other members. A memorandum of association may stipulate that such right is also given to

[317] In a joint-stock company, the articles of association may stipulate that a shareholder or shareholders who hold shares with a nominal value being lower than 5% of the registered capital shall also have such right.

[318] Section 187(2) of Act No. 90/2012 Coll. on Commercial Companies and Cooperatives (Business Corporations Act).

a member whose investment contribution is less than 10% of the registered capital. Similarly to a minority member's right to convene a general meeting, even in this case it can be said that in view of the fact that the calculation of a majority in the event of voting by letter is based on the total number of votes attributable to all members, such right may not always be effective.

The foregoing implies that special provisions enshrined for the protection of minority members' rights do not always contribute to such protection; on the contrary, their protection as the weaker party is ensured by the provisions intended for all members. We can mention Section 141(2) of the Commercial Code as a good example. Pursuant to such provision, in a limited liability company, any change to a memorandum of association may not become valid without the consent of minority members, as long as such amendment extends the obligations imposed, or reduces/limits the rights conferred, upon members by the memorandum of association. In this case, the law requires the consent of all members to which such change applies, even if the change to a memorandum of association is decided under Section 141(1) of the Commercial Code at a general meeting and, in other cases, a change to a memorandum of association is subject to at least a two-thirds majority of all members' votes.

We can also mention the provision of Section 131(1) of the Commercial Code, under which any member (including a minority member) may file a petition with a court to declare a resolution of a general meeting invalid if such is contrary to the law, memorandum of association, or articles of association. We deem such right to be very effective for the protection of a minority member (for example, when he/she has not been invited to the general meeting, or a majority member has abused his/her position within the scope of the general meeting's decision-making authority). On the other hand, this is a situation where the company's representatives are also protected from being bullied by a minority shareholder, since, as mentioned above, it must be a resolution that is contrary to the law, memorandum of association, or articles of association. Legal certainty of the company is also ensured, as such right shall extinguish if a member fails to exercise it within three months of the adoption of the general meeting's resolution, or if the general meeting has not been duly convened from the date the member could have become aware of the resolution. Moreover, the court may, upon a member's petition, declare a general meeting's resolution invalid only if the breach of the law,

memorandum of association, or articles of association could limit the rights of the member who seeks such declaration of invalidity.[319]

However, the weaker party under company law may not only be represented by minority members/shareholders, but, depending on particular circumstances, also by other persons, such as employees or members of company bodies (for instance, when negotiating the conditions under which they will perform their functions), as well as by the company itself. Under certain circumstances, a company or its members/shareholders may become the weaker party, for example, in relation to members of the company bodies, who can benefit from the existing information asymmetry. The extensive issue of company creditors' being in the position of the weaker party also raises questions.

5.1.1.2 Protection of the Weaker Party in Commercial Obligation Relationships

The principle of the protection of the weaker party plays a key role in relation to the two fundamental principles, i.e. the principle of individual autonomy (freedom of will) and the principle of legal equality of entities that constitute the value basis of private law. The principle of freedom of will is explicitly liberal in nature and represents an individual dimension of a person. On the other hand, the principle of equality of entities expresses the existence of a person as a member of society, thus having a social dimension derived therefrom.[320] Without equality of parties, freedom of will would be completely unlimited and could be predominantly exercised in pursuit of the interests of stronger entities. Thus, as stated by Lazar, the principle of equality should act as a certain social corrective in their mutual relationship, as well as provide freedom of will for all entities. To ensure such state, both liberal and social elements must be balanced. As already mentioned above, it is a balance of interests of all parties in order to achieve a fair result corresponding to the principles of equity and good morals. And this is the role of legislation.[321] The

[319] For the sake of completeness, it should be added that the same right is conferred upon a shareholder by Section 183 of the Commercial Code with the difference that if the shareholder attended the general meeting, he/she may file a petition with a court to declare the general meeting's resolution invalid only if he/she ensured that his/her protest was recorded in the minutes of the general meeting.

[320] HURDÍK, J. et al. *Občanské právo hmotné. Obecná část. Absolutní majetková práva*. Pilsen: Vydavatelství a nakladatelství A. Čeněk, 2013, p. 71.

[321] LAZAR, J. Hodnotová orientácia navrhovaného slovenského kódexu súkromného práva a zásada ochrany slabšieho subjektu. *Právny obzor*, 2015, no. 3, p. 210.

need to make the equality of entities more real is one of the reasons why we also encounter the issue of strengthening the protection of the weaker entity in legislation governing commercial obligation relationships. However, finding the right limit is a very demanding role in commercial obligation relationships in view of their distinctive character. It is much more challenging given the fact that the envisaged new legislation integrates both commercial and non-commercial obligations.[322]

Commercial obligation relationships have traditionally been based on the equality of parties thereto. But also in this type of relationship, such formal equality is often fictitious. Not every party enters into a legal relationship with the same (equal) starting position. Individual parties to legal relationships are different, whether in their abilities, intellect, economic status, or knowledge. Such inequality can be observed not only in relationships, where a business entity is one party and a non-business entity (consumer) is the other party, but also in the mutual relationships between businesses. Their positions are not always equal either. Business status as such does not guarantee equality between partners or the same bargaining power, even if a business is operating in connection with its own activities. Inequality can primarily be seen in the economic area, where every business has a different amount of capital it can invest in its operations. A difference is also between a business that is just starting its operations and a business which has been operating in the market for a longer time, or between an entrepreneur – sole trader and a large company. All the factors above influence the equality of businesses in the market. And law is a tool which is aimed at and capable of balancing these unequal positions of legal persons. It needs to be added that in contrast to company law, where the ratio of mutual powers in company relationships is often variable in time, the ratio of mutual powers throughout a commercial obligation relationship is generally unchanged.

The legal protection of the weaker party in relationships between businesses is a very delicate intervention in freedom of contract, and the self-regulatory and selective operation of a market. It can turn into discrimination of an initially stronger party, which is damaging to competition and ultimately to a consumer as well.[323]

[322] See also https://www.najpravo.sk/obcianske-pravo/clanky/text-navrhu-rekodifikacie-obcianskeho-zavazkoveho-prava.html.

[323] BEJČEK, J. *Smluvní svoboda a ochrana slabšího obchodníka*. [online]. Brno: Masarykova univerzita, Právnická fakulta, 2016, p. 15. [cited on 25/02/2019] Available at: https://science.law.muni.cz/knihy/monografie/Bejcek_Smluvni_svoboda.pdf.

In commercial obligation relationships between businesses, especially so-called small and medium-sized enterprises are deemed to be the weaker party. The criteria as to which businesses can be regarded as small and medium-sized enterprises can be found in Commission Recommendation No 2003/361/EC. Medium-sized businesses or enterprises (in European terms) mean enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. Small enterprises are those which employ fewer than 50 persons, and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. A microenterprise is defined as an enterprise which employs fewer than 10 persons, and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.[324]

It can be said, however, that the creation of such a broad and intrinsically incoherent category of small and medium-sized enterprises is questionable, as it covers almost all businesses in the European Union.[325] While the protection of small and medium-sized businesses has a certain logic in relation to large businesses, we believe that linking the protection of the weaker party in commercial obligation relationships only to the very concept of small and medium-sized business is not the most appropriate solution. It entails a number of problems, e.g. that an enterprise with 249 employees should be protected, yet one with 250 employees should be excluded from such protection; this would also lead to a "struggle" to gain the status of a small or medium-sized enterprise. We rather see the path to defining the weaker party in finding a disadvantage on the part of one of the contracting parties, where such a disadvantage is so significant and substantial that it can be objectively

[324] See also the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises (2003/361/EC).

[325] Over a decade ago, small and medium-sized enterprises ("SMEs") in the European Union accounted for 99% of the total number of enterprises. See HESSELINK, M. W. *SMEs in European Contract Law. Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis. Final version – 5 July 2007*. Amsterdam: Centre for the Study of European Contract Law, Working Paper Series no. 2007/03, p. 4. In 2017, microenterprises accounted for 96.9% (550,016), small enterprises accounted for 2.5% (14,159), and medium-sized enterprises represented 0.5% (2,956) of the total number of active businesses in Slovakia. The percentage of large enterprises was only 0.1% (662). See SLOVAK BUSINESS AGENCY. *Malé a stredné podnikanie v číslach v roku 2017*. [online] Bratislava: Slovak Business agency, 2018, p. 11 [cited on 26/02/2019]. Available at: http://www.sbagency.sk/sites/default/files/msp_v_cislach_v_roku_2017_infograf_sep2018.pdf.

considered crucial to the given contractual relationship and may not be disregarded by law.

A party to a contractual relationship that is in a less favourable position than the other party is currently protected by mandatory legal rules (for example, a sleeping partner's rights in a sleeping partnership agreement),[326] which basically limit the freedom of will of the parties and do not allow any deviations from the said rules. However, if any of the parties deviates from such provisions, the law declares such agreements or parts of the agreements invalid. Depending on the seriousness of a deviation and the need to regulate the situation in question with mandatory provisions, this may involve relative or absolute invalidity. As a rule, those agreements that grossly (materially) contravene the law or good morals are affected by absolute invalidity. The invalidity of legal acts is one of the last resorts for protecting the party which, for various reasons, has consciously agreed to unfavourable conditions, or has not been aware of the consequences of his/her consent at all. Another means of protecting the weaker party is the obligation to act in accordance with good morals and the principles of fair trade.[327] Although the principle of good morals and the principles of fair trade may, in certain cases, also be used to protect the weaker party, we believe that they are too general to provide a sufficient degree of legal certainty and serve as a general institute protecting the weaker party.

5.1.2 Fair (Honest) Conduct

One of the values found in European Union law is the value of solidarity which is, in contractual relationships, reflected in the principles of good faith and fair (honest) conduct, which can be understood as good morals in the national legal system of Slovakia.[328] As Lurger states, while the parties cannot be expected to fully cooperate and waive their interests, what can nevertheless be expected is that the parties will behave fairly (in good faith) and take

[326] See also Section 675 a Section 676(1) and (2) of the Commercial Code.

[327] Section 39 of the Civil Code reads as follows: "A legal act is invalid if the content or the purpose thereof violates or evades the law or is inconsistent with good morals." Section 265 of the Commercial Code reads as follows: "Exercise of a right that is contrary to the principles of fair trade (i.e. honest business relations) shall not enjoy legal protection."

[328] MASLÁK, M. *Slušnosť v európskom súkromnom práve*. Dissertation thesis. Trnava: PF TU, 2017, p. 35.

into account the other party's interests.[329] The option of solidarity in contract law is also pointed out by Sefton-Green, when he compares a contract/agreement to a connection of the parties' objectives, i.e. he does not refer to the individualism, but to the altruism of the parties.[330]

In European private law there were established, besides the traditional principles of private law, such as the principle of freedom of contract or that of *pacta sunt servanda*, newer principles aimed at highlighting the social responsibility of private-law entities and contributing to accentuating the social function of private law. One such principle is the principle of regard and fairness (in German: Rücksichtnahme und Fairness). The said principle comprises openness, fairness, and regard between the parties. Although this refers to contractual solidarity, its designation as a principle of regard and fairness more accurately reflects its true content and does not create false associations related to the concepts of solidarity and social contract law. The thing is that the principle of regard and fairness is not based on solidarity in the sense of redistribution of wealth, or on social policy measures. According to such principle, the parties need not waive their interests, but are only expected to act honestly (fairly), i.e. in good faith and take into account the other party's interests.[331]

Honesty, openness and regard for the other party's interests are features that can also be used to characterise the principle of fairness. Honesty is to be understood "in the sense of the unacceptability of fraud towards the other party".[332] Openness is such behaviour of a party that can be designated as transparent, and regard for the other party's interests means the minimum regard normally required.[333]

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[329] LURGER, B. The "Social" Side of Contract Law and the New Principle of Regard and Fairness. In HARTKAMP, S. A. et al. (eds.) *Towards a European Civil Code*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 286.

[330] SEFTON-GREEN, R. A Vision of Social Justice in French Private Law: Paternalism and Solidarity. In MICKLITZ, H. W. (ed.). *The many concepts of social justice in European private law*. Cheltenham: Edward Elgar Publishing Limited, 2011, p. 245.

[331] JANČO, M., JURČOVÁ, M., NOVOTNÁ, M. et al. *Európske súkromné právo*. Bratislava: Euroiuris, 2012, p. 181.

[332] NOVÝ, Z. *Dobrá víra jako princip smluvního práva v mezinárodním obchodu*. Prague: C. H. Beck, 2012, p. 139.

[333] See also: VON BAR, CH., CLIVE, E., SCHULTE-NÖLKE, H. (eds.) *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR).* [online]. Munich: Sellier European Law Publishers, 2009, p. 136. [cited on 28/02/2019] Available at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

Each of us perceives ethics in social behaviour as certain rules of decency that are generally known and recognised by society, which each individual should accept. However, business ethics is not only an abstract concept, but also has a legal dimension that can even be legally enforced.

It is assumed that a business will pursue its own interests in relationships with other businesses, use the opportunities provided to it by law, and seek to make the highest possible profit and improve its market position. On the other hand, in pursuing its interests, it must not exceed the limits arising from the principles of fair trade, nor should it abuse the rights it has legally acquired. A right cannot be exercised so that the other party to an obligation relationship is groundlessly deprived of its fundamental right, nor can such exercise lead to an imbalance of mutual rights and obligations. Even freedom of contract of the parties to an obligation relationship is not unlimited, and must not depart from certain and legally acceptable bounds. If such are overstepped, the parties cannot be granted legal protection. As stated above, under Section 265 of the Commercial Code the exercise of a right that is contrary to the principles of fair trade shall not enjoy legal protection. The exercise of a right in accordance with the principles of fair trade, sometimes referred to as the principles of fair dealing, considerably fulfils the purpose of the principle of regard and fairness.

As per the Commercial Code generally referring to the principles of fair trade in Section 265, such principles are legally binding and, since such provision is mandatory, the parties may neither exclude nor restrict such provision by agreement.

In general, we could characterise the principles of fair trade as the honest, decent, and professional conduct of businesses in mutual relationships, as well as in relationships with other entities. A business is also under the obligation to conduct itself in accordance with the principles of fair trade in its relationships with non-business entities.[334]

It can be stated that the principles of fair trade are an expression of concretisation of more general moral principles or norms reflected in the concept of good morals. This is a matter of concretising moral norms for commercial obligation relationships. They form a coherent set of principles (rules) of conduct which, if observed in commercial relationships, are classified there-

[334] ELIÁŠ, K. et al. *Obchodní zákoník. Praktické poznámkové vydání s judikaturou*. Prague: Linde, 2004, p. 557.

by as fair and honest.[335] Inconsistency with the principles of fair trade always occurs if a party to a legal relationship, in the pursuit of its interests, abuses its rights to the detriment of the other party, or if the exercise of its rights is clearly aimed at harming the other party in order to put it in a more unfavourable position.

With regard to the relationship between the institutes of fair trade and good morals, it can be stated that the principles of fair trade and good morals have a common core that lies in equity. Their function is to find justice where the formal application of legal rules would lead to unsustainable implications.[336] However, the concept of good morals is broader in content than the concept of fair trade principles. The principles of fair trade may be understood as a subset of good morals, and due to Section 1(2) of the Commercial Code, it is possible to also apply the rule of inconsistency with good morals to the area of commercial obligation relationships, with a subsequent sanction in the form of declaring a legal act invalid.[337] Nevertheless, the fact that a certain action is contrary to the principles of fair trade under Section 265 of the Commercial Code does not imply ipso facto that such action (legal act) is invalid because it is inconsistent with good morals in the spirit of Section 39 of the Civil Code.[338]

If the performance of legal acts is inconsistent with good morals, Section 39 of the Civil Code shall apply, resulting in the (absolute) invalidity of such legal acts. But if the exercise of a right contravenes the principles of fair trade, Section 265 of the Commercial Code shall apply and a court shall deny the exercise of such right, i.e. in this case, it does not concern the invalidity of a legal act, but only the denial of the legal protection of the exercise of the right which is contrary to the principles of fair trade (even if no mandatory provision of the Commercial Code is violated thereby). Thus, such exercise is valid, but may not be claimed before a court. It is only the exercise of a right which may be inconsistent with the principles of fair trade, and not a legal act under which the right is exercised. A precondition for the application of Section 265 of the Commercial Code is a valid legal act under which the right is

[335] Ruling of the Constitutional Court of the Slovak Republic of 9 June 2010, ref. no. I. ÚS 221/2010-20.

[336] See also the Ruling of the Constitutional Court of the Czech Republic of 1 August 2011, ref. no. I. ÚS 3727/10.

[337] Ruling of the Constitutional Court of the Slovak Republic of 9 June 2010, ref. no. I. ÚS 221/2010-20.

[338] Judgement of the Supreme Court of the Czech Republic of 1 July 2008, ref. no. 29 Odo 1027/2006.

exercised.[339] The reason for such a solution is, among others, the legislator's endeavour to ensure the greatest possible freedom of contract in business relationships.

Section 265 of the Commercial Code belongs to legal rules with a relatively vague (abstract) hypothesis, i.e. to legal rules, the hypothesis of which is not directly stipulated by law, thus leaving it up to a court to define, at its own discretion, the hypothesis of the legal rule from a wide, unlimited range of circumstances in each individual case.[340] Courts must be very prudent in their decision-making, as we quite often encounter objections to Section 265 of the Commercial Code in litigations (for instance, in the case of interest on late payment or the amount of a contractual fine), and it is often an attempt by the parties to take advantage of the said provision and apply it to compensate for their own trade risk or their inattention when concluding a contract, etc.[341] A decision as to whether the conditions for the application of Section 265 of the Commercial Code are fulfilled must therefore be made by a court after careful consideration, in which all the circumstances relevant to the case must be taken into account. The application of the said provision should be, in exceptional cases, the last resort (*ultima ratio*) for mitigating or eliminating the excessive strictness of the law in a situation where allowing the claim filed would be extremely unfair.[342] Section 265 of the Commercial Code is to be seen as an order for a judge to decide in accordance with equity; in contrast to good morals, the principles of fair trade allows the specifics of professional relationships existing in the business environment and its specific ethics to be taken into account.

[339] Ruling of the Supreme Court of the Czech Republic of 7 December 2011, ref. no. 32 Cdo 542/2010, analogously also the Judgement of the Supreme Court of the Czech Republic of 25 June 2008, ref. no. 32 Cdo 3010/2007.

[340] Ruling of the Supreme Court of the Czech Republic of 1 December 2016, ref. no. 23 Cdo 2664/2016.

[341] See also NEVOLNÁ, Z. Zásady poctivého obchodného styku. In OLŠOVSKÁ, A., LACLAVÍKOVÁ, M., MORAVČÍKOVÁ, M. (eds.) *Ethica et aequitas in iure. Pocta prof. JUDr. Alexandre Krskovej, CSc.* [online]. Trnava: Trnavská univerzita v Trnave, Právnická fakulta, 2017, p. 93 to 104. Available at: http://publikacie.iuridica.truni.sk/wp-content/uploads/2017/03/ETHICA-ET-AEQUITAS-IN-IURE-Pocta-Alexandre-Krskovej.pdf.

[342] Judgement of the Supreme Court of the Czech Republic of 20 January 2009, ref. no. 29 Cdo 359/2007.

5.1.3 Loyalty in Company Law

The principle of loyalty is one of the fundamental principles of company law. It can be found not only in the relationship between a member of the elected company body and the company, but also in the relationship between a member/shareholder and the company, as well as between the members/shareholders themselves.

Members of statutory company bodies are obliged to exercise their powers not only with professional care, but also in accordance with the interests of the company and all its members/shareholders.[343] They are therefore required to act not only professionally, but also loyally towards the company and its members/shareholders. When exercising their powers, they shall not give priority to their own interests, the interests of only certain members/shareholders or the interests of third parties over those of the company. The same obligations shall also apply to the members of supervisory bodies.

Loyalty in relation to the company and its members/shareholders also includes the obligation to keep secret and in confidence confidential information and facts which, if disclosed, could cause harm to the company or endanger its interests or the interests of its members/shareholders. We could also subsume the prohibition of competition, as well as the prohibition of the misuse of insider information (insider dealing) under the obligation of loyalty.

Meeting the criterion under the obligation of loyalty is in many cases difficult for the members of company bodies, as the interests of the company as such and those of its members/shareholders may be different, even the interests of members/shareholders themselves may be distinct from one another.[344] The fact that the company and the members/shareholders do not always pursue the same interest is particularly logical in capital companies. It is natural especially for members/shareholders in large companies to primarily pursue their own interests and benefits.[345] However, members of the elected company bodies must in any event favour the interests of the company.

[343] See Section 135a and Section 194(5) of the Commercial Code.

[344] JABLONKA, B. Odborná starostlivosť z pohľadu povinnosti štatutára pri výkone funkcie. In LENHART, M., ANDRAŠKO, J., HAMULÁK, J. (eds.) *Riadenie a kontrola v obchodných spoločnostiach v kontexte s vývojom v práve EÚ. Bratislavské právnické fórum 2016. Zborník príspevkov z medzinárodnej vedeckej konferencie.* [online]. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2016, p. 18. [cited on 03/03/2019]. Available at: http://www.lawconference.sk/zborniky/CDBPF2016/BPF2016_05.pdf.

[345] The lowest level of shareholders' loyalty can primarily be observed in public limited companies, while the highest level of partners' loyalty can be found in business partnerships.

Corporate loyalty must also be observed by the shareholders/partners themselves. The basic requirement for compliance with the principle of loyalty by a member/shareholder can be seen in general in the regulations governing all types of companies, and such requirement also follows from Section 56a of the Commercial Code. The principle of a member's/shareholder's loyalty towards the company is a basis for all of his/her duties, and also constitutes an interpretative rule, under which it is necessary to construe the individual partial obligations of a member/shareholder towards the company. It can be stated that the principle of loyalty obliges members/shareholders to seek to fulfil the objectives for which the company was set up, observe its internal rules, and respect its legitimate interests, i.e. in summary, to behave fairly and honestly towards the company.[346] The obligation of loyalty implies a passive obligation to refrain from taking a certain action which would jeopardise the proper functioning of a company, but also an active obligation to contribute to achieving a common goal.[347] The obligation of loyalty applies to the conduct of a member/shareholder at a general meeting, but also affects conduct outside a general meeting. A breach of the obligation of loyalty could also mean a situation where a member/shareholder would deliberately act in such a way that the company ceases to generate profits, or is prevented from attaining the objectives for which it was set up.[348] The obligation of loyalty would also be breached if a member/shareholder him-/herself, or through third parties, speaks scurrilously of the company or its products/services, which could lead to a reduction in its profits. The obligation of loyalty can also take the form of a requirement to act actively in certain circumstances, for example, when a certain general meeting's resolution must be adopted in order to ensure the company's survival. The principle of loyalty can even be applied in a one-person capital company, as a deed of association also establishes a mutual relationship between a member (although only one) and the company.

However, it should be emphasised that in business partnerships, mutual closeness, as well as the dependence of the company's existence on the personal participation of its partners, lead to a greater need for altruistic be-

[346] ČERNÁ, S. *Obchodní právo. Akciová společnost*. Volume 3. Prague: Aspi-Wolters Kluwer, 2006, p. 186.

[347] OVEČKOVÁ, O. et al. *Obchodný zákonník. Veľký komentár.* Bratislava: Wolters Kluwer, 2017, p. 380.

[348] Judgement of the Constitutional Court of the Czech Republic of 8 December 2011, ref. no. I. ÚS 3168/2011.

haviour than in capital companies. Capital companies (especially joint-stock companies) don't have such close relationships between members/shareholders. A shareholder often perceives his/her participation in a company as a temporary investment project that he/she does not associate with the long-term management of the company, and is therefore not motivated to altruistically behave towards the company and other shareholders, which in many cases he/she does not even know. Thus, for the purpose of guiding various partial interests of the respective partners and the company itself, it is necessary to establish the obligation of loyalty as a corrective to their relationships.

It should be added that the obligation of loyalty does not deprive the members/shareholders of the right to defend their legitimate interests (both judicially and extrajudicially) against the company or anyone else.[349] A member/shareholder is not obliged to fully subordinate his/her interests to those of the company. However, member's/shareholder's interests must be justified; he/she shall still have the right to somehow advance his/her interests. The pursuit of his/her interests should be limited only if doing so would significantly affect the interests of the company. The principle of loyalty of a member/shareholder cannot be used as "cracking the whip" towards members/shareholders in all cases where they choose to prefer their own interests to those of the company.

The company itself is also required to comply with the obligation of loyalty. The manifestation of a company's loyalty towards its members/shareholders is based on the equal treatment of each member/shareholder. In addition to pursuing its interests, a company is also a means of satisfying the legitimate interests of individual members/shareholders. When they do so, the company must act impartially, must not unjustifiably favour or disadvantage any member/shareholder, and must allow all the members/shareholders to smoothly exercise their rights.

The obligation of loyalty also applies to a so-called factual statutory officer who, in addition to the duty to act with professional care, is also required to act in accordance with the interests of the company and all its members/shareholders.[350] In view of the fact that the provisions of the Commercial Code governing the principles of the exercise of statutory bodies' powers

[349] DVOŘÁK, J. In ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář*. Prague: Wolters Kluwer, 2014, p. 652.

[350] Section 66(7) of the Commercial Code.

also apply to liquidators, they are also under the obligation to act in accordance with the principle of loyalty and in compliance with the interests of the company and all its members/shareholders.[351]

Last but not least, it is necessary to mention Section 66aa of the Commercial Code, under which the controlling entity is liable towards the controlled entity's creditors for damage caused by the controlled entity going bankrupt, if the controlling entity substantially contributed to the controlled entity becoming bankrupt. The controlling entity is relieved of such liability if it proves that it has proceeded in an informed manner, and is acting in good faith in favour of the controlled entity.

5.2 Summary of General Recommendations for the Integration of Rules of Social Nature into Commercial Law

5.2.1 Protection of the Weaker Party

With regard to the protection of the weaker party, it can be stated that such protection is now becoming a permanent trend in private law. Such trend is likely to be targeted at making the protection of the weaker party a fully-fledged principle of private law in a gradual manner.[352] The aim and purpose of the broadest possible application of the principle of the protection of the weaker party in legislation is to contribute to ensuring a balance between the interests of all parties in line with the objective of achieving a fair result consistent with the rules of equity and good morals.[353] Neither the Commercial Code nor the Civil Code contains a specific definition of the institute of a weaker party. Given that the application of the principle of the protection of the weaker party is intended to balance the factual inequality of parties to a legal relationship, in our opinion, it would probably not be possible to cover all possible cases of such factual inequality by any specific definition. We believe that it is also problematic to set a specific criterion for determining whether or not a weaker party is involved in a given case.

[351] See also Section 71(7) of the Commercial Code.

[352] ZOULÍK, F. Soukromnoprávní ochrana slabší strany. *Právní rozhledy*, 2002, no. 3, p. 109.

[353] LAZAR, J. Hodnotová orientácia navrhovaného slovenského kódexu súkromného práva a zásada ochrany slabšieho subjektu. *Právny obzor*, 2015, no. 3, p. 218.

5.2.1.1 Protection of the Weaker Party in Company Law

As mentioned above, a minority member/shareholder can also be considered a weaker party. In addition to companies with one or more members/shareholders who hold the same business shares, each company also includes member/shareholders with different amounts of business shares, where such amounts determine the level of their control over the company's business strategy and direction. Although the Commercial Code enshrines the principle of equal treatment of members/shareholders, clinging to their absolute equality is impossible, even undesirable. If favouring or disadvantaging is justified, it can be properly admitted subject to compliance with other conditions. The nature of companies implies the option to make different amounts of investment contributions to registered capital, which is also reflected in the size of a member's/shareholder's participation/shareholding in the company and the option to control (influence) its operations. But then it should be noted that a more beneficial position of members/shareholders thanks to their higher investment contributions to the company is also associated with a higher level of risk, which is borne by the members/shareholders due to such higher investment contributions if the company's business is unsuccessful.

On the one hand, it can be stated that good protection of members/shareholders can ensure greater interest in having a participation/shareholding in companies, but on the other hand, excessive protection of minority members/shareholders is not of great importance to the company as a whole and may be rather damaging thereto in terms of consequences. Minority members/shareholders may abuse their positions, for example, by questioning and delaying economically advantageous transactions through various kinds of obstruction in the course of voting at a general meeting. Therefore, the legislation governing members'/shareholders' rights should be dealt with in a prudent manner. By its nature and definition, the protection of the weaker party should primarily lead to the real equality of private law entities, which continues to be a fundamental principle of this important law subsystem. We think that the scope of minority members'/shareholders' rights enshrined in the Commercial Code can, in principle, be considered sufficient and comparable to other laws. Although there is certainly scope for improvement of the legislation governing the protection of minority members'/shareholders' rights, considerations of the protection of a minority member/shareholder

as a consumer seem rather harmful to us.[354] A minority member/shareholder should be protected by corporate law, not by consumer protection law.[355] As the examples given above show, quality legislation designed to protect the rights of all members/shareholders often contributes to protecting the rights of a minority member/shareholder as a weaker party to a more considerable extent than special provisions of a social nature enshrined by the legislator to only protect minority members/shareholders. In order to prevent majority members/shareholders from pursuing their own interests in the company (not only at the expense of other members/shareholders, but often at the expense of the company itself), it is also necessary to use the opportunities provided to members/shareholders by the Commercial Code itself and amend some "braking mechanisms" directly in a memorandum of association or articles of association. It is necessary that members/shareholders remember these safeguards when drawing up a memorandum of association or articles of association, thus preventing the creation of a situation which is unfavourable for both minority members/shareholders and the company.[356]

With regard to the scope for enhancing the legal regulations governing the protection of minority members/shareholders *de lege ferenda*, following the example of the Czech Republic, it would be possible, for example, to provide for so-called cumulative voting for the purpose of electing and remov-

[354] However, we are concerned that the trend is moving in a different direction, see for example HULMÁK, M. Společenská smlouva jako spotřebitelský kontrakt, společník jako spotřebitel? *Právny obzor*, 2014, no. 4, p. 397.

[355] CSACH, K. Who is weaker? Defining David. In BARANCOVÁ, H., BLAHO, P., LAZAR, J. *XI. Dies Luby Iurisprudentiae. Rechtsschutz des schwächeren Subjekts im Privatrecht*. Frankfurt am Main: Peter Lang GmbH International Academic Publisher, 2014, p. 188.

[356] Given that a minority member/shareholder has the greatest opportunity to exercise his/her rights at a general meeting of the company, better protection of minority members/shareholders can be ensured, for instance, by stricter legal regulations on a quorum of the general meeting; the general meeting's quorum can be set forth for individual matters by way of derogation if, in some cases, a rapid response from the company is required, while other cases involve serious decisions that can have a significant impact on minority shareholders, or even on the whole company. And these are the cases where stricter legal regulations on a quorum of the general meeting could be justifiable in a memorandum of association or articles of association. It is also possible to set forth by way of derogation a minimum number of votes required for the adoption of the general meeting's decisions and a vote by a larger proportion of votes for specific matters that are of crucial importance for the company or its members/shareholders. But it should be borne in mind that too rigorous legal regulations on the votes necessary to adopt a general meeting's decision may not result in somehow cumbersome decision-making, thus making the company too weak to respond quickly and effectively to the arisen situation.

ing the members of company bodies in the Commercial Code.[357] Cumulative voting could help resolve or remedy conflicts between majority and minority members/shareholders. For the purpose of cumulative voting, the number of votes of a member/shareholder shall be determined by multiplying the number of votes the member/shareholder has at the general meeting by the number of elected seats of the members of company bodies.[358] In this type of vote, a member/shareholder is entitled to use all the votes he/she has, or any number of them only for a particular person or persons. Each company body member is voted individually, and votes are cast only for the election of a certain person or persons. The persons elected are those who received the highest number of votes, and they must be elected by at least an absolute majority of all votes of the members/shareholders present at the general meeting, determined for the purpose of cumulative voting. The election of a company body member by cumulative voting also affects his/her possible removal. If a company body member who was elected by cumulative voting and has not seriously breached his/her duties is to be removed, he/she can only be removed with the consent of the majority of those members/shareholders who voted for his/her election. The introduction of cumulative voting is subject to its inclusion in a memorandum of association or articles of association. This method of decision-making is inspired by the Anglo-American legal system, the main task of which is to favour minority members/shareholders but only for the purpose of electing and removing members of company bodies, thus eliminating the risk of long-term control over these bodies by majority members/shareholders. When electing the members of the respective company bodies in a usual way, a majority member/shareholder takes advantage of his/her majority of votes in the election of each individual company body member, resulting in the entire company body being elected as it suits him/her. Conversely, when using cumulative voting, the result is the proportionate representation of members/shareholders in a company body, where minority members/shareholders are protected by having their representative in the company body. This method of election is important in larger companies with a higher number of company body members. The practical impact of cumulative voting principally depends on the number of elected mem-

[357] See Sections 178 to 180 and Sections 354 to 356 of Act No. 90/2012 Coll. on Commercial Companies and Cooperatives (Business Corporations Act).

[358] In the event of the election of company executives and members of the supervisory board (if established), for the purpose of cumulative voting, the number of a member's/shareholder's votes shall be determined for each individual company body.

bers of company bodies and the text of a memorandum of association (especially on which candidates will be voted earlier, which later, whether voting will be secret or public, whether a minority or majority member/shareholder will vote as the first one). Given the need to provide for cumulative voting in a memorandum of association or articles of association, there can be doubts as to whether minority members/shareholders will be able to enforce this change in existing companies; we rather assume that this type of voting will start to be used in memorandums of association and articles of association of newly established companies. Nevertheless, this institute can be supported because, in addition to the protection of minority members/shareholders, it can make the company more attractive for investors, as they would have a greater influence on the election of company bodies in their capacity as minority members/shareholders. Investors' joining the company can increase its attractiveness and consequently its value.[359]

The protection of minority members/shareholders could also be enhanced, for example, if Section 182(1)(a) of the Commercial Code imposing the board's obligation to include, at the request of qualified shareholders, the matter determined by them in the agenda of the general meeting is also appropriately incorporated into the provisions on a limited liability company. Minority members would thus be able to enforce discussions about certain matters at the general meeting without having to request the convening of an extraordinary general meeting pursuant to Section 129(2) of the Commercial Code.

It should also be added that for the best corporate governance and management, it is necessary to ensure, in addition to quality legislation, the high-

[359] For the sake of completeness, it should be added that the disruption of a company statutory body as a collective body may be a certain disadvantage when, for example, a member of the board of a joint-stock company elected by a minority shareholder will primarily defend the interests of that minority shareholder, possibly causing such body's incoherence, or disrupting or even worsening the performance of the board as a whole. In extreme cases, a minority shareholder may abuse his/her representation in the board for his/her own benefit (e.g. a shareholder may misuse the information he/she obtains through his/her board member for the shareholder's own competitive advantage). For cumulative voting, see, for example GORDON, J. N. Institutions as Relational Investors: a New Look at Cumulative Voting. *Columbia Law Review*, 1994, Vol. 94, No. 1, p. 124 to 192 or ČERNÁ, S. Nominování členů orgánů kapitálových obchodních společností v novém českém korporačním právu. In *Reforma súkromného práva na Slovensku a v Čechách. Zborník príspevkov z konferencie Československé právnické dni. Detašované pracovisko Justičnej akadémie Slovenskej republiky v Omšení, 29. – 30. máj 2013.* [online]. Brno: Masarykova univerzita, 2013, p. 30. Available at: https://www.ja-sr.sk/files/Zbornik_2013_CSPD-upraveny.1.KL-1.pdf.

est possible interest of members in corporate governance and management, and consequently their highest possible attendance at the general meeting. Especially in the area of public limited companies, we can observe that many shareholders are passive and often only interested in making their short-term profits. Moreover, minority shareholders are not often motivated to attend general meetings and cast their votes at such meetings, mainly due to the disproportionate costs of attending a general meeting and the option to influence voting results. As research shows, the average shareholders' attendance at general meetings of the largest European companies is less than 60%, with the average minority shareholders' attendance only accounting for 45%. Research suggests that the financial performance of a company, as well as the inclusion of more items in the agenda of a general meeting, have almost no impact on attendance at general meetings. Attendance is positively influenced only by the election of company body members.[360]

5.2.1.2 Protection of the Weaker Party in Commercial Obligation Relationships

There is currently a widespread debate about the extent of application of freedom of contract in obligation relationships, particularly in commercial obligation relationships. The value of freedom should be counterbalanced by the value of equality and solidarity, and the principle of freedom of contract by the principle of the protection of the weaker party, by the principle of transparency in contractual relationships, or by the principle of good faith and fair (honest) conduct. In this respect, we are speaking of social justice in private law.[361] The issue of social justice is also very topical in European legal science. We need to find answers to the question of how much freedom is allowable in contracts, or what consequences are attributable to unbalanced contracts. Equality of entities is only a fiction. As mentioned above, individual parties to legal relationships differ, whether in their abilities, intellect, economic status or knowledge. The inequality of these entities is also reflected in such disparity. And it is law that should be a means of reducing this inequality. Law should be aimed at achieving a real balance, so it must rectify

[360] VAN DER ELST, CH. Revisiting Shareholder Activism at AGMs: Voting Determinants of Large and Small Shareholders. ECGI – *Finance Working Paper*, no. 311/2011, p. 39.

[361] HURDÍK, J., SELUCKÁ, M., KOUKAL, P. et al. *Evropské soukromé právo v čase a prostoru. I. díl: Část teoretická, metodologická a systémová.* [online]. Brno: Masarykova univerzita, Právnická fakulta, 2017, p. 156. [cited on 04/03/2019]. Available at: https://science.law.muni.cz/knihy/monografie/Hurdik_ESP_v_case_a_prostoru.pdf.

the inequality of initial positions. We cannot content ourselves that all entities will be provided with the same legal means. A solution which can ensure that initial economic, informational, professional, and other differences between parties to legal relationships are legally balanced is imbalanced legislation governing the rights and obligations of private law entities, where more rights will be conferred and fewer obligations will be imposed upon the weaker party, and not the stronger party. And the principle of the protection of the weaker party is aimed at balancing the positions of individual parties and compensating respective differences, thus giving weaker parties the option to fulfil the principle of freedom of will. In order for such a system of protection to work, there must be a balance between social aspects and liberal values.

However, commercial obligation relationships have their own specifics. It is assumed that a business will pursue its own interests, use the opportunities provided to it by law, and seek to make the highest possible profit and improve its market position. Limits of restricting the freedom of will in commercial law relationships entail the risks of restricting traditional bases of the business environment. It is therefore important to set these limits only exceptionally in the interests of the weaker party. It is also essential to regulate such issues with the utmost caution and prudence in order not to abuse the weaker party's position. In commercial obligation relationships, the protection of the weaker party must imply neither the fundamental weakening of freedom of contract, nor the elimination of a competitive market mechanism. On the other hand, it cannot be understood as the protection of recklessness and irresponsibility either. It would not be right to protect a business entity that is incompetent, negligent, does not examine business terms and conditions, does not obtain necessary information, etc.

As mentioned above, currently, when a weaker party is under discussion between business entities in obligation relationships, they primarily refer to small and medium-sized enterprises. However, in view of the foregoing, we think that it is not a good way to look for the definition of a small and medium-sized enterprise as the weaker party, but when identifying the weaker party, it may be rather advisable to find a disadvantage on his/her part, more specifically such a significant disadvantage that can be objectively regarded as crucial to the given contractual relationship, and therefore cannot be disregarded by law.

In conclusion of this part, in can be stated that the principle of the protection of the weaker party should be clearly enshrined in our private law.

However, the very content of such principle must be set out in a very precise, careful and balanced manner, especially for the needs of commercial obligation relationships, where, given the prevailing professionalism of these relationships, sensitivity to aspects of social justice is somewhat weaker. The absolutisation of the principle of equality would pose discrimination against stronger parties to legal relationships and their demotivation, but on the contrary, the absolutisation of the principle of freedom of contract would lead to the survival of only the strongest entities and consequently, to the denial of freedom of less competent entities, resulting in the polarisation of society.[362] However, in the protection of the weaker party, the decision-making of courts also plays an important role besides quality legislation. It is mainly the courts' task to pay attention to the reasons and all the factors that have influenced the state of the case under consideration and, when applying the principle of the protection of the weaker party, not to cross the accepted boundary between natural inequality, which in principle does not require any rectification, and inequality where one of the parties is designated as the weaker party and needs adequate protection.[363]

5.2.2 Fair (Honest) Conduct

The definition of "fair trade" (as well as of "good morals") is generally left to legal science and court's practice (case law). We can find the definition of the said terms in a legal rule only in exceptional cases.[364] We consider this approach correct, as these are the concepts that are multiform and their significance evolves in time and space.

The inconsistency with fair trade has many concrete forms in real life. The exercise of a right, which does not infringe the mandatory provisions of the applicable law or the provisions of the contract, but is inconsistent with the principles of fair trade and oversteps the limits of freedom of contract provided by the law in commercial obligation relationships, cannot enjoy legal protection. A business shall not abuse the rights conferred upon it, es-

[362] BEJČEK, J. *Smluvní svoboda a ochrana slabšího obchodníka*. [online]. Brno: Masarykova univerzita, Právnická fakulta, 2016, p. 19. [cited on 15/03/2019]. Available at: https://science.law.muni.cz/knihy/monografie/Bejcek_Smluvni_svoboda.pdf.

[363] BEJČEK, J. Princíp rovnosti a ochrana slabšího. In *Sborník vědecké konference Princip rovnosti a princip ochrany slabšího, 18. prosince 2003, Právnická fakulta MU v Brně, Katedra obchodního práva*. Brno: Právnická fakulta MU, 2003, p. 4.

[364] For example, the definition of conduct contrary to good morals in Section 4(8) of Act No. 250/2007 Coll. on Consumer Protection.

pecially when its rights are not threatened to the extent that it could be admitted ipso facto that other entities are clearly harmed by the exercise of its rights.[365] Honesty expresses a certain standard of behaviour in legal relationships, requiring integrity, fairness, openness, and the obligation to have regard for the other party's interests. Fair conduct is intended to protect contractual partners from bullying tendencies and practices in trading.

The obligation to act fairly should also be clearly stated in the new civil code. Emphasis should be placed on the general prohibition of abuse of a right, and the good-naturedness of the parties to contractual relationships. The Czech legislator also chose a similar way, when it highlighted the need to act fairly in the new Civil Code, emphasising that no one may benefit from acting unfairly or unlawfully. (Section 6 of Act No. 89/2012 Coll., the Civil Code). Section 7 also clearly states: "A person who acted in a certain way is presumed to have acted fairly and in good faith." Consequently, Section 8 of the Czech Civil Code plainly implies that evident abuse of a right does not enjoy legal protection.

5.2.3 Loyalty in Company Law

The principle of loyalty significantly affects company law, and the consistent observance of such principle also considerably contributes not only to the protection of a company and its members/shareholders, but also to the protection of corporate creditors. It is therefore necessary that it be retained in our legal system even after the recodification of private law. Basically, we deem the current legal regulations governing such principle to be satisfactory. The content of the obligation of loyalty is not clearly delimited in the Commercial Code, and is primarily based on the extent of a member's/shareholder's participation in the company, the form or the size of the company. The closer the relationships between members/shareholders, the more loyalty the member/shareholder is expected to show. As a rule, it would be more difficult to infer the obligation of loyalty of a shareholder in a large joint-stock company, who only holds a fraction of the company's shares, than that of a member of a limited liability company consisting of two members. Of course, there is no generalised conclusion; the degree of the obligation of loyalty, as well as its specific content, will always need to be assessed on a case-by-case basis.

[365] Judgement of the Regional Court in Bratislava of 18 April 2013, ref. no. 1 CoZm/30/2012.

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6. LABOUR LAW AND SOCIAL NORMS

The theory of labour law perceives the emergence of modern labour law in conjunction with the changes that occurred during the industrial revolution.[366] Labour law is deemed to be a separate area of law; although independence, just as that of any area of law, is relative. In fact, the areas of law are interlinked (labour law mainly with civil, as well as with administrative or social security law).[367] Labour law is also regarded as part of social law, which is not perceived as an area of law, but a term common to labour law and social security law.[368] Labour law is also specific in that it is considered a "separate area of law" of a hybrid nature, characterised not only by private-law, but also by public-law elements."[369]

The fundamental function of labour law, which is more pronounced in this area of private law, is a protective function which should be aimed at protecting an employee as the weaker party. The term 'weaker party' is not explicitly enshrined in labour-law regulations. However, the legislator first approached the issue of reinforcing the concept through procedural protection by adopting the Civil Litigation Code, in which the legislator sets forth a weaker party's disputes in Chapter Two.[370] An employee is also deemed to be a weaker party.[371] The importance of the concept of procedural protection for a weaker party is also currently accentuated by the Supreme Court of the Slovak Republic.

The fundamental function of labour law was originally aimed at protecting natural persons – employees, who worked in difficult working conditions, and focused mainly on occupational safety and health, and the pro-

[366] BARANCOVÁ, H. Pojem, predmet, funkcie a systém pracovného práva. In: BARANCOVÁ, H., SCHRONK, R. *Pracovné právo*. Bratislava: Sprint 2. 2016, p. 25. ŠTEFKO, M. Vznik a vývoj institutu pracovní doby v českých zemích. In: BĚLOVSKÝ, P. – STLOUKALOVÁ, K. (eds.). *CARO AMICO. 60 kapitol pro Michala Skřejpka aneb Římské právo napříč staletími*. Prague: Auditorium 2017, p. 442.

[367] GALVAS, M. et al. *Pracovní právo.* 2. dopl. a přeprac. vyd. Brno: MU, 2015, Edice Učebnice PF MU, p. 46.

[368] BĚLINA, M. Postavení pracovního práva v systému práva. In: BĚLINA, M., PICHRT, J. *Pracovní právo*. 7th edition. Prague: C. H. Beck 2017, p. 4–5.

[369] BARANCOVÁ, H. Pojem, predmet, funkcie a systém pracovného práva. In: BARANCOVÁ, H., SCHRONK, R. *Pracovné právo*. Bratislava: Sprint 2, 2016, p. 27.

[370] See also: GEŠKOVÁ, K. Abstraktná kontrola ako prostriedok ochrany viacerých subjektov. In: *Acta iuridica Olomucensia*. – ISSN 1801-0288. – Vol. 13, no. 1 (2018), p. 9–22.

[371] Cf. Section 316 et seq.

tection of special employee categories (women, children). The traditional concept of labour law is gradually changing, especially due to the development of new production methods.[372]

Due to globalization, the effort to be a competitive employer, and the development of technology, the position of an employee is threatened in the performance of dependent work (i.e. wage labour) by other phenomena (it is no longer just hard manual work), such as disproportionate stress at work, requirements for working excessive overtime, and monotony in production.

That is why the EU is also responding to this development. First, it was the so-called flexibility[373] of labour relations and thereto related increase in so-called atypical jobs (employment for a definite period of time - i.e. fixed-term contracts, shorter working hours, employment through employment agencies), which have been discussed since the early 1990s. The labour market issue was subsequently seen from the perspective of so-called flexicurity,[374] which was also included in the European Employment Strategy. The said concept was to express a qualitatively new approach to the perception of labour law and its protective function. Flexicurity was to be a social model of the state with an active labour market policy. On the one hand, there is flexibility for employers (flexible working conditions) and, on the other, securing employees and the unemployed through a social security system and lifelong learning.

The development is further progressing, and it is necessary to cope with a labour market that co-creates Industry 4.0 (also commonly referred to as the Fourth Industrial Revolution).[375] It's no longer anything new that we perceive as a threat the substitution of labour force by robots or the creation of such forms of work performance that are outside the framework of not only labour law, but also law as such (natural persons perform work/provide services through different platforms outside the legal framework, which, on the one hand, allows them to work at any time and under any conditions, but on the other, to do so without any "benefits", which, in this respect, include so-

[372] ŠTANGOVÁ, V. Ke genezi pracovního práva. In: BĚLOVSKÝ, P. – STLOUKALOVÁ, K. (eds.). *CARO AMICO. 60 kapitol pro Michala Skřejpka aneb Římské právo napříč staletími*. Prague: Auditorium 2017, p. 440.

[373] See also: BARANCOVÁ, H. Flexibilné formy zamestnania v pracovnom práve Slovenskej republiky. In: *Pracovní právo 2010*. Brno. Masarykova univerzita, 2010, p. 15–40.

[374] BARANCOVÁ, H. Flexikurita a pracovné právo pre 21. storočie. In: *Pracovné právo 21. storočia*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2009. p. 22 et seq.

[375] See also: *Digital Transformation Monitor*. Available at: https://ec.europa.eu/growth/tools-databases/dem/monitor/ [cited on 09/02/2019].

cial insurance or the guarantee of a minimum wage). It seems that the negative phenomenon of covering dependent work by civil or commercial relationships is accompanied by an attempt to regulate matters extralegally.

In order for the performance of dependent work to be set forth by labour law rules, the need for a reform of labour law must be perceived, perhaps making it more flexible and simplified, while guaranteeing an employee fundamental working conditions and dignity; this is precisely an area where the legitimate existence of rules with a social function can be observed.[376]

Given the extensive nature of the issue, attention will be paid to institutes of labour law that can currently be considered to be those, the essence of which should be a social function in the context of private-sphere labour relations with the involvement of EU law. EU labour law is principally based on directives that concern the principles (stated herein only in a simplified manner given the extensive nature of the issue) of equal treatment, informing employees, working conditions, such as working time, safety at work, protection of employees' rights in the transfer of business, collective redundancies, insolvency, and maternity protection.

6.1 The Principle of Equal Treatment and Non-discrimination

The principle of equal treatment can be regarded as an important area of European Union law, as evidenced by its enshrinement in both primary and secondary law. In order to implement the principle of equal treatment, the European Union adopted a number of directives providing for non-discrimination on the grounds of sex, race or ethnic origin, disability, age, sexual orientation, and religion or belief. The Court of Justice of the European Union plays a major role in this area[377] by its interpretation of the principle of equal treatment. The most important directives include:

[376] BARANCOVÁ, H. Bezpečnosť a dôstojnosť zamestnanca – súčasnosť a budúcnosť pracovného práva. In: *Dôstojnosť zamestnanca v pracovnoprávnych vzťahoch*. Bratislava: Sprint dva, 2011, p. 11–30.

[377] Cf. VARGA, P. Zákaz diskriminácie pri poskytovaní služieb v práve EÚ. In: *Diskriminácia v zmluvnom práve*. – Trnava: Typi Universitatis Tyrnaviensis, 2015, p. 61–77; Diskriminácia na základe pohlavia v kontexte antidiskriminačnej legislatívy Európskej únie vo veciach zamestnanosti a povolania. In: *Hodnotový systém práva a jeho reflexia v právnej teórii a praxi*. – Trnava: Typi Universitatis Tyrnaviensis 2013, p. 407–424; Religious Discrimination in the Workplace In: *Free Movement of Goods and Persons across the Polish - Czech - Slovak Borders*. – Katowice: Oficyna Wydawnicza Wacław Walasek, 2012, p. 94–101.

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- Directive 2006/54/EC of the European Parliament and of the Council of 5 June 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The constitutional enshrinement of the protection of an employee from discriminatory actions can be seen in Art. 36(c) of the Constitution of the Slovak Republic, under which employees shall have the right to fair and satisfactory working conditions, and the law primarily provides them with protection against discrimination in employment.

The anti-discrimination labour-law regulations are enshrined in the Labour Code in general (Article 1 of the Basic Principles and Section 13 thereof), referring to the amendment to Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination and on alterations and amendments to certain acts (the "Anti-Discrimination Act"). The prohibition of discrimination on the grounds of sex is particularly highlighted in Art. 6 and Section 119a of the Labour Code. Cases of admissible different (unequal) treatment of special categories of disadvantaged persons (pregnant women, adolescents, parents) are primarily subject to the legal regulations in the seventh part of the Labour Code (the employer's social policy).[378]

The Anti-Discrimination Act provides for means of legal protection if the said principle (Section 1) is violated, and such violation concerns employment and similar legal relationships, social security, health care, the provision of goods and services, and education (Section 3). It also sets forth exceptions and admissible different (unequal) treatment.

The legislation distinguishes between compliance with the principle of equal treatment (a broader concept) and non-discrimination (the prohibition of discrimination). Pursuant to Section 2(1) of the Anti-Discrimination Act, compliance with the principle of equal treatment is based on the prohibition of discrimination on the grounds of sex, religion or belief, race, mem-

[378] DOLOBÁČ, M. Vzťah noriem pracovného práva a antidiskriminačnej legislatívy. In: *Právne aspekty rovnakého zaobchádzania v Slovenskej republike*, p. 45, 46. Available at: http://www.diskriminacia.sk/sites/default/files/Pravne_aspekty_text.pdf [cited on 08/12/2018].

bership of a national minority or an ethnic group, disability, age, sexual orientation, marital and family status, colour, language, political or any other opinion, national or social origin, property, gender or other position. When respecting the principle of equal treatment, good morals must also be taken into account in order to extend the protection against discrimination [Section 2(2)].

Under Section 2(3) of the Anti-Discrimination Act, compliance with the principle of equal treatment also involves taking measures to ensure protection against discrimination.

The Anti-Discrimination Act defines discriminatory grounds [Section 2(1)] and forms of discrimination [Section 2a(1)]; the said sections distinguish between direct and indirect discrimination, harassment, sexual harassment, and victimisation; discrimination shall also mean an instruction to discriminate and incitement to discrimination.

Section 9 of the Anti-Discrimination Act stipulates the conditions of legal protection and procedures in matters relating to the violation of the principle of equal treatment. Under this Act, every person shall be entitled to equal treatment and protection against discrimination, and may, if such consider themselves wronged in their rights, interests protected by law, and/or freedoms due to non-compliance with the principle of equal treatment, claim their rights before a court in judicial proceedings.

A aggrieved person[379] may primarily require that the person violating the principle of equal treatment (i) be made to refrain from taking such action; and where possible, (ii) rectify the illegal situation; or (iii) provide adequate satisfaction (e.g. an apology before the members of a team with which the aggrieved person works). Should adequate satisfaction prove to be insufficient, especially where the violation of the principle of equal treatment has considerably impaired the dignity, social status and social functioning of the aggrieved person, the aggrieved person may also seek (iv) non-pecuniary damages in cash (the amount of non-pecuniary damages in cash shall be determined by a court, taking into account the extent of non-pecuniary damage incurred and all underlying circumstances).

Pursuant to Section 11 of the Anti-Discrimination Act, proceedings shall be initiated by a petition from a person who feels wronged by the violation of the principle of equal treatment. With regard to the burden of proof, the defendant is under the obligation to prove that there was no violation of the

[379] See also: BARANCOVÁ, H. *Ochrana zamestnanca pred diskrimináciou*. Bratislava: Sprint 2, 2014, 280 p.

principle of equal treatment if the facts submitted to a court by the plaintiff give rise to a reasonable assumption that such violation has indeed occurred.

If the plaintiff objects that there was a violation of the principle of equal treatment, the plaintiff shall produce evidence, based on which it can be reasonably assumed that the principle of equal treatment has been violated.[380]

Even in the case of the exercise of rights and obligations contrary to good morals, the abuse of rights, or the sanctioning or persecution (i.e. victimisation) of an employee, judicial protection can be claimed under the Anti-Discrimination Act.

The issue of discrimination is often associated with the phenomenon of mobbing/bullying in the workplace. The Slovak legislation does not contain special provisions on mobbing/bullying, and therefore, we need to rely on the general provisions of the Labour Code, anti-discrimination legislation, and occupational health and safety regulations. Section 13(3) of the Labour Code, under which the exercise of rights and obligations arising from employment relationships must conform to good morals, can be mentioned as a general basis for legal regulations on mobbing/bullying. Such rights and obligations shall not be misused by anyone to the detriment of the other party to the employment relationship or fellow employees.

The term 'harassment' is often associated with the term 'mobbing/bullying'. Pursuant to the anti-discrimination legislation, harassment shall mean conduct which creates or may create an intimidating, hostile, shameful, humiliating, degrading, disrespectful or offensive environment, and the intention or consequence of which is or may be interference with a person's freedom or human dignity. Harassment can be understood as unwanted conduct related to one or more prohibited grounds for discrimination (e.g. race, ethnicity, sexual orientation, religion), the intention or consequence of which is or may be interference with a person's freedom or human dignity, and the creation of an intimidating, hostile, humiliating, degrading or offensive environment. For an individual towards whom such conduct is directed, it is undesirable and undermines his/her integrity. Bullying and mobbing can be considered as more systematic forms of harassment.[381]

[380] Cf. BARANCOVÁ, H. *Zákonník práce. Commentary*. 2nd edition. Prague: C. H. Beck, 2012, p. 197.

[381] Cf. DEBRECÉNIOVÁ, J. *Antidiskriminačný zákon (Anti-Discrimination Act). Commentary*. Bratislava: ODZ, 2008, p. 50 et seq.

But in this respect, it should be noted that harassment as referred to in the anti-discrimination legislation occurs only if there are discriminatory grounds. If harassment occurs, but there are no discriminatory grounds (an employee is bullied for no reason, i.e. not on the grounds of his/her age, sex, race, colour, etc.), such cases of harassment are not covered by the anti-discrimination legislation. In general, employee protection can be primarily understood as the prohibition of the exercise of rights contrary to good morals and of the abuse of rights. The foregoing is more easily applicable to the forms of bossing (employee bullying by his/her boss); it is debatable how courts would deal with a case of mobbing (bullying between peer employees, i.e. employees at the same level).

Such approach can also be inferred from a court ruling dealing with this phenomenon. According to the judgement of the Regional Court in Banská Bystrica, it should be distinguished between bullying and discrimination; the court declared that "bullying is not *expressis verbis* enshrined in the Labour Code and, by analogy, bullying can be regarded as a specific form of the abuse of a right".[382]

6.2 Working Time

The working environment, the workload of an employee and consequently, his/her personal and family life are considerably influenced by the employee's working time. Working time should have an important role when stipulating employee working conditions.[383] At the European level, this area is regulated by Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (the "Directive").

In addition to examining minimum and maximum duration in relation to the institute of working time (given the basic, protective function of labour law, labour-law regulations lay down maximum working hours and minimum rest periods) and the concepts associated with working time as such, the future of this institute in general also needs consideration.

"Working time" as referred to in Article 2(1) of the Directive means any period during which the worker is working, at the employer's disposal and carrying out his/her activity or duties, in accordance with national laws and/

[382] Judgement of the Regional Court in Banská Bystrica, ref. no. 16CoPr/11/2012.
[383] See also: TOMAN, J. *Pracovný čas*. Bratislava: Wolters Kluwer, 2018, p. 218 et seq.

or practice. In compliance with the concept of the definition above, Section 85(1) of the Labour Code defines working time as the period of time, during which the employee is at the employer's disposal, working and carrying out duties in accordance with the employment contract.

Subsequently, under Article 2(1) of the Directive, "rest period" means any period which is not working time. The term "rest period" is defined in Section 85(2) of the Labour Code in line with the Directive as any period which is not working time.

However, there are situations where an employee performs tasks for the employer, e.g. time spent travelling during a business trip, which, in terms of time, does not fall within the scope of a work shift, and such time is deemed to be a rest period under the Labour Code. In respect of the institute of a business trip, the Court of Justice of the European Union partially addressed the issue of business trips in its judgement in Case C-266/14 of Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA, which has not yet been reflected in Slovak labour law.[384] To put it simply, the Court of Justice of the European Union stated that, as regards workers who were not assigned a fixed or habitual place of work, the time spent by those workers travelling between the workers' homes and the premises of the first and last customers constituted 'working time'.

In addition, the Fourth Industrial Revolution entails and will entail changes in the labour market, which we are striving to understand and grasp, but it seems that such task is not easy to perform. During the gradual penetration of the Fourth Industrial Revolution into the practical life of the labour market, coming to the fore is not only the requirement and need for the more flexible organisation of working time, but also suggestions for the complete exclusion of working time from the basic institutes of labour law, as the organisation of working time is not so much problematic but rather the assessment thereof. The fundamental question is what period can be considered working time for which the employee shall be entitled to wage payment, and at what point it concerns other labour-law institutes (if any).

A typical case, which regularly appears, is the situation of an employee who is "at work" and simultaneously "not at work" for 24 hours in succession, seven days a week throughout the calendar year (i.e. 24/7/365), when

[384] See also: VARGA, P. Pracovný čas pracovníkov bez stáleho pracoviska a nárok na náhradu za nevyčerpanú dovolenku za kalendárny rok v prípade úmrtia pracovníka. In: *Justičná revue*. ISSN 1335 6461. Vol. 68, no. 12 (2016), p. 1436–1443.

the nature of the employee's work requires him/her to be able to fulfil or carry out his/her job duties whenever necessary, and during the rest of the time the employee simply does not work and spends it at his/her own discretion, while not entering the area designated as his/her workplace at all. The employee fulfils his/her job duty through a mobile device with Internet access, despite the employee not being in his/her workplace, which need not to be designated, because the employee has not been provided with any workplace or other space and time for being available to the employer. The said nature of work is then in direct violation of the legal prerequisites, on which the institute (definition) of working time is based under Section 85(1) of the Labour Code, including the flexible working time introduced under Section 88 of the Labour Code, since even the most flexible model of working time organisation does not correspond to the employer's need and the nature of the employee's work performance.[385]

Working time seems to be losing its role as a key element in the labour-law protection of employees, as the identification thereof will be increasingly demanding, including the determination of any expected extent of its application to the employee, or checking the limits of its maximum allowable extent. It is therefore necessary for legislation to respond to new forms of work by setting the borders that can adequately protect employees. If the institute of working time cannot respond in such a way, in order to maintain the social function of labour law and protect an employee and his/her dignity, other protective mechanisms for employees' work performance will come to the fore, especially measures relating to the assessment of psychosocial risks and employees' health status in general. Employee mental health is likely to become a key commodity, and employers will need to find new ways to protect employees from burnout syndrome. In this respect, there is a need for legislation with regard to the right to switch off or the right to the protection of an employee's private and family life, which is likely to be highlighted even more urgently not only in terms of the protection of personal data and the monitoring of an employee's movement in the virtual (online) world, but also in the context of the employee's work-life balance, where work life will become a common part of the household.

[385] STRIEDER, D. *Arbeitszeit: 24/7*. Available at: http://digitale-arbeitswelt.at/arbeitszeit-247/.

6.3 Occupational Safety and Health

The protection of employees' life and health, as well as their safe working conditions, are among the priorities of European Union social policy,[386] and this area can be regarded as one in which the social dimension should be reflected as much as possible. In general, the protection of health and life is the fundamental right of every person. In view of the diversity of working conditions created by employers, safe working conditions are provided for in a number of EU directives. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, aimed at establishing a minimum standard of occupational safety and health (OSH) for Member States, can be regarded as fundamental.

In Slovakia, the protection of occupational safety and health is primarily guaranteed by Article 36 of the Constitution of the Slovak Republic (in conjunction with Art. 51 thereof), and under Art. 8 of the Basic Principles of the Labour Code, employers are obliged to take measures in order to protect the life and health of their employees at work. The basic provisions are then contained in the sixth part of the Labour Code "Labour Protection" (Sections 146-150). Under Section 147(1) of the Labour Code, an employer is required, to the extent of its operations, to constantly provide for employees' occupational safety and health, and take the necessary measures to that end, including preventive measures, providing the necessary equipment, and instituting a suitable labour protection management system. The employer shall enhance the level of labour protection in all its activities, and adapt the labour protection level to changing circumstances.

An important provision is also Section 133(1) of the Labour Code, which, in the part setting working standards, stipulates that when determining the required quantity of labour and the pace of work, the employer must take into account the pace of work which is appropriate to physiological and neuropsychic capacities, legal regulations and other regulations that ensure occupational safety and health, time for employees to wash after work, and time for employees to satisfy their natural needs.

[386] Art. 153 of the Treaty on the Functioning of the European Union (TFEU): With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers' health and safety.

The basic law governing safety and health at work is Act No. 124/2006 Coll. on Occupational Safety and Health, as amended (the "OSH Act"), which shall apply to employers and employees in all sectors of manufacturing and non-manufacturing spheres (unless otherwise provided by law). Consequently, in view of the diversity of working conditions, requirements for working procedures and the working environment to ensure the life and health of those in workplaces and employees performing work are usually further set forth in secondary legislation, technical regulations and the special source of labour law - in internal (in-house) normative acts issued by employers, which stipulate safe working conditions, while taking into account a specific situation and risks existing on the employer's part.

The OSH Act is aimed at establishing general principles of prevention, and basic conditions to ensure safety and health at work and eliminating the risks and factors that cause accidents at work, occupational diseases, and other occupational injuries to health.

An important law regarding health protection is Act No. 355/2007 Coll. on the Protection, Support and Development of Public Health, as amended, which stipulates conditions for assessing the working environment in terms of health and employees' medical fitness for work (routine check-ups, i.e. general medical examinations in relation to work).

Monotony of work and stress at work can be perceived as the most pressing current problems in occupational safety and health. In employers' pursuit of higher profits, lower labour costs, and the goal of being competitive, it is not unusual when they do so at the expense of a number of employees and by setting "destructive" standards, such as labour input standards. Of course, it should also be noted that many employers take a responsible approach to the creation of safe and healthy conditions.

6.4 Employee Protection

In addition to the substantive enshrinement of employees' rights in labour law, guaranteeing employees labour-law protection, attention should be paid to those rules that also ensure the enforceability of the protection of an employee as a weaker party to the employment relationship if such rules are not observed or violated. To put it simply, the procedural protection of employees' rights can be provided in the form of administrative protection (protection given by a public authority, which is, in the area of labour relations, primarily the National Labour Inspectorate and the competent labour in-

spectorates), as well as in the form of civil judicial protection (in exceptional cases, e.g. if the employee's health is damaged, protection in offence proceedings or criminal proceedings may also be considered).

If an employee's rights are infringed by the employer, the employee has several legal options to deal with such situation. The employee may claim protection by filing a complaint with the employer, a motion with a competent labour inspectorate or court.

If labour law is perceived as an area in which social function is more pronounced compared to the other areas of private law, especially in relation to substantive law, the social function aimed at protecting the weaker party should also be reflected in rules that are procedural in nature and aim to protect the employee's rights. The social element thus grasped can also be seen at the level of a competent labour inspectorate's monitoring of compliance with labour-law regulations. A public-law institution may interfere with a private-law employment relationship. Even from this point of view, we consider the area of labour law as a certain hybrid sector containing both private- and public-law rules, as we deem the regulations governing the activities and work of labour inspectorates to be labour-law.

The options of employee protection (mentioned above) can also be seen in the spirit of the third sentence of Section 13(3) of the Labour Code, under which no one shall be persecuted or otherwise sanctioned in the workplace in connection with the exercise of employment relationships on the grounds of filing a complaint, an action, a petition for criminal prosecution, or other notice of criminality or other anti-social activity against another employee or the employer.

Act No. 125/2006 Coll. on Labour Inspection and on alterations and amendments to Act No. 82/2005 Coll. on Illegal Work and Illegal Employment and on alterations and amendments to certain acts, as amended (the "Labour Inspection Act"), regulates labour inspection that is used to enforce the protection of employees at work and the performance of state administration in the area of labour inspection [Section 1(a)]. In brief, the said labour inspection (Section 2 of the Labour Inspection Act) means supervision over adherence to labour-law regulations (governing both individual and collective labour relations), drawing responsibility for the violation of such regulations, and the provision of free-of-charge advisory services in labour law.

Under Section 150(2) of the Labour Code, employees aggrieved by the breach of obligations arising out of employment relationships, as well as em-

ployee representatives employed by an employer at whose premises they ascertained the breach of labour-law regulations in performing their control activity under Section 239 of the Labour Code, may file a motion with the competent labour inspection body.

Neither the Labour Code nor the Labour Inspection Act stipulates the formal or content particulars of such motion. According to publicly available documents of the National Labour Inspectorate, a motion[387] means a submission by a natural person or legal entity that highlights a breach of the obligations referred to in Section 2(1)(a) of the Labour Inspection Act.

It can be said that a labour inspectorate has virtually no effective coercive means at its disposal, if the employer fails to take the necessary measures to rectify the identified shortcomings. In that case, the employee concerned has the option to refer, for example, to the competent court (e.g. if the labour inspectorate ascertains that the employer does not pay a wage to the employee and orders the employer to pay such wage, but the employer fails to do so, the employee can refer to the competent court). As regards sanctions, in relation to general violations of labour-law regulations the Labour Inspectorate may, under Section 19(1)(a) of the Labour Inspection Act (Administrative Delicts), impose a fine of up to EUR 100,000, unless otherwise provided for in the Labour Inspection Act (e.g. a fine of up to EUR 200,000 may be imposed in the event of a fatal accident at work).

The institute of a complaint must be seen in the context of the Labour Code provisions. Under Section 13(6) of the Labour Code, an employee shall have the right to file a complaint with the employer concerning a breach of the principle of equal treatment and non-compliance with the conditions stipulated in Section 13(3) to (5) of the Labour Code (including conditions for the protection of employee privacy, the exercise of rights and obligations in accordance with good morals, and the abuse of rights). The employer shall respond to the employee's complaint without undue delay, take corrective action, refrain from such conduct, and eliminate its consequences. However, the Labour Code does not set forth the formal or content particulars of such complaint, and nor does it stipulate the conditions for the procedural handling thereof. Some employers have such particulars and procedures specified in their internal rules and regulations, but in general, an employee's complaint is rather considered a formality.

[387] *Motions and Complaints*. Available at: https://www.ip.gov.sk/staznosti-a-podnety/ [cited on 19/01/2019].

Judicial protection is also used in labour relations. Article 9 of the Basic Principles of the Labour Code stipulates that employees and employers aggrieved by a breach of obligations arising from employment relationships may exercise their rights in court. Employers shall not discriminate and aggrieve employees on the grounds that employees exercise their rights under employment relationships. Subsequently, Section 14 of the Labour Code provides for disputes between an employee and the employer regarding claims arising from employment relationships shall be heard and settled by courts. However, the Labour Code does not contain more detailed provisions, and therefore procedures under the general civil code – Civil Litigation Code shall apply.

Under Section 3 of the Civil Litigation Code (courts' competence and jurisdiction), private-law disputes and other private-law matters shall be heard and settled by courts, unless other authorities do so according to the law. Taking into account the need to protect the weaker party – an employee, the Civil Litigation Code contains specific provisions that stipulate how courts shall proceed with hearing and settling labour-law disputes.[388]

The Civil Litigation Code directly specifies what dispute is an individual labour-law dispute in two legal definitions in Section 316 as follows:

(1) For the purposes of this Act, an individual labour-law dispute means a dispute between an employee and the employer arising from employment and other similar employment relationships. (2) An individual labour-law dispute also means a dispute arising from the principle of equal treatment, provided that it is related to an individual labour-law dispute.

6.5 Perspective

It can be figuratively stated that labour law is a "child" of the first industrial revolution, and all industrial revolutions so far have affected labour-law regulations. It is interesting to consider whether the modern era and the rapid development of society as a whole shape labour law so that it is adjusted to reflect appropriate labour-law regulations, or the situation on the labour market and the level of labour protection are different and develop in the opposite direction. Industry 4.0 is currently a major challenge for labour law, and therefore attention needs to be paid to this issue, specifically to explor-

[388] So-called disputes with the protection of the weaker party mean disputes which include, besides consumer disputes and anti-discrimination disputes, individual labour-law disputes.

ing how the Fourth Industrial Revolution (digitization) can affect[389] the performance of dependent work and the enshrinement thereof in labour-law regulations.

The thing is that the globalized labour market is causing the decline of "traditional" labour relations, where work is rather result- than recurring activity-oriented, not being linked to one workplace or employer.

We are currently confronted with the fact that dependent work is virtually performed beyond the scope of labour law, and the issue of the so-called Švarc system (i.e. a system for the misclassification of employees as independent contractors, which in the Czech Republic is termed the "Švarc system" after the entrepreneur Miroslav Švarc, who first used the system) appears to be negligible at this point. In the context of labour law, there are efforts to create so-called shared jobs, use homeworking (remote working), telecommuting or shared employees, but it seems that the concept of flexicurity is no longer sufficient for the market.

The current industrial revolution will affect society and the labour market to a much greater extent, because the changes it entails are not focused on the physical aspect of work, as during previous industrial revolutions, but rather on its mental aspect.

(Not only) labour law needs reform which, however, takes into account employee dignity and basic decent working conditions. The focus on defining dependent work and specifying its essential characteristics seems to be a primary need. Another tendency can be seen in reflections of different labour-law regulations for different employee categories (the scope of labour protection depending on the characteristics of dependent work and their intensity).

Other key labour-law institutes to be influenced by Industry 4.0 undoubtedly include, *inter alia*, working time, occupational safety and health with an emphasis on psychosocial risks, termination of employment and, last but not least, remuneration. Setting the working conditions (also) in the Industry 4.0 era cannot only be seen in the spirit of national legislation, but both the European and international dimensions need to be taken into consideration.

According to several studies, Industry 4.0 will involve the end of some jobs; while some will need to undergo significant change, and new ones will

[389] E.g. BARANCOVÁ, H. Pracovné právo v digitálnej dobe. In: *Pracovné právo v digitálnej dobe*. Prague: Leges, 2017, p. 9–29.
BUHR, D. *Social Innovation Policy for Industry 4.0.* Available at: https://library.fes.de/pdf-files/wiso/11479.pdf [cited on 19/02/2019].

also be created. The question is whether employees will be sufficiently prepared to fill new or reformed jobs. These will be jobs that require technical knowledge and jobs that deal with services, such as health care, education, and social services, where it will not (yet) be possible to replace humans with robots. The labour market will be changed due to the replacement of human labour by robots; it is particularly interesting how society and law will tackle the issue of the involvement of humanoid robots, as there are suggestions about conferring human rights and freedoms upon such robots.

Comprehensively dealing with the consequences of Industry 4.0 appears to be necessary – whether in terms of employment, social and health insurance contributions or tax burden, where education, lifelong learning and digital literacy are no less important.

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CONCLUSION

Our book "Social Function of European private law and its proliferation by applying the principles of European private law" reflects the findings of research aiming at the strengthening social justice in private law.

As the first step we have concentrated on the legal principles and their role in legislation and application of law. Legal principles need not be unavoidably explicitly enshrined in legislation; their existence can be inferred from the characteristics of a set of certain legal rules. Principles may serve as a means of "grasping stability in the ever-changing dynamic interaction of legal being and non-being", i.e. as certain stability in a rapidly changing world. The principles are therefore an important tool used in the interpretation of legal rules. In addition to that, we strongly believe that it is appropriate to discuss the issue of finding the real role of courts, rather than increasing their power to the detriment of the lawmaker; since the lawmaker's powers remain unchanged, it only depends on how the lawmaker exercises such powers.

Legal principles under EU law and at the post-modern age in 21st century has overcome significant evolution. The value of freedom with utmost importance for private law is considerably counterbalanced by the value of solidarity, which thanks to the EU and its activities is represented by the protection of the weaker party (consumer, discriminated, employee). This evolution naturally opens up the gate for the second step in our research where we can contemplate on mutual interconnection between legal principles and the quest for social justice in private law. The concept of principles and standards as an expression of values, purpose and aim of legislation, as opposed to the norms constituting the rules of conduct. Standards and principles play an essential role in the interpretation of rules and are also determinants of the social aim of a norm in its application. Social dimension is neither enshrined, nor even implied in the structure of individual legal rules that are normative in terms of content. It is their function and the goals pursued by these norms that are social. To assess social norms means to study the entire normative package that has the social mission.

Affiliation with private law needs to be taken into account as part of the proposals for implementing social nature rules into a model of legal regulations governing private law relationships. The principle of proportionality must be allowed for in the process of decision-making by courts and other entities authorised to authoritatively decide on the rights and protected in-

terests of private law entities, and settle disputes arising from private law relationships. The role of private law principles in decision-making practice is of particular importance for the settlement of disputes; building trust in the judiciary requires creating flexible legal rules to the extent that such leave scope for judicial reflections. Flexibility does not mean uncertainty in terms of fluctuating solutions.

The business relationships themselves have certain specifics. The social aspect of the fairness of a relationship is more difficult to apply in a system of business relations. Given the prevailing professionalism of commercial law relationships, the sensitivity to aspects of social justice is somewhat poorer in the system of commercial law (allowing for the specifics of business ethics). Under given circumstances, even practices which could already be considered immoral in general civil law can be regarded as fair in commercial law.

The fundamental function of labour law, which is more pronounced in this area of private law, is a protective function which should be aimed at protecting an employee as the weaker party. The labour law faces the significant challenges under the industrial revolution 4.0 and EU law may create the supportive system for overcoming the burdens of new age. EU law is sometimes too casuistic, but on the other hand it opens the way to seeing law as value.

Hand in hand with Industry 4.0 authors point out at the tasks for preserving the sustainable development as it creates a prerequisite for guaranteeing all individual interests. Promoting subjective rights and obligations should be enhanced by increasing the individual responsibility of private law entities.

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