

An Introduction to Law

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List of abbreviations

ACCLE	Act on Criminal Liability of Legal Entities
Ad hoc	on a case by case basis
ADR	Alternative Dispute Resolution
BCA	Business Corporations Act
BITs	Bilateral Investment Treaties
Brussels I Regulation Recast	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
CAP	Common Agricultural Policy
CEO	Chief Executive Officer
CETA	Comprehensive Economic and Trade Agreement
CFO	Chief Financial Officer
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
DGs	Directorates General
DSB	Dispute Settlement Body (WTO)
ECHR	European Court of Human Rights
ECSC	European Coal and Steel Community
EEC	European Economic Community
e.g.	for instance
EMU	European Monetary Union
EU	European Union
EP	European Parliament
EPSO	European Personnel Selection Office
FTAs	Free Trade Agreements
ICC	International Criminal Court
ICJ	International Court of Justice
i.e.	that is
JHA	Justice and Home Affairs
MEP	Member of European Parliament
NCAAs	National Competition Authorities
NCC	New Civil Code
NGO	Non-governmental Organization
NUTs	Nomenclature of Territorial Units
OJ	Official Journal
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
SMEs	Small and Medium Sized Enterprises
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
TNCs	Trans-national corporations
UK	United Kingdom
UN	United Nations
US	United States
WTO	World Trade Organization

Introduction

The objective of this text book is to provide a study tool for students of the University of Economics, Prague, majoring mainly in International Business with respect to the legal issues they may face while doing business as professionals. To this aim, authors of the text book have attempted to provide a comprehensive survey of all key topics which are relevant for pursuing international business, such as understanding the concept of law, the sources of law and their mutual hierarchy; and identifying applicable sources of law to specific real life situations.

Also, the text book surveys the key ways of law enforcement, both by way of out-of-court settlement of disputes, and by means of judicial actions. If business disputes feature an international element (for instance, parties to the contract are established in different states) it is also relevant to introduce the rules defining international jurisdiction of tribunals (in particular, the Brussels I Regulation Recast in the EU context) and rules specifying the applicable law (in particular, the Rome I Regulation in EU law) in case the parties fail to agree on the law applicable to the contract or they make a choice which is contrary to the overriding mandatory provisions recognized by the states concerned.

The chapters of the text book are organized as follows: The chapters set out with a theoretical introduction to the topic discussed, which is followed by a summary of the key principles addressed and by a list of self-assessment questions, to make the book user friendly. Also, practical examples are given as widely as possible to apply the theoretical concepts to practical real life situations. Finally, a list of references to further resources analyzing the topic is provided for those students who wish to engage in a more in-depth study of the topic or believe they would like to elaborate on the topic in their bachelor thesis.

The text book covers the topics of the course which are discussed in lectures. It deals with the concept of law, the different legal systems and the sources of law. The book surveys the key topics of International Public Law, EU Institutions and EU Law, the Czech Constitutional Law and the Protection of Human Rights in the European Union. Also, Contractual Law, the Law of Torts, the Fundamentals of Labor Law, Corporate Law and Compliance are discussed and so is the Enforcement of Law.

The authors believe that students will find this text book helpful, both in terms of preparing the relevant legal vocabulary before the class, and when studying for the mid-term and final exams.

The manuscript of the text book has been completed in February 2019. Students will be notified of the necessary updates, if any, during the lectures.

Prague, February 2019

Chapter 1. The Concept of Law and Legal Systems

1. What is law?

Law is a system of rules regulating the behaviour of the members of the society and the observance of which is enforced by the state. Law is basically all around us, every one of us deals with law on daily basis – if you go to the shop, to the canteen for a lunch, borrow books in the library, use public transport, follow the road traffic rules when driving, etc.

The characteristics of any legal rule are that these are (i) foreseen by law, i.e. a rule relates to social relationships which are regulated by law (not all social relationships are dealt with by law such as how to raise a child, how to spend one's salary, how to celebrate Christmas, how to dress to the theater etc.), and (ii) enforceable by the means foreseen by law (typically before the competent court and a subsequent execution). Rules which lack the above characteristics are not legal rules. Those are, for example traditions, moral rules, ordinary customs, rules of sport, rules of the game, religious rules or non-legal agreements between friends and family (invitation for a cup of coffee). These rules are neither foreseen by law, nor are they enforceable. You cannot successfully sue somebody who cheated while playing cards or somebody who does not follow Christian traditions during Christmas etc. On the contrary, you can successfully sue somebody who borrowed money from you and is overdue since loan agreement is regulated by law and is enforceable by means foreseen by law.

2. Functions of law

The main function of law is to set and maintain order in society and achieve justice. Imagine, how the world would look like without any legal rules. Nobody would be really keen to enter into contracts without being sure that there is an independent court protecting his/her rights in case of a dispute, there would be a chaos on the roads without any traffic rules, etc. The function of law is also to define the limits of acceptable behaviour (the constitutional principle of what is not prohibited, is permitted) as well as defining the consequences of certain behaviour (sanctions for breaching legal rules). Law also prescribes procedures for the use of law and its enforcement (for details see the chapter Litigation). Another function of law is to give authority to agents of the state to take actions against citizens – for example police has a legal right to use force against citizens breaching law or the executors have a right to enter the property of the debtors.

3. The concept of law

In order for the rules to be qualified as legal, they must satisfy three criteria:

- a) a general application to society;
- b) developed by a legitimate authority of the society;
- c) accompanied with sanctions supporting their implementation and enforcement.

A general application to society means that legal rules relate to all who satisfy criteria set by the hypothesis (legal rules of purchase contract relate to everybody entering into purchase contracts, employment law relates to all employers and employees etc.) rather than to only some specific groups (e.g. an internal rule in a firm prescribing dress code relates only to the

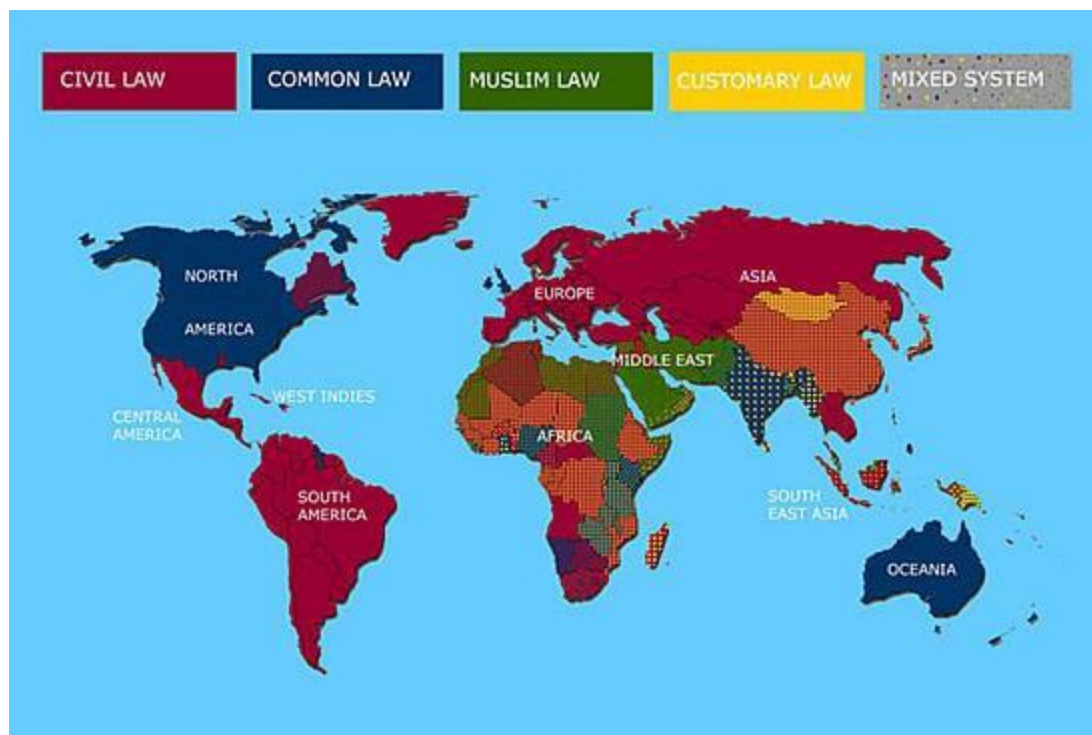
employee of such firm not to all employees and thus it does not satisfy the criteria of general application).

Also, a legal rule must be developed by a legitimate authority of the society which is in the Czech Republic a parliament (as opposed to e.g. non-legal internal rules set by a firm prescribing a dress code).

And third, the legal rules are accompanied with sanctions for their breach. Only the threat of sanctions which may be enforced, supports the adherence of legal rules by society.

1.4 Law and legal systems

Law is implemented through legal systems. There are five basic legal systems used around the world. Which legal system is used in each country depends on the tradition, history and inclination to specific legal culture. The five legal systems are the civil law systems, common law systems, customary law systems, religious legal systems and the mixed legal systems. On the map of the world below you can see which part of the world uses which legal system.



Legal systems in the world¹

Civil law systems are used in all Europe except for the UK which is based on common law tradition, South America and vast majority of Asian countries. Civil law systems follow the Roman Law tradition developed in the Roman empire. Of course, national legal orders of civil legal systems differ widely from one another, they, however, have some common characteristics which differentiate them from the other legal systems. Firstly, nations of civil law traditions are based on codified statutes which are the dominant source of law (Civil Code, Commercial Code, Criminal Code etc.). Usually, these nations also have a written constitution which is the highest legal norm of a state. Since the legal statutes have to be passed by bodies

¹ Picture taken over from the web page Guide to International and Foreign Law Research, available online: <https://guides.law.sc.edu/c.php?g=315476&p=2108388>; last accessed on 5 February 2018.

of parliament, the civil law systems is more rigid (compared to common law tradition) but also more stable because it is not that easy to change them (there must be enough social and political support for such change). Courts, on the other hand, are the bodies which only interpret and apply rather than create law. Case law is thus not the official source of law, however, case law of the higher courts has a strong persuasive power.

Common law systems are used in the UK, North America and Australia. The dominant source of law are precedents (judge-made law) with the principle of *stare decisis* (principle of following the rules established by previous judicial decision if the facts of the case are comparable). Precedents allow for flexibility because case law can be easily changed without a need to look for wider political support. Common Law countries of course have also written statutes but they are not a dominant source of law. These countries can but do not have to have a written constitution (the UK does not have a written constitution whilst the USA do).

Customary law systems are built on customs accepted and maintained by the whole society. Such rules are handed down from generation to generation and are usually unwritten. These legal systems do not exist in their clear form anymore but rather they can be found as a mixture of civil or common law with these customs.

Religious legal systems are based on religious tradition. A typical example is Islamic law which is based on Quran.

Mixed legal systems combine two or more legal system stated above.

Apart from the above national legal systems, there is also the **international legal system** with the international law regulating relations between states or international organizations (UN, NATO etc.) and the **supranational legal systems** such as EU law which is superior to national laws of the member states.

To demonstrate how the legal system looks like, the picture below shows the Czech Legal System which belongs to the civil law traditions (national law is based on codified statutes and written constitution), the Czech Republic is a member of the EU and thus EU law is binding for us (with superiority over the national law) and also Czech Republic is a signatory to many international treaties.

1.5 The Czech Legal System



1.6 Sources of law

Formal and material sources of law

Formal sources of law are the outer forms of legal norms (legal norms are included in statutes, international treaties, case-law, normative agreements etc. which are the formal sources of law). These forms give the norms their legal force and validity (we know that there is a speed limit in the towns of 50 km per hour (legal norm) and it is binding because it is written in the law no. 361/2000 Coll., on road traffic, as amended (formal source of law). In order to find out the legal norms from their formal sources, interpretation of such sources is needed. Formal sources are either written (statutes approved by the Parliament, administrative rules, executive orders, normative agreements, case-law) or unwritten (oral or implied such as recognized principles, accepted customs).

Material sources of law are the source of substance for law – the state of society, technological development, economic and cultural level, traditions. It is an answer to the question, why do we need a specific legal regulation? E.g. the speed limit in the towns and villages was introduced because it is dangerous to drive fast in places with high occurrence of people; the technical level of the society is now so developed that the new law establishing the possibility to vote in elections electronically is considered, etc.

Sources of law within the Continental tradition v. the Common law tradition

Continental tradition has as its dominant source of law legislative texts (written Constitution, codes, statutes) which are passed by a formal procedure in the Parliament and thus there must always be political will to pass such law. The main branches of law are moreover embodied in the written codes (Civil Code includes codification of all civil law, Criminal Code a codification of criminal law, Business Corporations Act a codification of business corporations, Labor Code a codification of labor law etc.). In the civil law systems, case-law is, on the other hand, only the complementary source of law which has rather interpretative function.

Common law tradition is based on plurality of sources with the precedents dominating over statutes (in the UK this has partly changed with their membership in the EU since EU law (directives) needs implementation into the national law through the statutes). Common law countries also may but often do not have a written constitution while civil law countries are typical for their written constitution. The role of the courts is dominant because they create law (instead of the mere interpretation as in the civil law systems).

Formal sources of Czech law

As was stated above, the Czech law belongs to the civil law tradition with its characteristics. The Czech Constitution and the Bill of the fundamental rights and freedoms (both written) are on the top of the hierarchy of the sources of law which means that all other legal acts must be in compliance with them and the Constitution and Bill of rights are always superior. The other source of law are the international treaties which also have superiority over the statutes (not over the Constitution or Bill of rights) in case such international treaties are directly applicable. Next in the hierarchy are statutes passed by the Czech Parliament and the lowest in the hierarchy of the sources of law is a so called derived legislation (regulations and decrees adopted by the government, ministries and other authorities of state administration, and legislative acts of territorial self-governing units) which must be in compliance with the statutes.

1.7 Classification of law

Law can be classified based on several criteria. First is the classification into the national, international and supranational law depending on which relations (domestic or international) it regulates. The other classifications relate to the substantive and procedural law and lastly to private and public law.

National law relates to a particular nation and governs relations within national territory, national citizens, residents etc.

International law governs relations between states or parties from different states.

Supranational law is a legal systems sui-generis standing above the national laws (EU law).

Substantive law says what the law is, i.e. it defines, describes, regulates and creates legal rights and duties (civil law, commercial law, criminal law etc.).

Procedural law says how to enforce the substantive law, i.e. it defines the rules for the enforcement of substantive law and establishes the methods of enforcing the rights generated by the substantive law (civil procedural law, criminal procedural law etc.). For details of procedural law, see the chapter Litigation.

Public law regulates relationships between one public party which is in superior position over the other party with the power to impose duties or grant rights on the private party. The position of the two parties is thus unequal and the private party must comply with the will of the public party. There is always a public interest on one side and a private interest on the other (Constitutional law, Administrative law, Criminal law).

Private law regulates relationships between the parties with equal position where the rights and duties are the result of their mutual cooperation (rather than the power of one party to impose duties or rights on the other party). Private law deals with the rights and duties of individuals, families, business corporations etc. and there is no public interest in the field of private law (civil law, family law, commercial law, most part of labor law).

1.8 Summary

This chapter was introductory and dealt with the concept of law, legal systems, the sources of law and the classification of law. Law can be defined as the set of rules that are foreseen by law and enforceable by the means foreseen by law. Any legal rule has a general application to society, is developed by a legitimate authority of the society and is accompanied with sanctions supporting their implementation and enforcement. There are five legal systems in the world - the civil law systems (characterized by written constitution, statutes as dominant source of law), common law systems (with precedents as dominant source of law), customary law systems, religious legal systems and the mixed legal systems. Legal rules can be found in the formal source of law (in the continental law tradition typically the statutes) whilst material sources of law are the source of substance for law. Law can be classified into the national, international

and supranational law, further into the substantive and procedural law and lastly to the public and private law.

1.9 Self-assessment questions

1. What are the characteristics of legal rules?
2. Why do not rules of the games belong to legal rules?
3. What legal systems do you know?
4. Describe the main differences between the common law systems and the civil law systems.
5. What is the difference between the material and formal sources of law?
6. Describe the main difference between the public and private law.
7. What is procedural law for?

1.10 Further reading/listening

A brief video on the concept of law recorded by an American professor of law:

<https://www.youtube.com/watch?v=2ds-NIFhU9s>

BOBEK, Michal. An Introduction to the Czech Legal System and Legal Resources. [online]. Available at: http://www.nyulawglobal.org/globalex/Czech_Republic.html

Chapter 2. International Public Law

1. Origins of the International Public Law

The origins of international public law go back to the process of the creation of national states, i.e. the 19th century. In 1815 (the Vienna Congress), the first collective security system was established under international law to protect the monarchy. In the second half of the 19th century the first international organizations were set up in the field of communications (the International Telegraph Union, the International Post Union and the International Railways Union).

In the course of its history, the practice of international public law saw the emergence of peremptory norms (sometimes referred to as the *jus cogens*) which are binding upon states. These include e.g. the observance of the principle of prohibition of the use of force, the respect for human rights, and the protection of the environment. The breach of these norms amounts to the breach of peace and security which may give rise to an action by the UN Security Council.

The UN Security Council consists of 15 members out of which 5 are standing (UK, US, Russia, China and France). For a resolution of the UN Security Council to be adopted, the consent of all 5 standing members is required. An abstention of a permanent member does not constitute a veto. The UN Security Council may adopt traditional sanctions (arms embargo, economic embargo etc.) which usually adversely affect the civilian population. Therefore, in the past years the UN Security Council favors the so-called **smart sanctions**, which are addressed to individuals, usually political elites responsible for breaching international law. Smart sanctions include e.g. freezing bank accounts, not issuing visas for traveling abroad, and prohibition of trading in a stock exchange. Smart sanctions do not affect the civilian population; that is why they are getting more and more popular.

2. Difference between International Public Law and International Private Law

Legal scholarship makes a distinction between **International Public Law** on the one hand, and the International Private Law (also referred to as Conflict of Laws) on the other. So what is the difference between the two? Despite their denominations, only International Public Law is truly international in terms of its **origin**, whereas the rules of International Private Law are generally set by national states, even though the European Union as an international organization has greatly contributed to the harmonization and/or unification of conflict of law rules for its Member States.

Apart from their origin, the two legal disciplines differ in the addressees of the norms, and in the degree of their enforceability.

The addressees of the norms of International Public Law are (usually) states and intergovernmental international organizations, whereas the addressees of international private law are private entities (individuals and corporations). To understand the difference in practice, two examples have been given below.

(i) Example of an International Public Law treaty

The UN Charter, the founding treaty establishing the United Nations stipulates the conditions which have to be met by a candidate Member State and it establishes the procedure for endorsing a new Member State by the UN bodies. It is binding upon the Member State of the United Nations.

(ii) Example of an international private law rule applying to mutual relations between individuals: Article 4(4) of the Rome I Regulation adopted by the EU reads as follows:

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen [by the parties to the contract] the law governing the contract shall be determined as follows:

- (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; [...]*

With respect to enforceability, it is much more difficult to enforce International Public Law, since there is no international police or a global executive force. International Public Law can be interpreted by the International Court of Justice (ICJ) which is the judiciary body of the United Nations; however, its jurisdiction is not obligatory. The jurisdiction of the ICJ includes contentious cases (i.e. there is a dispute between two member states concerning the delimitation of their borders) and advisory opinions on issues of international law (i.e. the advisory opinion on the compatibility of the unilateral declaration of independence by Kosovo with international law). States which are not parties to the dispute may present their written opinions on questions of international law in all proceedings before the ICJ as “friends of the court” (*amicus curiae* briefs). Judges of the ICJ may express their reasoned dissenting opinion. If a judgment of the ICJ is not complied with by a state on a voluntary basis, the UN Security Council may decide to adopt a resolution that the act of non-compliance equals to the breach of international peace. Also (in theory), the UN Security Council may decide to adopt some sanctions with respect to the non-compliant state, but this is rather unlikely, since the political context of adopting decisions in the UN Security Council is very delicate.

Some international organizations, such as the World Trade Organization (WTO), create their own law enforcement rules. To this end, the WTO has established its quasi-judicial body entitled the Dispute Settlement Body (DSB), which interprets the law of the WTO and often uses rules of general International Public Law to carry out this task. If a report (which is basically equivalent to a judgment) adopted by a panel or the appellate body of the DSB is not complied with, the DSB may adopt economic sanctions with respect to the non-compliant state which will also affect individuals (such as raising the customs tariffs applicable to goods to which previously reduced or no tariffs applied).

2.3 Subjects of International Public Law

International Public Law traditionally recognizes only a limited number of **subjects**, i.e. entities which have international legal personality. These include states and intergovernmental international organizations. Nevertheless, the number of **actors** in international law is much bigger and includes TNCs (trans-national corporations), and NGOs (non-governmental

organizations). Some legal instruments developed by International Public Law also protect individuals, in particular in terms of their human rights. Both TNCs and NGOs try to influence the creation of international rules by their lobbying activities. Also, NGOs often contribute with their *amicus curiae* briefs before international courts and tribunals with the aim to participate in the interpretation of International Public Law.

Some entities are treated as **semi-subjects of International Public Law as they are in between being a state and an international organization**, such as the Holy See (Vatican), the seat of the Roman Catholic Church. The Holy See can conclude international agreements with states, it has an observer status with the UN and it can send and receive diplomatic representatives. An equivalent of an ambassador representing the Holy See is called NUNCIUS. Also, the Holy See can grant the citizenship of Holy See to high ecclesiastical hierarchy. Since high posts in the Catholic Church can only be held by men, no woman can thus obtain the citizenship of the Holy See. The nationality of the Holy See is not exclusive. This means the member of the ecclesiastical hierarchy do not lose the nationality of his origin.

Another state element of the Holy See is its constitution. However, the usual division of state power developed by the French philosopher Montesquieu, which requires the legislative, executive and judicial power to be split among different entities, does not apply to the Vatican constitution, where all the three powers are held by the Pope, head of the Roman Catholic Church.

2.4 Constitutive elements of a state and succession of states

What makes a state a state? International Public Law requires four constitutive elements for a state to enjoy an international legal capacity. First, permanent inhabitants; second, a defined territory; third, an effective government; and fourth, a capacity to enter into international relations.

Some areas of the world lack permanent population (such as Antarctica), where an international regime for carrying out research has been put in place. With respect to the territory of a national state, the definition of its boundaries proceeds in two steps. First, there is a delimitation of the border on a detailed map, and second, there is a physical demarcation in the very border area. The national boundaries are defined by means of a three D model, since the national territory includes the airspace and subsoil of the state as well as the *terra firma* within the boundary, and the internal waters and territorial sea, where applicable. An effective government is a government which is able to exercise effective jurisdiction within the state territory. Some entities fail to meet the condition of the capacity to enter into international relations, because they have not been widely recognized by the international community, such as the Republic of Northern Cyprus which has only been recognized by Turkey.

Some entities labeled as states cannot be considered states under International Public Law, such as the so-called Islamic State, as they do not meet simultaneously all the four constitutive elements of a state.

In terms of **succession of states**, different regimes are in place depending on whether the succession concerns international treaties and membership in an international organization.

All international treaties are binding for the new states, i.e. when Czechoslovakia split in 1993, all international treaties became binding on both, the Czech and Slovak Republics respectively.

On the contrary, there is no automatic succession for membership in international organizations. Therefore, a new application of membership has to be submitted by the succeeding states. For instance, if Catalonia separated from Spain, it would not be able to keep its EU Membership, but it would have to reapply to become an EU Member.

2.5 International Organizations

Only Intergovernmental International Organizations (i.e. international organizations having national states as their members) are considered subjects of International Public Law. Private Law organizations, such as Greenpeace, which have individuals as their members, are not considered subjects of International Public Law. Intergovernmental Organizations are established by means of founding documents: There are different names for the founding documents of international organizations, such as Charter (UN Charter), Statute (Rome Statute establishing the International Criminal Court), and Treaty (Treaty on the Functioning of the European Union). The founding documents define the purpose and the objectives of the organization; its powers, the conditions of membership, the organs/bodies of the international organization; the calculation of membership contributions, the minimum number of ratifications necessary for the organization to start its operation, its seat(s) and the manner of amending the founding document.

As for the bodies of an international organization, all international organizations have a body representing the common interests (e.g. the UN Security Council) and a body representing the interests of its Member States (e.g. the General Assembly of the UN). Normally, international organizations also have an administrative body, a secretariat headed by its Secretary General. Some international organizations may have a judiciary body (such as the ICJ serving the UN) or a quasi-judicial body, such as the Dispute Settlement Body resolving trade disputes between the members of the WTO.

2.6 Implications of International Law with Respect to Individuals

Even though individuals are not subjects of International Public Law, its rules are likely to exert influence on natural persons and legal entities in a number of real life situations, such as the rules on granting nationality, rules governing extradition, the protection of human rights and responsibility for internationally criminal acts.

The nationality of business people is relevant whenever they make big international investments. If their investments have been negatively affected by actions taken by a foreign state (for instance, raising taxes for profits resulting from investments into solar panels; nationalizing privately owned property without a corresponding retribution) foreign investors may rely on bilateral investment treaties (BITs) which provide them with a privileged access to arbitration courts rather than to domestic law courts to claim compensation of damages they incurred. National states basically rely on two principles when establishing their own rules for granting nationality. The two principles are called *jus sanguinis* (nationality is derived from the

nationality of the parents) and *jus soli* (nationality is derived from the place of birth). The interplay between the principles of *jus sanguinis* and *jus soli* may lead to statelessness or dual/multiple nationality. In order to limit the occurrence of statelessness, in 1961 a special convention was concluded obliging the signatory states to apply corrective measures to their national rules on acquiring nationality. The following boxes give examples of the interplay between *jus sanguinis* and *jus soli*.

A Spanish couple spends their holiday in the Czech Republic. Their child is prematurely born within the Czech territory. Since the Czech Republic applies the principle of *jus sanguinis*, a child born within the Czech territory will not obtain Czech nationality unless at least one of the parents is Czech. Spain, on the contrary, applies as a general rule, *jus soli*. As the child was not born within the Spanish territory, it would be born stateless, if no corrective measures were adopted by Spain, allowing for the award of Spanish nationality to foreign born children whose parent is Spanish.

Now, we can twist the example detailed above.

Let us imagine a Czech couple spending their holiday in Spain. Their child is born within the Spanish territory. Following the Czech rules, the child will acquire Czech nationality and following the Spanish rules, it will also obtain the Spanish nationality. At times, where military service was obligatory in most European countries, men having two or more nationalities were facing the problem of committing the crime of serving in a foreign army. Nowadays, the defense systems of European states rely largely on professional soldiers and military service is mostly no longer mandatory.

Double or multiple nationality may also be linked to some advantages. If a person holding two different passports ends up in a foreign prison (for instance for drug trafficking in Thailand), the consuls of two countries will try to provide legal assistance to that person.

Apart from birth, nationality can be obtained by marriage, by long term residence in a foreign country upon completion of certain requirements (usually language and civilization tests) or by participating in investment schemes. There are currently various European Union Member States which offer investments schemes linked to obtaining the nationality of an EU Member State, for instance, Austria, Malta, Cyprus, and Portugal. Some of the schemes have been criticized by the European Commission due to a security risk they may pose if no security screening is carried out prior to awarding the nationality of an EU Member State.

Obtaining another nationality may be conditioned by giving up the previous nationality. The Czech Republic legislation provides for the possibility of obtaining the Czech nationality without having to give up the original one.

Having the nationality of an EU Member States gives rise to a number of privileges listed in the founding treaty of the European Union. EU nationals shall receive national treatment in all the other EU Member States. They shall not be treated as foreigners within the EU internal market. This means, for instance, that they can travel to other EU Member States for work, studies or for their leisure activities without the need to have visas or work permits. Also, EU nationals may set up their business in another EU Member State under the same conditions as the nationals of that state. Apart from the free movement of persons, the EU internal market grants also the free movement of goods, services and capital. Other rights of EU nationals include the possibility to petition the European Parliament if they believe that their national

state has misapplied EU law, to lodge a complaint to the European Ombudsman, should an EU body or institution commit maladministration. Also, EU citizens may turn to another EU country's embassy for help (for instance if they lose their passports) should their own country be not represented in the third country concerned. Countries which are not members of the EU are called "third countries". There are only three countries in the world, where all EU states are represented by their respective embassies, in particular, the United States, Russia and China.

International Public Law can influence real life of individuals also with respect to **extradition rules**. The Oxford Dictionary of Law defines extradition as "The surrender by one state to another of a person accused of committing an offense in the latter." For extradition to occur, there must be a valid bilateral treaty (called extradition treaty) between the requesting state and the requested state. For instance, the Czech Republic has bilateral treaties with all former socialist countries; on the contrary, the Czech Republic has no bilateral treaty with South Africa, a popular destination for Czech criminals trying to escape justice. The act for which extradition is requested, must be criminal in both states concerned. Extradition cannot proceed for political crimes. Apart from states, also international courts and tribunals (such as the International Criminal Court) may ask states to surrender their own nationals accused of committing serious crimes.

The impact of International Public Law on the **protection of human rights** will be discussed in Chapter 5 in further detail.

Individuals, who breach rules of international law, can be held **accountable for their acts** before international courts and tribunals which usually have complementary jurisdiction. Complementary jurisdiction means a last resort jurisdiction which only applies if national states are unwilling or unable to prosecute serious crimes against international law. In the history of human kind, there was a number of *ad hoc* criminal courts which dealt with particular situations (such as the International Criminal Court for Former Yugoslavia). **In 1998 the first permanent International Criminal Court** (based in The Hague) **was set up** following the ratification of the Rome Statute, its founding treaty. The International Criminal Court is not a judicial body of the UN. It enjoys the status of a separate international legal entity.

The International Criminal Court (ICC) started being operative as of 1 July 2002. **It can only try individuals, hence it has no jurisdiction against states.** The ICC can only hear cases which occurred after 1 July 2002 and has no retroactive jurisdiction. Its jurisdiction includes genocide, war crimes and crimes against humanity. A Member State or the UN Security Council may refer a case to the ICC. It can also try cases where the crime was committed on the territory of an ICC Member State or by a national of an ICC Member State. However, many big countries have not joined (nor do they wish to join) the ICC (US, Russia, China). In the early years of its functioning, the ICC concentrated mostly on situations in Africa. Currently, also situations in Latin America and Asia are under investigation. The ICC has no prison (only a detention center) of its own. If an individual has been sentenced to imprisonment, the court has to rely on the willingness of its state parties to house the criminal in one of their national prisons. The Nordic countries are particularly willing to provide their assistance in these cases.

The jurisdiction of the ICC is complementary, i.e. it is a court of last resort that steps in only if the corresponding national court is unwilling or unable to try the suspect criminals itself.

As for its composition, the ICC consists of the Presidency (comprising 3 judges), of Chambers (pre-trial, trial and appeals chambers), of the Office of the Prosecutor and of the Registry. The pre-trial chamber is in charge of issuing an arrest warrant. The trial chamber has to decide whether the suspect is guilty or not and if he/she is guilty it has to decide on the length of the sentence and on reparations to be paid to the victims. The appeals chamber can confirm, reverse or amend the decision taken by the trial chamber or it can order a new trial. In this case, the composition of the trial chamber has to be different to the original one. Persons sentenced to a liberty penalty have to serve it outside the Netherlands, ideally in their home country, if this is impossible in another ICC Member State that volunteers to execute their liberty sentence.

2.7 Summary

This chapter has discussed the origins of International Public Law, the difference between International Public Law and International Private Law, the concept of national states and International Organizations, the differences between subjects and actors of International Public Law. Also, it dealt with the impacts that International Public Law can have on the legal status of individuals, natural persons and legal entities alike.

With respect to real life situations business people may encounter in practice, the notion of nationality was introduced as a key criterion for benefiting from the special protection provided by bilateral investment treaties (BITs). Also, the possibility of acquiring nationality by participating in an investment scheme was addressed. The legal conditions for extraditing accused persons who may have committed fraud while doing their business were discussed and so was the concept of EU nationality which grants a number of privileges to the national of EU Member States within the EU internal market.

2.8 Self-assessment questions/tasks

1. What is the difference between International Public Law and International Private Law? Give an example of a real life situation governed by International Public Law, on the one hand and by International Private Law, on the other hand.
2. What is the difference between subjects and actors of International Public Law?
3. What is the name of the judicial body of the UN and of the quasi-judicial body of the WTO?
4. Can the Vatican be considered a state or an international organization?
5. What are the constitutive elements of a state? Does the so-called Islamic State meet these criteria?
6. How is the national territory defined under International Public Law?
7. If Catalonia breaks away from Spain, will it be still part of the EU?
8. Give an example of a situation where the interplay of *ius soli* and *ius sanguinis* would cause either double nationality by birth or statelessness by birth.
9. On which conditions will a state surrender a suspected criminal to another state?

10. Fill out the following table to distinguish the jurisdiction of the ICJ and ICC.

Name of the court	UN body or independent?	Jurisdiction with respect to states or individuals?	Example of a resolved case
ICJ			
ICC			

2.9 Further reading/listening

Printed books:

Kaczorowska, Alina: Public International Law, 5th ed., Routledge, 2015 (preview available at books.google.com)

Online resources:

Bauböck, Rainer; Perchinig, Bernhard; Sievers, Wiebke (eds.), Citizenship Policies in the New Europe, Amsterdam University Press, 2009 (full view available at books.google.com)

Documentary videos:

“ICC Institutional Video, 2018” available at:

<https://www.youtube.com/watch?v=gwhufH4vNzY> (last accessed on February 15, 2019)

“Lecture 2B: Enforcement and Interpretation in International Law” by prof. Givens

<https://www.youtube.com/watch?v=2pr9ziZjpeI> (last accessed on February 15, 2019)

Chapter 3. History and Powers of the EU. EU Bodies and Institutions

3.1 A Brief Account of the History of the European Union

Since most of our international students come from non-EU countries, it is expedient to provide a brief outline of the history of European integration which started in the 1950s as an integration stressing economic cooperation. The Maastricht Treaty which came into force in 1993 coined the term of the European Union and extended the field of action of what used to be the European Communities into political cooperation.

The European integration started after the Second World War in the early 1950s in a specific sector of mutual cooperation in the field of the heavy industry, in particular by the establishment of the **European Coal and Steel Community** (ECSC) in 1951. The Treaty establishing the ECSC (also referred to as the Paris Treaty, since it was signed in Paris) comes into force on 23 July 1952. This community, unlike the two others which followed suit, was founded for a limited period of 50 years. Its activities were later absorbed the European Community. There were six founding members of the ECSC, in particular, Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands. The political idea behind setting up this community consisted in taking an international control over Germany's heavy industry to make sure it would not use its carbon resources for rearming and triggering another war.

Two more communities were set up in 1957 by the same group of countries indicated above. The Treaty establishing the **European Economic Community** (EEC) and the Treaty establishing the **European Atomic Energy Community** (Euratom) were signed in Rome (hence they are also referred to as the Treaties of Rome). The Rome Treaties came into force on 1 January 1958. These treaties were revised later to take account of the current economic and political development on a number of occasions (the Single European Act, the Maastricht Treaty, the Treaty of Nice, the Treaty of Amsterdam and the Treaty of Lisbon, to name the most essential reforms of the founding documents).

In July **1968** customs duties between the member states on industrial goods were completely abolished, 18 months ahead of schedule, and a common external tariff is introduced. This is called the **customs union** which means that no single Member State may establish its own tariffs with respect to goods coming from the third countries (non-EU Member States are referred to as third countries). However, nowadays, the EU customs union also includes some states which are not members of the EU (such as San Marino and Andorra).

The very **first enlargement** takes place in **1973** when **Denmark, Ireland and the United Kingdom** join the European Communities, bringing their membership to nine. Norway stays out, following a referendum in which a majority of people voted against membership.

The **first direct elections to the European Parliament** are held in **1979**. Prior to that date, Member States selected some of their national deputies to represent them before the European Parliament. Nowadays, it is no longer possible to combine the mandate of the Member of European Parliament (MEP) with that of a national deputy.

In **1981** another **enlargement** of the European Communities takes place when **Greece** joins the club, bringing the number of members to ten. In **1986 Spain** and **Portugal** follow suit, which raises the number of the member of the European Communities to 12.

In December 1991 a major review of the founding treaties was signed in **Maastricht**, laying the foundation for a **common foreign and security policy**, closer cooperation on **justice and home affairs** and the **creation of an economic and monetary union**, including a single currency. What used to be limited to purely economic cooperation has now clear elements of political cooperation as well. It is precisely the Maastricht Treaty which **introduces the concept of the European Union**. Under the Maastricht Treaty, the European Union consists of three pillars. The first pillar is integrated by the three communities set up in the 1950s, where decisions are taken mostly by qualified majority. The second pillar lays down the principles of the Common Foreign and Security Policy (CFSP) and the third pillar launches cooperation in the Justice and Home Affairs (JHA) area. In the second and third pillar measures require unanimity of Member States in order to be adopted.

In **1995 Austria, Finland and Sweden** join the EU, bringing its membership to 15. Norway stays out once again following a referendum in which a majority of people voted against membership.

In 1999, the third state of the European monetary union (EMU) starts. 11 EU countries adopt the euro, which is launched on the financial markets as ECU, replacing their currencies for non-cash transactions. The European Central Bank based in Frankfurt, Germany takes on responsibility for monetary policy. The 11 countries are joined by Greece in 2001. In 2002 Euro notes and coins are introduced in the 12 euro-area countries.

The **biggest EU enlargement** takes place in **May 2004**, when Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia join the European Union bringing its membership to 25. Bulgaria and Romania follow track in **2007**.

The last extensive reform of the founding treaties was adopted in **Lisbon** in 2007 and came into force in **December 2009**. The current legal regime of the EU is now embodied in the TEU (Treaty on the European Union corresponding to its mission statement) and the TFEU (Treaty on the Functioning of the European Union which specifies the steps how to achieve the objectives envisaged in the TEU).

The last country to join the European Union was **Croatia** in July **2013**, setting the number of EU member states at 28.

The Lisbon Treaty lays down for the first time in the history of the European Communities and the European Union a clause authorizing a member to leave the block if it wishes to do so. Following this express authorization in the treaty, **a referendum to leave the EU was held in the United Kingdom in 2016**. Slightly more than 50 per of the British population decided in favor of leaving the EU (this is referred to as the BREXIT). The procedure to disassociate from the EU will take a couple of years. Since the UK is not part of the Eurozone, nor is it part of the Schengen Area the negotiations should be easier than in case of more integrated EU Member

States. At the time of writing there was no agreement on the conditions on which the UK would leave the EU and which would govern the future relationship between the EU and the UK. The “divorce” procedure was triggered in March 2017 and the negotiations of the „divorce from the EU“ should take 2 years to complete, but it is more than clear that there is too little time to agree on everything before this period expired in March 2019. It cannot be discarded that no agreement on the conditions of UK’s leaving the EU will be reached.

3.2 Objectives of the European Union

Following the Treaty of Maastricht, the objectives of the European Union are no longer limited to the economic cooperation between the EU Member States, but have become much wider, as summarized by Articles 2 and 3 of the Treaty establishing the European Union which read as follows:

Article 2 TEU

*The Union is founded on the values of **respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights**, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which **pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail**.*

Article 3 TEU

*1. The Union’s aim is to **promote peace, its values and the well-being of its peoples**.*

3.3 Division of Powers between the European Union and its Member States

In order to achieve its objectives, the European Union requires its Member States to delegate their powers to a supranational level and in some instances to abstain from regulating certain fields of competence. Before joining the European Union, the Czech Republic had to change its constitution in order to provide for the said delegation of powers to the level of the European Union. There are basically two sets of competences exercised by the European Union: first, it is the **exclusive powers of the EU**, where the EU Member States may no longer legislate, and second, it is the **shared powers between the EU and its Member States**, where the EU Member States may still adopt legislation in areas where no legislation was adopted at EU level.

Article 3 of the Treaty on Functioning of the European Union lays down an **exhaustive list of exclusive powers** of the EU which include the following five areas:

- (a) The customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) the monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy; and
- (e) the common commercial policy.

An indicative list of the **shared powers** between the EU and the Member States is included in Article 4 of the Treaty on Functioning of the European Union. The shared powers apply to the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

Some of these competences may require further explanation since they may sound generic in nature but may not disclose precisely their meaning in practice. Let us start with the **internal market**, which includes the four freedoms: the free movement of people, goods, services and capital where no discrimination based on nationality is acceptable. EU nations have to be granted **national treatment** in these areas. This means that they have to be treated equally as if they were nationals of the Member States where they wish to exercise their rights resulting from the internal market.

With respect to the **social policy** mentioned in the list of the shared powers, only a limited scope of action falls within the remit of the EU. All the social security benefits (such as the unemployment benefit or the old age pension) continue to be governed and paid out from national budgets and the EU does not intervene in stipulating the rates of these benefits. On the contrary, the action of the EU in the area of social policy is to promote the free movement of people by harmonizing (rather than unifying) certain rules that would encourage people to move across the borders, especially in order to work in a different EU Member State. To that end, the Treaty on Functioning of the EU requires the social security agencies of the Member States to recognize the number of years worked in another EU Member State (or a Member State of the European Economic Area including Norway, Iceland and Liechtenstein) as if work was done within the territory of the Member State of its origin for the purpose of calculating the duration of active working life. Otherwise, migrating workers would face the risk of not having worked a sufficient number of years in any Member State for an old age pension to be granted. The old age pension of migrant workers is paid partially by the different states where the migrant worker used to work. For instance, if an employee spent 20 years working in Slovakia and 20 years

working in the Czech Republic, 50 per cent of their old age pension will be paid by Slovakia and 50 per cent of their old age pension will be paid by the Czech Republic.

The policy of **economic, social and territorial cohesion** aims at reducing economic differences between different regions of Europe. The poorer the region, the higher the benefits it may receive from EU structural funds to improve its infrastructure by building roads, educational facilities, and/or sports facilities (such as cycling routes). Even though, the cohesion policy has not managed to eliminate economic differences between all regions of Europe it has managed to reduce them to a significant extent.

The field of the **common agricultural and common fisheries policies** continues to trigger heated debates when it comes to deciding on the EU budget. In its early times, the common agricultural policy, also well-known under its acronym of CAP, used to consume over 50 per cent of the entire EU budget. Nowadays, its “consumption rate” has dropped to about 40 per cent of the EU budget. The CAP should be supporting small and medium sized enterprises (SMEs) engaged in agriculture and regional development, however, in practice, the EU funds have been misused by big players who pretended to be small farmers. The aim of the CAP is to subsidize European farmers in order to make their produce competitive in world markets.

Finally, the concept of the **area of freedom, security and justice** should be addressed. It includes

- Policies on border checks, asylum and immigration;
- Judicial cooperation in civil matters;
- Judicial cooperation in criminal matters; and
- Police cooperation

When the European Commission proposes legislation covered by EU’s exclusive competence it does not need to justify its proposal with respect to the sovereign powers of EU Member States. On the contrary, when proposing legislation in the area of shared competences, the European Commission has to justify why an action at EU level is better suited for the purpose. This is called the principle of subsidiarity, which means that the EU can only take action if an action taken at a lower level (for instance at the level of Member State or a region of a Member State) would be ineffective. For instance, if the European Commission intends to set up a supranational legal form of a business company (for instance an EU wide joint stock company) it can take action, since the jurisdiction of a single member state is limited to the territory of that Member State and cannot bind another Member State.

The principle of subsidiarity is defined in the Treaty as follows:

*Under the **principle of subsidiarity**, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

To sum up the principle of subsidiarity, action should be taken at the lowest possible level, where it is still effective.

Another principle governing the exercise of shared powers by the EU is the principle of proportionality which should leave as much room for maneuver to EU Member States as possible. For instance, directives should be preferred to regulations, as directives leave some level playing field to EU Member States unlike regulations. For the same reason, Framework directives should be preferred to detailed directives.

The treaty defines the principle of proportionality as follows:

*Under the **principle of proportionality**, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

3.4 EU bodies and institutions

The main EU institutions are listed in Article 13 TEU as follows:

- the European Parliament,
- the European Council,
- the Council,
- the European Commission,
- the Court of Justice of the European Union,
- the European Central Bank,
- the Court of Auditors.

For the purpose of this introductory course, only the European Parliament, the Council of the EU (also referred to as the Council of ministers), the European Commission, the European Council and the Court of Justice of the European Union will be discussed further. **Each of the institutions represents a different interest.** Whereas the European Parliament should represent the interests of EU citizens as the only directly elected institution, the Council of Ministers represents the national interests of the individual EU Member States and the European Commission represents the supranational interest of the international organization striving for an ever closer European Union.

3.4.1 The European Parliament

The European Parliament exercised jointly with the Council of Ministers legislative and budgetary functions. It also exercise political control with respect to the European Commission and elects the President of the Commission.

The European Parliament is composed of representatives of the Union's citizens. The Representation of citizens based on the **principle of degressive proportionality**, which means that small EU Member States are overrepresented while big EU Member States are underrepresented.

The members of the European Parliament (MEPs) are elected for a term of five years by direct universal suffrage in a free and secret ballot. MEPs can be reelected.

The European Parliament has three working places (Strasbourg, where plenary sessions are held 12 times a year for one week; Brussels where committee meetings and mini-sessions are held, and Luxembourg which houses the Parliament's secretariat). The official seat of the European Parliament is in Strasbourg.

Similarly to the composition of national parliaments, the European Parliament divides its work into 22 standing committees as follows:

1. [Foreign Affairs](#) (AFET)
2. [Human Rights](#) (DROI)
3. [Security and Defense](#) (SEDE)
4. [Development](#) (DEVE)
5. [International Trade](#) (INTA)
6. [Budgets](#) (BUDG)
7. [Budgetary Control](#) (CONT)
8. [Economic and Monetary Affairs](#) (ECON)
9. [Employment and Social Affairs](#) (EMPL)
10. [Environment, Public Health and Food Safety](#) (ENVI)
11. [Industry, Research and Energy](#) (ITRE)
12. [Internal Market and Consumer Protection](#) (IMCO)
13. [Transport and Tourism](#) (TRAN)
14. [Regional Development](#) (REGI)
15. [Agriculture and Rural Development](#) (AGRI)
16. [Fisheries](#) (PECH)
17. [Culture and Education](#) (CULT)
18. [Legal Affairs](#) (JURI)
19. [Civil Liberties, Justice and Home Affairs](#) (LIBE)
20. [Constitutional Affairs](#) (AFCO)
21. [Women's Rights and Gender Equality](#) (FEMM)
22. [Petitions](#) (PETI)

Even though the European Parliament should represent the interests of EU citizens, the only committee out of the 22 listed above which has a direct contact with EU citizens is the Petitions Committee.

Each MEP serves as a member of at least one committee and a substitute of another committee. In the European Parliament its members do not sit next to each other based on their nationality. Their seats are assigned based on their political affiliation. Traditionally, the European People's Party has been the strongest one in the past elections having the highest number of seats, followed by the European Socialist Party. The other parties represented in the current period of office of the European parliament (2015-2019) include

ECR (European Conservatives and Reformists Group),

ALDE (Group of the Alliance of Liberals and Democrats for Europe),

GUE/NGL (Confederal Group of the European United Left/Nordic Green Left),

Greens/EFA (Group of the Greens/European Free Alliance),

EFDD (Europe of Freedom and Direct Democracy Group), and

ENF (Europe of Nations and Freedom).

MEPs without a specific political affiliation are considered to be independent and labeled as "Non-attached members".

The **powers of the European Parliament** include adopting both legislative resolutions (by means of co-deciding together with the Council of Ministers) and non-binding political resolutions adopted on European Parliament's own initiative, for instance on the violation of human rights in a third country. Also, the European Parliament participates in adopting the budget and adopting discharge for the implementation of the budget. Apart from appointing the European Commission it appoints the European Ombudsman.

To be **able to vote on a proposal**, at least 1/3 of the Members of European Parliament (MEPs) have to be present. However, the EP may vote on a proposal with any number of MEPs present (that is even less than 1/3), unless a MEP asks for the verification of the 1/3 threshold.

The **speaking time** in the EP is limited due to a high number of MEPs to one minute during plenary session. However, MEPs are not limited in time when discussing reports during committee meetings.

Interpreting of plenary sessions is done into all EU official languages. The plenary sessions of the EP can be followed online on the official webpage of the European Parliament.

To have a more precise idea about the type of resolutions discussed by the European Parliament during its plenary sessions, the following box gives an example of selected items included in its agenda for its Tuesday meeting in Strasbourg on 11 September 2018:

09:00 - 11:30 • <i>Debate with the Prime Minister of Greece, Alexis Tsipras, on the Future of Europe</i> 12:00 - 12:30 Formal sitting • <i>Address by Michel Aoun, President of the Lebanese Republic</i> 12:30 - 14:30 VOTES followed by explanations of votes • ***I (A8-0253/2018 - 150) SIEKIERSKI AGRI <i>Equivalence of field inspections</i> • * (A8-0260/2018 - 150) VANDENKENDELAERE ECON <i>Common system of value added tax as regards the special scheme for small enterprises</i> • * (A8-0271/2018 - 150) ŠKRIPEK LIBE <i>Implementing decision on subjecting the new psychoactive substances cyclopropylfentanyl and methoxyacetylfentanyl to control measures</i> • (A8-0272/2018 - 150) LEWANDOWSKI BUDG <i>Mobilisation of the European Union Solidarity Fund to provide assistance to Bulgaria, Greece, Lithuania and Poland</i> • (A8-0273/2018 - 150) MUREȘAN BUDG <i>Draft Amending Budget No 4/2018: mobilisation of the European Union Solidarity Fund to provide assistance to Bulgaria, Greece, Lithuania and Poland</i>	15:00 - 24:00 • (A8-0250/2018) SARGENTINI LIBE <i>The situation in Hungary</i> • ***I (A8-0245/2018) VOSS JURI <i>Copyright in the Digital Single Market</i> • <i>Statement by the VPC/HR - Autonomous weapon systems</i> • (A8-0251/2018 - 150) BROK AFET <i>State of EU-US relations</i> • <i>Statement by the VPC/HR* - The emergency situation in Libya and the Mediterranean</i> • <i>Statement by the VPC/HR - The threat of demolition of Khan al-Ahmar and other Bedouin villages</i> <i>Vote: Thursday</i> • (A8-0252/2018) BELDER AFET <i>State of EU-China relations</i> • ***I (A8-0394/2017) DELVAUX, LÓPEZ AGUILAR ECON/LIBE <i>Controls on cash entering or leaving the Union</i> <i>*The abbreviation "VPC/HR" stands for the Vice-President of the Council/High Representative of the European Union</i>
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Source: European Parliament, Agenda for the sittings of 10-13 September (Strasbourg)

3.4.2 The Council and the European Council

The Council of the EU (formerly known as the Council of Ministers) exercises jointly with the European Parliament legislative and budgetary functions. It also carries out policy-making and coordinating functions, especially with respect to the commercial policies of the EU Member States.

The Council consists of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote. Depending on the agenda to be discussed, the Council can meet in 10 different configurations listed below:

1. Agriculture and fisheries
2. Competitiveness
3. Economic and financial affairs
4. Environment
5. Employment, social policy, health and consumer affairs
6. Education, youth, culture and sport
7. Foreign affairs
8. General affairs
9. Justice and home affairs
10. Transport, telecommunications and energy

When adopting legislation, Council acts by a qualified majority as a rule. There is a blocking minority consisting of 4 Member States which have to represent at least 35 % of the population of the EU.

Qualified majority consists of two majorities: at least 55 % of the members of the Council, representing Member States covering at least 65 % of the population of the Union.

Some exceptional topics require unanimity in the Council, e.g. taxation, but qualified majority voting (QMV) is a rule. If a regulation or a directive is adopted by QMV against the will of a Member State or if a Member State abstained from the vote, such a regulation or directive will be still binding on that Member State which was outvoted.

The Council is based in Brussels. When deciding in its legislative function, its meetings are public. Otherwise (especially when deliberating on issues linked to the Common Foreign and Security Policy) it meets in private in order not to compromise the outcome of the negotiations.

The Council publishes the results of vote on legislative documents on its web page.

The meetings of the Council are prepared by COREPER which stands for the Committee of Permanent Representatives. Each Member State has a permanent representation (mission) in Brussels before the EU. The members of COREPER come from these permanent missions. Usually, they are career diplomats working for the Ministry of Foreign Affairs of their home country who have been seconded to Brussels for 3 or 4 years.

The **Council of Ministers** as a legislative body needs to be distinguished from a younger institution first established in the 1970s, the European Council, which is a non-legislative body exercising a political function.

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. The Commission can act based on the political proposals adopted by the European Council by proposing a regulation, a directive or a soft-law instrument.

The European Council consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy also takes part in its work. The Czech Republic is represented by the Prime Minister as it is a Parliamentary Democracy. Other Member States, such as France, are represented by their President, as France is a Presidential Democracy. The nature of the national representative attending the meeting of the European Council is based on the national constitutional habits.

3.4.3 The European Commission

The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law [therefore it is called the **Guardian of the Treaties**] under the control of the Court of Justice of the European Union [by means of launching an infringement procedure against the Member State breaching EU Law]. It shall execute the budget and manage programs. Also, the Commission shall exercise coordinating, executive and management functions. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. For instance, the Commission **negotiates commercial treaties** with third countries.

The Commission holds a **monopoly on legislative initiative**. Union legislative acts may only be adopted on the basis of a Commission proposal. Only the Commission may propose regulations, directives, and generally binding decisions.

The Commission's term of office is five years. The term of office of Commissioners is renewable if they receive the necessary political support by the government nominating them and obtain the necessary support by the European Parliament following a hearing before the competent Parliamentary committee.

The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

The Commission manages Directorates General (DGs) instead of ministries. Most DGs are located in Brussels, some of them are in Luxembourg. The Commission meets behind closed doors.

The number of Commissioners is equal to the number of Member States. However, the distribution of the different portfolios is very uneven. Whereas some commissioners administer significant amounts of EU budget, the roles of others are less prominent.

3.4.4 The Court of Justice of the European Union

The **Court of Justice of the European Union** is based in Luxembourg. It includes the Court of Justice and the General Court. It ensures the correct interpretation and application of EU law.

The Court of Justice consists of one judge from each Member State. The Court of Justice is assisted by Advocates-General who do not represent any of the parties to the dispute, but provide an impartial and independent assessment of the situation to compensate for the impossibility to lodge an appeal against the decision of this highest EU court instance. To speed up the decision making process, the Court of Justice usually decides in chambers. In cases of significant importance judgments are adopted by a grand chamber.

The General Court includes one or two judges per Member State. There are no Advocates-General working for the General Court as it is possible to lodge an appeal against the judgment of the General Court to the Court of Justice.

The internal working language of the Court of Justice of the EU is French. However, the language of procedure in case of preliminary references is the language in which the file was submitted to the court by the national judge. Before a judgment is delivered in public it has to be translated into all EU official languages.

Judges serving for the Court of Justice of the EU are nominated by the Member States. In case they meet the necessary qualification criteria (excellent command of French and previous experience of working as a judge), they are appointed for a renewable term of six years of office.

3.5 The Lobbyists

The founding treaties of the EU do not mention the world lobbyist. Yet, interest representatives play an important part in the decision making process within the EU, trying to influence legislative proposals and amendments to the legislative proposals. If lobbyists wish to contact high EU officials within the European Commission and the European Parliament, they have to sign up to the Transparency Register kept by the European Commission. In this register, lobbyists are obliged to disclose the policy areas in which they operate, the number of employees working for them and the annual volume of money earmarked for their lobbying activities. So far, the inscription in the Transparency Register has proceeded on a voluntary basis, but there is an ever rising trend towards more transparency of the legislative process, so we are likely to witness compulsory inscription into the Transparency Register in the future. The independence of the EU legislative process has been impeded on a number of occasions, when former high level EU officials and former Commissioners have moved from their posts in the EU institutions into the lobbying sector. This procedure is called the “revolving door”, as those who were the regulators turned into those who are regulated but use the network of contacts they have established while being regulators in high legislative positions.

3.6 Summary

This chapter has surveyed the history of the EU, the main EU bodies and institutions and their mutual interactions. Each of the institutions serves a different interest. While the European Parliament represents the interests of citizens, the European Commission the interest of the entire international organization, the Council of Ministers the national interests of the Member States, the unofficial activity of lobbyists favors the interests of corporations which try to influence EU legislation in such a way as to benefit from it. Apart from the institutions participating in the legislative process, also the role and the composition of the Court of Justice of the EU were discussed. More details on the activity of the Court of Justice of the EU will be provided in the next chapter dealing with EU Law.

3.7 Self-assessment questions

1. How did the Maastricht Treaty extend the scope of activities of the European Communities?
2. Which Treaty constitutes the last reform of the founding treaties?
3. What does the abbreviation “Brexit” mean?
4. Give an example of 3 exclusive and 3 shared powers of the EU.
5. Explain the principle of subsidiarity and proportionality?
6. What are the different interests represented by the European Parliament, the Council and the Commission?
7. Which committee of the European Parliament is the only one having a direct contact with EU citizens?
8. What does the principle of degressive proportionality mean with respect to the composition of the European Parliament?
9. What are the powers of European Parliament, the Council and the Commission?
10. How is qualified majority composed in the Council?
11. What is the difference between the Council and the European Council?
12. What is the role of Advocates-General within the Court of Justice?
13. What is the internal working language of the Court of Justice of the EU?
14. What is the Transparency Register?
15. What does “revolving door” mean?

3.8 Further reading/listening

Craig, P.; de Búrca, G., Text, Cases and Materials, 5th ed., Oxford: OUP, 2011, pp. 31-57 and pp. 78-84.

An Online resource published by the European Union:

http://europa.eu/abc/12lessons/key_dates/

Institutional video explaining the Council configurations:

<http://www.consilium.europa.eu/en/council-eu/configurations/>

Video on the activities of lobbyists within the EU institutions, called “The Brussels Business“:

<https://www.youtube.com/watch?v=h4C5SgeVK-Q>

Chapter 4. EU Law

The Law of the European Union is a self-standing legal system different from Public International Law and from national legal systems. There is a hierarchy of sources of EU Law: the so-called primary law is at the top, international treaties concluded by the EU with third countries have a lower legal rank than primary law, but higher than secondary law. In the following passages the individual sources of EU law will be discussed as well as the mutual relations between EU Law and national law. Finally, this chapter shall discuss the enforceability of EU Law both by judicial and by extra judicial means in case rights and obligations resulting from EU law have not been complied with on a voluntary basis.

4.1. Primary Law

The Primary Law is **equivalent to constitutional law of national states**. It has the highest legal rank. The primary law is composed of the founding treaties concluded by the founding Member States, its successive reforms, accession treaties of those states who joined the European Communities or later the European Union during its existence. Also, the Charter of Fundamental Rights of the EU is part of the EU Primary Law.

There are three founding treaties of the European Communities we mentioned in the previous chapter. The oldest founding treaty signed in 1951 which came into effect in 1952 established the European Community for Carbon and Steel. Since this treaty was signed in Paris, it is referred to as the Paris Treaty. Only this first European Community for Carbon and Steel was established for a definite period of time of 50 years, the remaining two communities were set up for an indefinite period of time. The founding members of all three European Communities are identical: France, Germany, Italy and the three Benelux countries (Belgium, Netherlands and Luxembourg).

In 1957 two more communities were established by **the Rome Treaties**, in particular the European Economic Community, which later evolved into the EU, and the Euratom Community. The Rome Treaties came into effect in 1958. The founding treaties specified the scope of activity of the individual European Communities, established the bodies of the European Communities and detailed their powers. The founding treaties also established the principle of mutual cooperation between the European Communities and their Member States. The successive reforms of the founding treaties include in chronological order the Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice and the Lisbon Treaty. Each of the reforms of the founding treaties conceded more powers to the European Parliament at the expense of the Council of Ministers (Council of the EU), extended the powers of the EU at the detriment of the sovereign powers of its Member States and extended the list of areas where the EU bodies are able to adopt secondary legislation by qualified majority rather than by unanimity. Adopting secondary legislation by unanimity in sensitive areas, such as taxation, has become an exception under the Treaty of Lisbon, whereas the adoption of legislation by qualified majority vote in the Council of Ministers (Council of the EU) has become a rule.

To reform the founding treaty, the wording of the reform has to be ratified by all Member States. If a single Member States votes against the reform, it cannot come into effect. The ratification procedure in the individual Member States is stipulated by their constitution. For instance, in the Czech Republic, the ratification of international treaties is implemented by the Czech Parliament, where the two chambers have to vote in favor of adopting an international treaty, which is followed by a countersignature by the Czech President. However, there are some EU Member States which require a referendum for adopting a reform of the founding treaties of the EU. The adoption of reforms to the founding treaties is thus a very lengthy and complex procedure.

EU Law as a whole takes precedence over national law. This rule is based on the case-law of the Court of Justice of the EU and has not been enshrined into the founding treaties as yet.

4.2 International Treaties concluded between the EU and third countries

While implementing its objectives and powers, the EU often concludes treaties with third countries, in particular in relation to the common commercial policy which aims at liberalizing the world trade. The EU is one of the founding members of the World Trade Organization and it has concluded a number of free trade agreements (FTAs) promoting international trade in goods and services. The legal nature of these international treaties has been discussed by the Court of Justice of the EU as it we not clear whether the entire agreements continue only elements which are part of the EU's exclusive powers or whether they also intervene with the shared powers between the EU and its Member States. In its opinion on the EU – Singapore Free Trade Agreement the Court of Justice of the EU expressed its view that such a FTA has a mixed nature. To conclude it, it is not sufficient to be ratified at EU level, but it also requires the ratification by all EU Member States, The same mixed nature has been attributed to the CETA, the Comprehensive Economic and Trade Agreement concluded by the EU and its Member States on the one hand and by Canada on the other hand.

Before adopting an international treaty, its compatibility with the EU primary law may be assessed by the Court of Justice of the EU to make sure that such a treaty is not contrary to the principles of functioning of the EU. When the EU wished to conclude an accession treaty to the Council of Europe's European Convention on Human Rights, the Court of Justice of the EU declared that the draft accession treaty is contrary to the EU legal order and thus cannot be adopted in the proposed wording. This preliminary review is similar to a review carried out by national constitutional courts with respect to international treaties to be ratified by national states. For instance, the Czech constitutional court reviewed the draft Lisbon Treaty twice to make sure it is compatible to the Czech constitution and it found that indeed it was in line with the Czech constitutional order.

Very often, the EU's Free Trade Agreements concluded with third countries include a chapter on the protection of foreign direct investment which limits the sovereign capacity of EU Member States to conclude bilateral investment treaties with countries where the EU has already concluded or launched negotiations on the protection of foreign direct investment. EU

Member States must thus abstain from concluding bilateral investment treaties with such third countries.

3. Secondary Law

The EU bodies have vested powers to adopt EU legislation which is referred to as EU secondary law. The sources of EU secondary law, mostly **regulations, directives and decisions**, are **proposed by the European Commission**, which holds a monopoly with respect to drafting proposals of EU legislation. The European Parliament is not authorized to propose EU secondary law. Once the European Commission has made a proposal for a regulation, directive or decision, it **forwards the proposal to the Council of Ministers (Council of the EU) and to the European Parliament to be adopted**. Most legislation is adopted at first reading, however, if the two institutions disagree, a second reading will take place. If there is no agreement at the stage of the second reading of the draft legislation, a conciliation committee composed of an equal number of representatives of the Council of Ministers and the European Parliament assisted by members of the European Commission meets to discuss a compromise wording of the draft legislation. The founding treaties require the legislative process to be as transparent as possible, however, the so called trialogue meetings which have proliferated in the past years and have been criticized by the European Ombudsman for their lack of transparency, have been heavily criticized by those in favor of more transparency in the work of the EU institutions,

Once the proposed legislation has been adopted by the Council of Ministers and the European Parliament, it is **published in the Official Journal of the EU in all the EU official languages** (at the time of writing there were 24 EU official languages). Due to a lack of EU staff speaking Gaelic (Irish), only EU regulations are published in Irish, whereas the Irish rely on the rest of EU legislation in the English language. The adopted secondary legislation comes into effect on the day stipulated in its final provisions. If such a date has not been specified, the act becomes effective on the 20th day following its publication in the Official Journal of the EU. The Official Journal of the EU is publicly available at eur-lex.europa.eu free of charge. There are two series of the Official Journal (OJ), the L series publishes legislation, that is regulations, directives, and decisions, whereas the C series publishes communications, for instance opinions adopted by advisory bodies to the EU (the Committee of Regions, the European Economic and Social Committee) or notifications by EU bodies, for instance notifications of open competitions by the European Personnel Selection Office (EPSO) inviting candidates to submit their applications to work for the EU.

1. Regulations

Regulations represent a binding source of EU secondary law. They are mostly adopted in the field of EU's exclusive powers since they leave no room for maneuver for the EU Member States. They are binding in their entire wording and they are binding for everyone, not only the EU Member States, but also for individuals, natural persons and legal entities alike. Regulations are very similar to acts or statutes adopted at national level which bind everyone as well. There is no need for EU Member States to transpose regulations into the national legal systems. The objective of regulations is to unify the legal system of EU Member States in the specific area

which they govern. To this end, regulations exert what is called a direct effect. Direct effect means that individuals can rely directly on the provisions of the regulation in their mutual relations (this is called horizontal direct effect), but also state authorities can rely directly on the provisions of the regulation before a law court in their dealing with individuals and vice versa (this is called vertical direct effect).

The following box provides an example of what an EU regulation looks like.

Selected provisions of the Brussels I Recast Regulation can be found below:

<i>REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)</i> SCOPE AND DEFINITIONS <i>Article 1</i> <i>1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).</i> <i>General provisions</i> <i>Article 4</i> <i>1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.</i> <i>2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.</i> FINAL PROVISIONS <i>Article 81</i> <i>This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.</i> <i>It shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014.</i> <i>This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.</i> <i>Done at Strasbourg, 12 December 2012.</i> <i>For the European Parliament, The President, M. SCHULZ</i> <i>For the Council, The President, A. D. MAVROYIANNIS</i>
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4.3.2 Directives

Directives are another binding source of EU secondary law. They are mostly adopted in the fields of shared powers between the EU and its Member States. They are not binding in their entire wording, but they are binding in terms of achieving the objective envisaged in the directive. EU Member States are obliged to transpose the directives into their national legal orders within a period of two or three years, depending on the complexity of the issues dealt with by the directive. Thus, directives do leave Member States with some room for maneuver, unlike regulations, and their objective is to harmonize the legislation of EU Member States rather than to unify it. A failure of a Member State to transpose a directive correctly and in time has a number of consequences both for the Member States concerned, and for individuals wishing to benefit from the corresponding directive.

If a Member State fails to transpose a directive in time, the European Commission being the Guardian of the Treaties may initiate an infringement procedure against that state before the Court of Justice of the European Union. In the initial stage of the procedure, the Commission will provide the Member State concerned with some extra time to transpose the directive. If the Member State fails to complete the transposition, the Court of Justice of the EU will decide that

the Member State has breached the founding treaties by not transposing the EU directive and it can also impose a fine on the breaching Member State which will become part of the EU budget. The fines are usually very high and motivate the Member State concerned to adopt the necessary legislation to comply with the EU directive.

As for the effects of a directive which was not transposed with respect to individuals, if the directive granted specific rights to individuals (for instance the right to terminate a contract in case of a purchase made outside the usual business premises) and individuals have suffered harm due to the impossibility of exercising these rights (for instance as in the famous *Faccini Dori* judgment discussed below), the directive can have a limited vertical direct effect. This means that individuals can sue the state for damages they incurred as a result of the state's failure to transpose a directive in time. However, the state can never rely on the directive with respect to individuals, nor can individuals rely on the provisions of the directive in their mutual relations before a law court. Hence, directives have no horizontal direct effect.

To have a better idea of what directives look like, you can find selected provisions from the Services Directive in the following box.

DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market GENERAL PROVISIONS Article 1 Subject matter 1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services. ADMINISTRATIVE SIMPLIFICATION Article 5 Simplification of procedures 1. Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined under this paragraph are not sufficiently simple, Member States shall simplify them. Article 6 Points of single contact 1. Member States shall ensure that it is possible for providers to complete the following procedures and formalities through points of single contact: (a) all procedures and formalities needed for access to his service activities, in particular, all declarations, notifications or applications necessary for authorisation from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association; (b) any applications for authorisation needed to exercise his service activities. FINAL PROVISIONS Article 44 Transposition 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 28 December 2009. They shall forthwith communicate to the Commission the text of those measures. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States. 2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive. Article 46 Addressees
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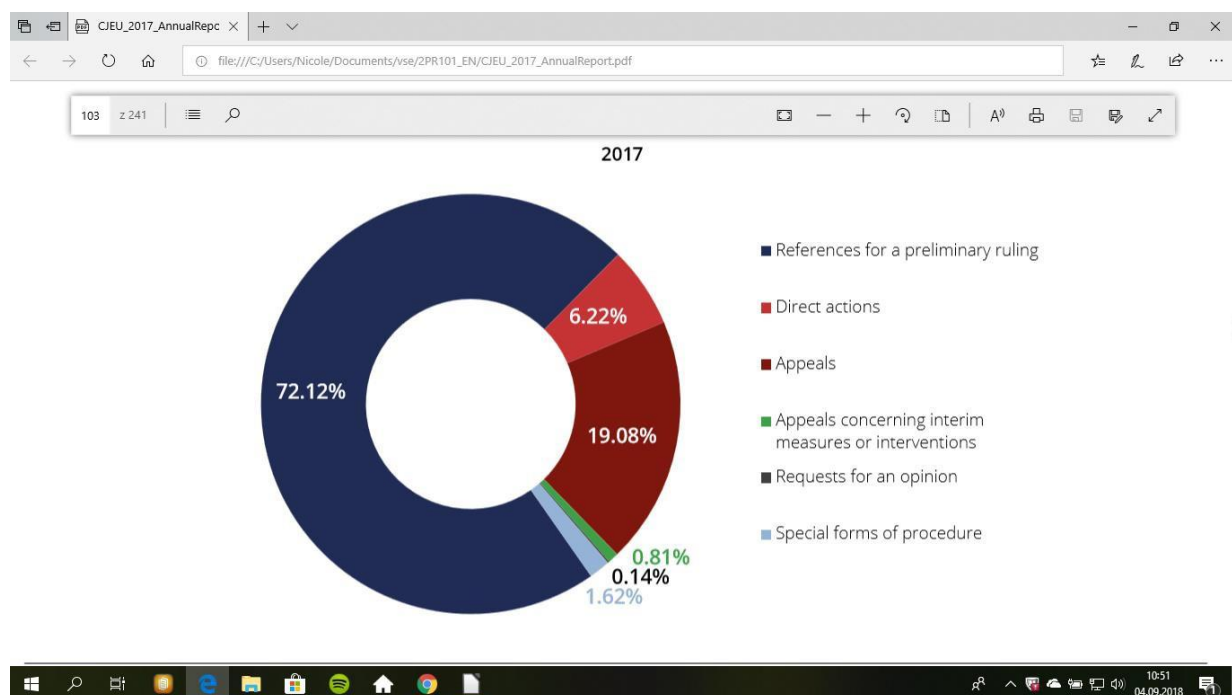
This Directive is addressed to the Member States.

The last binding source of EU legislation in a decision. In order for a decision to be considered a secondary source of law, it has to be proposed by the European Commission and adopted by the Council of Ministers and by the European Parliament. Having said this, decisions adopted by the Court of Justice of the EU are not considered secondary legislation, since they interpret secondary legislation rather than create it. In recent years, decisions have become rather a rare source of EU secondary legislation. If adopted, they are binding on its addressees which are specified in the final provisions of the decision. The addressees can be either EU Member States only, or both EU Member States and individuals.

4.4 Enforcement of EU Law by Law Courts

Since EU Law is most often applied by **national courts as first instance courts**, we speak about **decentralized enforcement of EU Law**. The Court of Justice of the EU only provides a binding interpretation of EU law if national courts expressly ask it to do so by means of making a **preliminary reference**. Parties to national court proceedings cannot force the national court to make a preliminary reference to the Court of Justice of the EU. It is entirely at the liberty of the judges deciding a particular case to refer a case for a preliminary ruling to Luxembourg. **The Court of Justice does not serve as an appeals court** with respect to the decisions delivered by national courts.

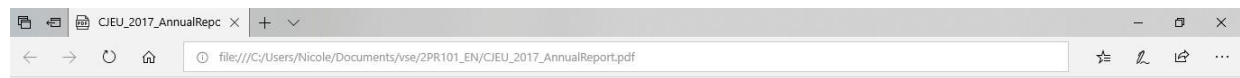
Looking at the breakdown of the judicial activities of the Court of Justice of the EU, it is clear from the figure below, that the highest judicial authority of the EU spends most of its time resolving preliminary references which may serve as precedents for similar cases in the future. It also resolves direct actions, such as infringements by EU Members States and it deals with appeals against the General Court, a lower court instance which is part of the Court of Justice of the EU.



Source: Court of Justice of the European Union, 2017 Annual Report

Since the decisions of the Court have to be translated into all official languages of the EU prior to being published, it takes more than one year (between 15 and 16 months on the average) for a judgment on a preliminary reference to be delivered.

The absolute number of cases dealt with by the Court of Justice of the European Union in 2017 is shown in the table below:



	2013	2014	2015	2016	2017
References for a preliminary ruling	450	428	436	470	533
Direct actions	72	74	48	35	46
Appeals	161	111	206	168	141
Appeals concerning interim measures or interventions	5		9	7	6
Requests for an opinion	2	1	3		1
Special forms of procedure ²	9	8	11	12	12
Total	699	622	713	692	739
Applications for interim measures	1	3	2	3	3

Source: Court of Justice of the European Union, 2017 Annual Report

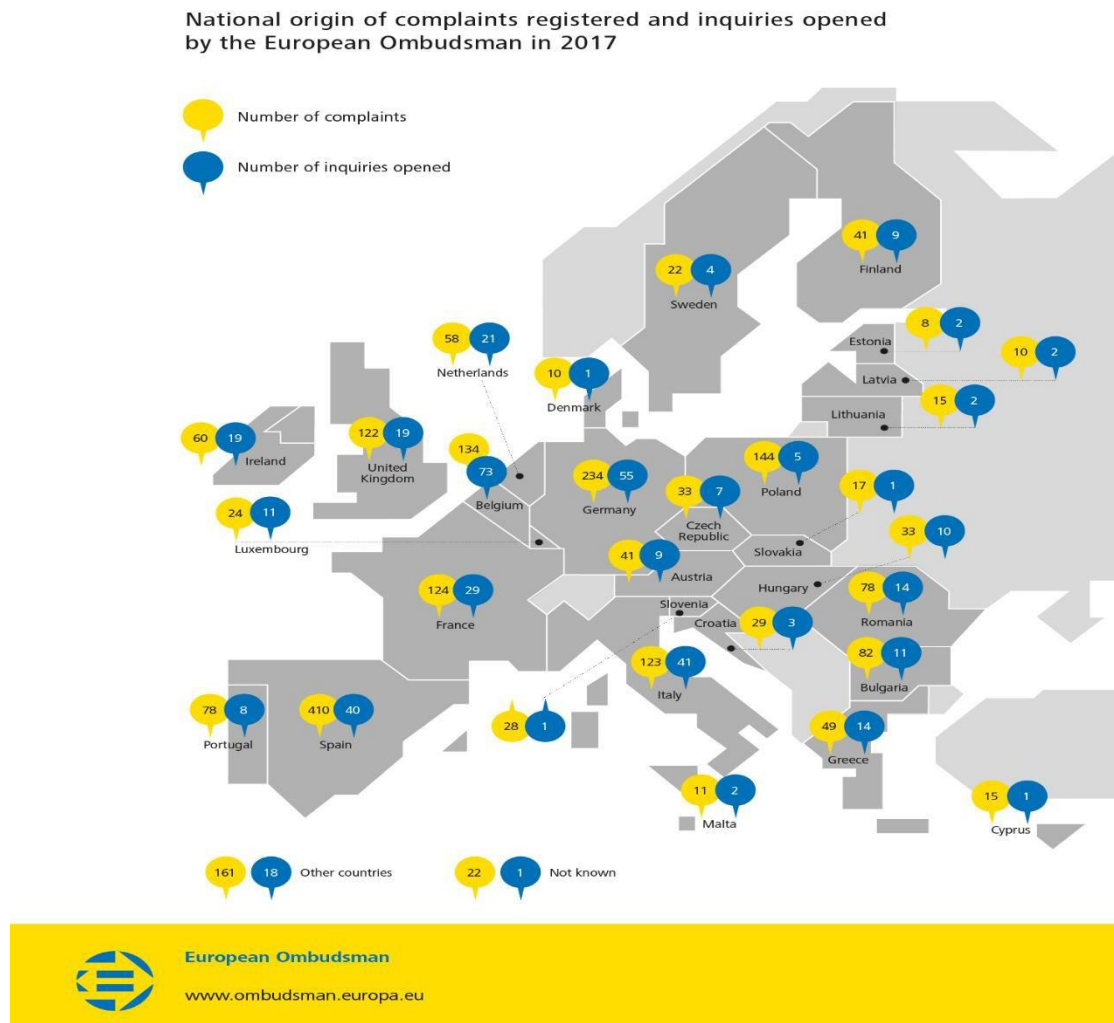
The access of **individuals as non-privileged applicants** to the General Court of the Court of Justice of the EU is extremely limited to cases when **an EU body or institution breach the rights of an individual**, which does not happen very frequently. Individuals have been availed of three different types of actions they may use. The action for annulment, the action for damages and the action for failure to act. The first one is used most frequently in competition cases and in cases where individuals require access to documents which have been made inaccessible by the requested EU institution.

4.5 Extra judicial enforcement by EU Law

Since the European Commission as a Guardian of EU law cannot force national judges to decide quickly, it promotes a number of out-of-court dispute settlement mechanisms, which can be more speedy and cheaper for the participants in certain circumstances, such as **mediation for resolving disputes between private parties**. If a public authority is involved in the dispute, an individual may direct his or her complaint either to the European Ombudsman, to the SOLVIT network or to the Petitions Committee of the European Parliament. The powers of these different avenues of extrajudicial resolution of disputes differ as explained below.

4.5.1 European Ombudsman

The European Ombudsman is in charge of resolving cases of **maladministration committed by an EU body or an EU institution with respect to an EU citizen or an EU resident**. If EU Law was breached by a national body, the European Ombudsman cannot deal with the case, but will inform the complainant that he or she should contact the national or the regional ombudsman to resolve the issue.



Source: European Ombudsman, 2017 Annual Report

A typical example of maladministration committed by EU bodies is undue delay, discrimination, and a failure to provide a document which is not classified.

Usually, the European Ombudsman manages to reach a friendly solution to a complaint in some 80 per cent of cases which are admissible. Individuals complain against the European Commission most often, since it has the highest number of staff out of all EU institutions and it is also most likely to come into direct contact with EU citizens.

The office of the European Ombudsman receives complaints in all EU official languages and it strives to achieve a settlement within a period of 9 months. The services of the European Ombudsman are operative as of 1995 and they are free of charge for the complainants. The

operation of the watchdog of the EU administration is fully covered by the EU budget. The European Ombudsman has its main office in Strasbourg and a smaller office in Brussels in the building of the European Parliament. However, there is no need for the EU citizens to lodge a complaint in person. Online means of communication are very common, such as an interactive web form or an email.

The European Parliament elects the European Ombudsman for a renewable period of 5 years. The European Ombudsman regularly reports to the Petitions Committee of the European Parliament. It also publishes its annual reports and reports on the cases resolved online. Apart from dealing with individual complaints, the European Ombudsman may decide to launch an investigation on its own initiative, when it appears that there is a systemic problem in the EU public administration rather than an individual shortcoming of an EU official or of a procedure.

4.5.2 SOLVIT

The SOLVIT network is an informal problem SOLVIT network for problems of **nationals of one Member State with the public administration of another Member State**. Perhaps you are a professional and wish to work in a different Member State, where the public administration fails to recognize your professional qualification. Your home SOLVIT center can help to resolve this issue in terms of weeks and free of charge by contacting the lead SOLVIT center of the target EU Member State.

Austrian physiotherapist authorised to practice in Portugal

An Austrian physiotherapist applied for professional recognition in Portugal. One year later he still had not had a response from the Portuguese authorities. When enquired how things were progressing, he was asked to wait until they called back.

This delay was jeopardizing his chances of working in Portugal. He had been offered a job but couldn't take it without having his professional qualifications recognised.

Thanks to SOLVIT Portugal, the physiotherapist obtained the recognition and was able to start working in Portugal. Solved within 5 weeks.

Source: European Commission, 2018

SOLVIT can also be used by businesses, for instance when they have difficulties with their VAT refund from another Member State when importing goods for further sale in their home country.

French company gets VAT refund from Germany



A French company requested a VAT refund from the German authorities – but the request remained unanswered for 10 months. Thanks to SOLVIT's intervention, the procedure was speeded up and the company received the amount it had asked for.

Solved within 6 weeks.

Source: European Commission, 2018

Apart from all EU Member States, SOLVIT centers are also operative in three more states which are part of the European Economic Area: Norway, Iceland and Lichtenstein. The European Commission regularly assesses the timely resolution of complaints and the success rate of their resolution and urges lenient Member States to reinforce the staff of the SOLVIT centers in order to maintain an efficient problem solving network.

4.5.3 European Parliament's Petitions Committee

The Petitions Committee of the European Parliament is the only European Parliament committee which has direct contact with EU citizens. It receives petitions (both individual and collective ones) from EU citizens when national authorities violate EU law. Very often, EU citizens complain about the breach of EU environmental law. For instance, a state authority authorizes a construction of a housing estate or of a hotel in an area which should be protected due to its enhanced environmental value and is part of the Natura 2000 network. Such an authorization clearly breaches EU law. The European Parliament may decide to set up a fact finding mission to investigate a petition, but its resources are limited. Hence, it is impossible to set up a fact finding mission to investigate each petition *in situ*. Yet, if it finds the petition substantiated, it may invite its author(s) to present it and to provide further details during the meeting of the Petitions Committee. Also, if the breach of EU law by a Member State is particularly serious and alarming, the Petitions Committee may decide to discuss this issue in a plenary session. Out of some 1000 petitions received each year, fewer than 10 make it to the plenary session of the European Parliament each year.

4.6 Summary

The European Commission may propose secondary legislation only if it has an express authorization to do so in the founding treaties. In the field of exclusive powers, usually regulations are proposed and adopted. In the field of shared powers, directives are preferred. The differences between the addressees and effects of EU secondary legislation have been summarized in the table below.

	Addressees	Effects
Regulation	All Member States, natural and legal persons	Directly applicable; binding in their entirety
Directive	Member States	Binding with respect to the intended result. Directly applicable only under particular circumstances
Decision	Member States and/or natural or legal persons	Directly applicable; binding in their entirety
Recommendation	Member States and/or EU bodies/individuals	Not binding
Opinion	Member States and/or EU bodies/individuals	Not binding

4.7 Self-assessment questions/tasks

1. Who creates EU Primary Law?
2. What are the binding sources of EU secondary law?
3. What does “direct effect” mean? What is the difference between the direct effect of regulations and directives?
4. What does decentralized enforcement of EU law mean?
5. What is the purpose of preliminary reference?
6. Who can initiate an infringement procedure and why?
7. Can EU nationals appeal to the Court of Justice of the EU if they are unhappy with a judgment delivered by their national court(s)?
8. What is the difference between the powers of the European Ombudsman, the Petitions Committee and the SOLVIT network? Give a practical example of a case resolved by each of these out-of-court disputes settlement avenues.

4.8 Further reading/listening

Craig, P.; de Búrca, G., Text, Cases and Materials, 5th ed., Oxford: OUP, 2011, pp. 103-130.

Online book on EU Institutions and EU Law available at

http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf, pp. 80-114

A link to a video on how the office of the European Ombudsman works:

https://www.youtube.com/watch?v=tY_4YEyFxyM

A link to a video on how the SOLVIT network may assist EU citizens:

<https://www.youtube.com/watch?v=Mc8D8KDq6iA>

A link to a video on how the SOLVIT network may assist EU businesses

<https://www.youtube.com/watch?v=7BeEqT6oy-g>

Chapter 5. Czech Constitutional Law and the Protection of Human Rights

1. The Czech Constitution in General

The Czech Constitution was adopted in December 1992 and **came into force** on the 1 January **1993** when Czechoslovakia split up into two independent states, the Czech Republic and the Slovak Republic. Since its adoption two major amendments to the Czech Constitution were adopted. The first one concerned the possibility of delegating powers to an international organization prior to our membership in the European Union. The second major constitutional amendment changed the way of appointing the Czech president. Under the original wording of the Czech constitution, the Czech president was elected on a common session of both chambers of the Czech Parliament. Currently, the Czech president is elected directly by Czech citizens.

Compared to other European constitutions, the Czech one is rather short, leaving the regulation of detailed provisions to implementing acts which can be amended more flexibly than the constitution that has been construed as a **rigid** one. A rigid constitution requires qualified majority in the Parliament in order to be amended. Some countries opted for a **flexible** constitution which can be amended by simple majority.

Selected provisions of the Czech Constitution in English can be found in the Annex to this textbook.

2. Division of Powers under the Czech Constitution

The political system of the Czech Republic constitutes a parliamentary democracy, although the President of the Republic, who is the head of the state, is directly elected under Art. 54 (2) of the Constitution. The Constitution defines the Czech Republic as a sovereign, unitary, and democratic state governed by the rule of law, founded on the respect for rights and freedoms of a person and citizen (Art. 1 (1) of the Constitution).

The legislature, the head of state and most of the executives are located in the capital city of Prague. Supporting the idea of separation of powers both Supreme courts (the Supreme Court as well as the Supreme Administrative Court) and the Constitutional Court are located in Brno. Brno is also the seat of some related institutions, such as the Czech Ombudsperson.

The functions of the head of state are mostly representative; the genuine executive power is vested in the government, which is in turn politically responsible to the Parliament (or more precisely to its lower chamber called the Chamber of Deputies).

1. The Legislative Power

The **legislative power** is exercised by the Parliament of the Czech Republic, consisting of the lower chamber (the Chamber of Deputies) and the upper chamber (the Senate).

The Chamber of Deputies has 200 members elected for a period of four years. The Chamber holds standing sessions. Members of the Chamber of Deputies are elected according to the principle of proportional representation.

The second chamber, the Senate is a permanent body composed of 81 senators elected for a six-year term of office. Every second year elections for one third of the senators are held providing for a partial renewal of the Senate every two years.

The Senate has a stabilizing role in the constitutional system, since it holds a permanent session; if the Chamber of Deputies is dissolved the Senate is empowered to adopt legislative measures on matters, which cannot be delayed and would otherwise require enactment of a statute (Art. 33 of the Constitution).

Ordinary statutes (zákony) are the universal form of legislative decision making adopted by the Parliament. For a statute to be adopted, the simple majority of the present members in the Chamber of Deputies and the simple majority of present senators (i.e. simple majority in both houses) are required (Art. 39 (1) and (2) of the Constitution).

Senate's legislative measure (zákonné opatření senátu) is a special type of legislation with the force of a statute. Its objective is to keep the legislative power of the Czech Republic operational even when the Chamber of Deputies has been dissolved. Should such a situation arise, the Senate is empowered to adopt legislative measures concerning matters of urgency and which would otherwise require the adoption of a statute. The legislative measures of the Senate must be approved by the Chamber of Deputies at its first meeting after the election. Should they not be ratified, they cease to be in force.

5.2.2 The Executive Power

The **executive power** is composed of the head of state (the president of the Republic) and the government. The government is divided into specialized ministries, the number of which is not laid down in the Constitution, but may vary depending on the government, as the number and the powers of the individual ministries are specified in a legislative act that can be amended more flexibly than a constitution.

The President of the Republic is elected directly by citizens for a term of office is five years, which is renewable once in a row.

The government is the highest body of executive power. It consists of the Prime Minister, deputy prime ministers and ministers.

The government is politically responsible to the Chamber of Deputies. Following a general election, the President of the Republic designates the Prime Minister. Upon the proposal of the designated Prime Minister, the President of the Republic appoints other members of the government and entrusts them with the management of the respective portfolios. Within 30 days of the appointment, the government as a collegiate body shall ask the Chamber of Deputies for a vote of confidence (see Art. 68 of the Constitution).

It is customary for the Czech Government to be composed by the party, which won the general elections. Alternatively, the chairperson of the second largest party is to be asked to form the Government. The Government is, however, has to be set up in such a way as to secure its support by the Lower chamber of the Parliament.

In the Czech Republic statutes can be proposed by the government, by a single member of the lower chamber of the Parliament, by a group of members of the upper chamber of the Parliament and by a regional council. The legislative initiative is exercised by the Government most often since the government has specialized civil servants working for different competent ministries at its disposal who are in charge of drafting legislation. Also, preparing the transposition of EU directives into the Czech legal order has been entrusted to the Czech government who shall propose statutes by which EU directives are to be implemented in the Czech Republic.

Apart from adopting legislation, the Czech Parliament is also in charge of adopting international treaties. All the international treaties by which the Czech Republic is bound must be published in the Collection of International Treaties, where the authoritative foreign version, as well as the Czech version, is published simultaneously.

Acts are published in the Collection of Laws (Sbírka zákonů, abbreviated in Czech as “Sb.”), published in a printed version by the Ministry of Interior Affairs. The English wording of some most common statutes is available at the official web site of the Ministry of Justice (such as the Civil Code, and the Business Corporations Act).

3. The Judicial Power

The **judicial power** is concentrated in the hands of the courts of general/ordinary jurisdiction (civil and criminal), administrative courts and the Constitutional Court.

The judiciary in the Czech Republic is organized as a four tier system being comprised of

- District courts
- Regional courts
- High courts and
- Supreme Courts

District courts are usually the courts of first instance in civil and criminal matters. Appeals against the decisions of district courts are lodged with regional courts. There are two high courts in the Czech Republic, one covering the territorial jurisdiction of Bohemia has its seat in Prague, and the other, covering the territorial jurisdiction of Moravia has its seat in Olomouc. There are two Supreme Courts in the Czech Republic, both having their seat in Brno. The Supreme Court covering the jurisdiction in civil and criminal matters hears extraordinary remedies against the decisions of high courts, whereas the Supreme Administrative Court is in charge of deciding extraordinary remedies in administrative cases.

Specialized administrative chambers operate at regional courts (there are 14 regions but only 8 regional courts, since the regional courts follow the old structure of regions existing prior to the accession of the Czech Republic to the EU, where the size of the regions had to be adapted to NUTs).

The judicial system in the Czech Republic is organized as a professional career judiciary. Hence there is no trial by jury. Judges are appointed by the President of the Republic. They must be at least 30 years of age at the time of the appointment, must have completed their graduate degree in law and a three-year period of specialized training within the courts. Except for constitutional

judges who are appointed for a period of 10 years, judges of general courts are appointed for life and can be only removed following disciplinary proceedings conducted by a special judicial ethics panel, composed of senior judges.

The **Constitutional Court** is based in Brno and lies outside the system of general courts. It has the authority to protect constitutionality under Article 83 of the Constitution. It deals with both, a **concrete**, and an **abstract review of constitutionality**.

The “abstract” review concerns the review of a compatibility of an international treaty with the Czech constitution before ratifying such a treaty. The “concrete” review is based on decisions on constitutional complaints against final court decisions infringing constitutionally guaranteed fundamental rights and basic freedoms. In this proceeding, any type of act or omission of a public authority including a judicial decision can be challenged, if the applicant claims that his/her constitutionally guaranteed rights and freedoms have been violated by the preceding act by public authority and after he/she has exhausted all available remedies.

The jurisdiction of the Constitutional Court also comprises ruling on impeachment of the President of the Republic based on charges of the Senate brought with the consent of the Chamber of Deputies.

5.3 Three Systems of Protecting Human Rights in the Czech Republic (national system, Council of Europe and the European Union)

Apart from the Czech Constitution (Act No. 1/1993), the **Czech Charter on Fundamental Rights** (Act No. 2/1993) is part of what is called the constitutional order of the Czech Republic, having the same legal rank as the Constitution. The Charter on Fundamental Rights is one of the three major human rights documents binding for the Czech Republic. The other two include the European Convention on the Protection of Human Rights adopted by the Council of Europe (a different international organization than the European Union, which was set up in 1949 having its seat in Strasbourg). The **European Convention** enables citizens and business to lodge direct actions against their Member States to the **European Court of Human Rights in Strasbourg** if an article of the said convention is believed to have been breached. However, individuals bringing a claim against their Member State need to have exhausted judicial remedies in their state to obtain access to the European Court of Human Rights in Strasbourg. If a Member State is found to have breached the European Convention, it has to compensate the person whose fundamental rights have been violated. Also, if the violation of fundamental rights has been systemic, a more in-depth change to the legal system or administrative practice of that state is required. An assembly of Ministers of the Member States oversees the implementation of the judgments delivered by the European Court of Human Rights in Strasbourg. With respect to the Czech Republic, the right to a fair trial (Article 6 of the European Convention) is the most violated provision by the law courts of the Czech Republic due to an excessive duration of judicial proceedings. As mentioned above, also the rights of businesses can be breached by a Member State, including an unfair expropriation of property, and the right to a fair trial.

The following box shows which rights guaranteed by the European Convention were breached by the Czech Republic in the past with respect to businesses. Interestingly enough, even the Czech Constitutional Court can be found to have breached the fundamental rights of a business:

1. Credit and Industrial Bank v. Czech Republic

21.10.2003

Decision of compulsory administration imposed on the applicant bank.

Violation of Article 6 § 1 - lack of full judicial review in the administrative proceedings

2. Vodárenská akciová společnost v. Czech Republic and Faltejsek v. Czech Republic

24.02.2004 and 15.02.2008

Excessive formalism of the Constitutional Court

Violation of Article 6 § 1

Source: Council of Europe, European Court of Human Rights, Press Country Profile – Czech Republic

The **third system** protecting fundamental rights in the Czech Republic has been enshrined in the **EU's European Charter of Fundamental Rights** which obtained its legally binding nature in December 2009 when the Lisbon Treaty came into effect. The European Charter of Fundamental Rights is **binding on EU Member State whenever they apply EU law**. This is to say that EU Member States do not need to observe the European Charter of Fundamental Rights in all their activities, particularly, when they apply national law only. Individuals have no direct recourse to the Court of Justice of the European Union if they believe that an EU Member State has breached their rights under the EU Charter. Only national courts may, on their own discretion, refer a case to the Court of Justice of the EU if they have doubts about the compliance of the State's activity with the wording of the European Charter of Fundamental Rights.

Instances where EU Member States have breached the EU Charter are being monitored by a specialized agency established in Vienna, Austria, the European Union Fundamental Rights agency, which publishes annual reports on Member States' compliance with EU Human Rights standards.

The following box shows an example of selected passages from a judgment in which the Court of Justice of the European Union found a violation of the EU Charter on grounds of unauthorized discrimination:

Judgment in Case C-68/17 IR v JQ (a preliminary reference made by a German Court)

Dismissal of a Catholic doctor from a managerial position by a Catholic hospital due to his remarriage after a divorce may constitute unlawful discrimination on grounds of religion.

The requirement that a Catholic doctor in a managerial position respect the Catholic Church's notion of marriage as sacred and indissoluble does not appear to be a genuine, legitimate and justified occupational requirement, which is nevertheless a matter for the German Federal Labor Court to determine in the present case.

*In that regard, the Court states that the **prohibition of all discrimination on grounds of religion or belief, now enshrined in the Charter of Fundamental Rights of the European Union, is a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law.***

Source: Court of Justice of the European Union, Press Release No. 127/18

5.4 Summary

This chapter surveyed the Czech constitutional system and three different systems of protection of human rights applicable in the Czech Republic.

Under the Czech Constitution, the Czech Republic is considered a parliamentary democracy, where the role of the president is mainly of a representative and a ceremonial nature. The state powers follows the classical division into the legislature, the executive power and the judiciary. The judiciary system is based on career judges.

The Czech Constitutional Court oversees the respect of the Czech Constitution, including the respect for fundamental rights and freedoms. Having exhausted their national remedies, Czech citizens and foreign residents in the Czech Republic may also lodge a complaint against the Czech Republic to the European Court of Human Rights in Strasbourg, which is the judicial authority of the Council of Europe. Finally, also the European Union has its own system of protecting human rights in place, however, individuals have direct recourse to the General Court of the Court of Justice of the European Union only if their fundamental rights have been breached by EU institutions. If national bodies breached the rights of citizens or businesses protected by the EU's Charter on Fundamental Rights, it is up to the national courts to decide if the EU Charter was violated and should doubts arise, national courts can make a preliminary reference to the Court of Justice of the EU to obtain its binding interpretation on the legal matters.

The following table summarizes the differences between the three human rights protection systems in place in the Czech Republic.

Czech Charter of Fundamental Rights – In Czech „Listina základních práv a svobod“ Act No. 1/2013 = rank of constitutional law	European Convention for the Protection of Human Rights – binding for the Czech Republic Author: Council of Europe, 1950	EU Charter of Fundamental Rights Binding as of December 2009; for EU Member States only when they implement EU law
Czech Constitutional Court (CCC) in Brno	European Court of Human Rights (ECHR) in Strasbourg	Court of Justice of the EU in Luxembourg
Individuals have direct access to the CCC by means of a „constitutional complaint“ – in Czech: ústavní stížnost; No complaint form available	Individuals have direct access to the ECHR in Strasbourg by filing a complaint; Complaint form available	Individuals have very limited direct access to the EU court by means of the action for annulment (strict time limit of 2 months for filing the action from the publication/notification of a legislative/non- legislative measure of the EU that breached the Charter);
legal representation necessary	legal representation necessary if complaint considered admissible	legal representation necessary; very strict formal rules for admissibility
Public database: NALUS available at www.concourt.cz	Public database: HUDOC, available at http://hudoc.echr.coe.int/	Public database: curia.europa.eu
Most frequent breach: unfair trial (extensive duration of proceedings)	Article 6 of the Convention: unfair trial	Too early to tell – The European Commission regularly monitors references made to the EU Charter by the CJEU

Source: Own compilation of data available in public databases

5.5 Self-assessment questions

1. What is the difference between a rigid and a flexible constitution? Is the Czech Constitution rigid or flexible?
2. Who can propose legislation in the Czech Republic and who does so most frequently?

3. What is the difference between concrete and abstract constitutional review carried out by the Czech Constitutional Court?
4. Which right protected by the European Convention adopted by the Council of Europe has been breached most often by the Czech Republic?
5. Is the EU Charter of Fundamental Rights binding on EU Member States in all their activities?
6. Do individuals have direct recourse to the General Court of the Court of Justice of the European Union if an EU Member State has breached their rights protected under the EU Charter of Fundamental Rights?

5.6 Further reading/listening

Selected provisions of the Czech Constitution in English in the Annex to this textbook

Craig, P.; de Búrca, G., Text, Cases and Materials, 5th ed., Oxford: OUP, 2011, pp. 465-498

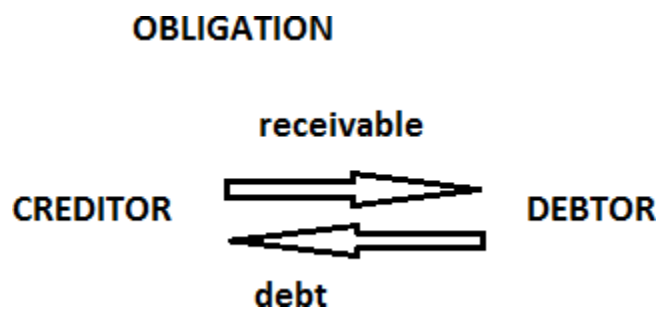
Link to an institutional video on the functioning of the European Court of Human Rights:

<https://www.youtube.com/watch?v=EPWGdhgQlgk>

Chapter 6. Contracts

6.1 Obligations

Contracts are the most common title (another one are delicts) for obligations to arise. Obligations are relations between creditors and debtors where a creditor has a receivable and a debtor has a corresponding debt.



Obligations are relative property rights where a relationship between specific subjects arises. Relative property rights thus affect only particular subjects, i.e. creditors and debtors. As an example we can name loan agreement where a creditor has a right to get the lent money returned together with the interest and a debtor has a corresponding duty to return the money together with the interest. No one else is involved in the relationship of the creditor and debtor.

Features of obligations

Any obligation has its subjects, object and its content. Subjects are, in general, a creditor and a debtor. The particular name of subjects depends on the contract in question – in case of a purchase contract, the subjects are a purchaser and a seller, in case of a donation contract, the subjects are a donor and a donee etc. An object of an obligation are goods or performance to which a contract relates. For example, if you intend to buy a house, the house would be an object of such purchase contract. A content of an obligation then comprises rights and duties arising out of a contract. In case of a purchase contract, the content of an obligation would be a **right** of seller for a purchase price and his **duty** to transfer an ownership right to a buyer and the corresponding duty of a buyer to pay a purchase price and his right to acquire an ownership right.

Relative v. absolute property rights

As opposed to obligations (relative property rights), there are absolute property rights such as ownership right which relate to some property rather than to a person. These rights affect all subjects even though they are in no specific relationship to the entitled person. E.g. an owner of a house has (an absolute property) right to use the house for living and everybody must respect such right and not prevent the owner from using the house (by e.g. changing the locks, occupying it etc.). Notice that there is no contract or other reason for creating any special

relationship between those subjects (as opposed in the case with loan agreement). The ownership right applies to all persons who have a corresponding duty not to disturb it.

6.2 Principles of contractual law

Contractual law is based on several basic principles such as principle of freedom of contract, *pacta sunt servanda* (see below), principle of the duty to behave honestly and not to harm anyone and also on the protection of the weaker party, especially a consumer.

Freedom of contract means that everybody is, in private law, free to choose whether to enter into a contract or not, choose the contracting partner and determine the content of the contract through negotiations. Nobody can force you to enter into contracts in the first place. There is, however, one exception which is a compulsory motor vehicle third party liability insurance. It is thus obligatory for any motor vehicle operator to conclude the third party liability insurance agreement. The motor vehicle operator is, however, free to choose an insurance company.

Pacta sunt servanda principle means that the contracts and their clauses are binding for the parties to the contract and that the failure to fulfil them is a breach of the pact.

6.3 Contracts

Contracts are, by their definition, the expression of the will of the parties to create an obligation between each other and to be bound by the content of such contract. Every contract starts with an **offer** which must include essential terms of the contract and such offer must be **accepted** by the other party unconditionally.

E.g. If one party intends to sell a cell phone, he/she must clearly express his/her will to sell it and specify the cell phone. Only such offer is binding and may be subject to an acceptance. If the acceptance is unconditional (no essential changes such as willingness to buy a different cell phone than the one offered), there is a binding purchase contract. If, however, an offeree changes the offered terms significantly, e.g. starts to negotiate about the purchase price, he/she is making a **counteroffer** which is subject to acceptance of the other party (who was an offeror before). Only once all the essential terms are agreed on by both parties, there is a binding contract.

Every offer also has its time limit for which it is binding. An oral offer or a written offer made towards a present person must be accepted immediately. If your friend offers you his laptop for CZK 8000 on Monday during the class and you do not answer, he is free to offer it to somebody else since the offer was not accepted, was made orally towards a present person and thus has expired. If you decide next day that you would like to buy it, you basically make a new offer to buy his laptop which he can accept if still interested (notice that the subjects are now in the opposite position). If an offer is made in writing towards a person who is not present, such offer must be accepted in the time limit stated by the offeror in the offer. If there is no time limit stated in the offer, the offer must be accepted in a **reasonable** period of time. What would be considered reasonable depends on several factors such as type of goods or performance (it will definitely be longer in case of the sale of a house than in case of the sale of a cell phone), means of communications used (longer for post than for e-mail), an established practice between parties etc. A consideration of what is a reasonable period has to be made on a case-by-case basis.

Form of the contract

Czech civil law is based on the principle of informality. Most of the contracts can thus take any form the parties choose – oral, tacit, written or notarial deed. There are, however, exceptions, where law requires specific forms and those are contracts relating to real property which have to be in writing or articles of association of capital companies which have to be in the form of notarial deed. Also, according to the Czech civil code, if at least one party to the contract requires a specific form of the contract (e.g. a written contract), a contract which does not fulfil such form is not binding. Other contracts do not require specific form.

Offers made in catalogues or advertisements

As we said, an offer once made is binding and if accepted, a contract is established. You have probably experienced several times that you came to the supermarket for some specific promotion which you saw in the leaflet and there you realized that they are out of stock. Was the offer in the leaflet binding? Is the out of stock situation a breach of the binding offer on the side of the supermarket? It is a practical exception from the rule that the offer made in catalogues, advertisements, leaflets etc. are binding subject to out of stock. Once the supermarket is out of stock, the offer stops being binding.

6.3.1 Changes in obligations

In commercial practice, it is very common that obligations need to be changed during their existence either in subject or content.

Changes in subject of the obligation

Once a contract is concluded, it is binding for both parties (creditor and debtor). If one of the parties wishes to unilaterally release from the contract, they can do it through the change in subject.

Change of the creditor

- (i) Creditors often sell their receivables to the third parties from various reasons, e.g. because the debtor does not pay voluntarily and the creditor does not want to get involved in court proceedings which is costly and risky. The sale of the receivable to the third party is called **an assignment of the receivable**. To assign the receivable, a creditor does not need to have the consent of the debtor. The content of the obligation does not change but the debtor is now obliged to pay to the new creditor instead of the original one.
- (ii) since the adoption of the new civil code as of 1 January 2014, it is now possible to **assign the whole contract** with all the rights and duties. However, only a party who has not yet received the performance can assign the whole contract and under the condition that the nature of the contract does not exclude it. If, for example, you entered into the contract with a famous photographer to take pictures from your wedding, he cannot successfully assign the contract because such performance is unique for you. In other words, you chose him specifically and you have no interest in any other photographer.

Change of debtor

Under specific circumstances, also a debtor can be changed during the existence of obligation.

- (i) In case of **take-over of debt**, an original debtor stops being a debtor and a new debtor replaces him. The creditor must, however, give a prior consent to such take-over so that the status of a creditor does not worsen. A creditor thus can refuse to accept a new debtor who would have less credibility than the original one.
- (ii) In case of **accession to debt**, both an old and a new debtor are jointly and severally liable and thus there is no need to have consent of the creditor because the position of a creditor gets stronger (instead of one debtor there are two of them).

Changes in the content of obligations – rights and duties

The parties to the contract are free to change or modify their current rights or duties arising out of the contract either because they have no interest in the original performance or they simply want to amend the current obligation with new rights or duties. Also, it is possible that such modification is necessary because there is some kind of dispute between the parties.

- (i) **Novation agreement** means that either the original obligation is terminated completely and replaced with a new one (**private novation**) OR the original obligation is just amended with new rights or duties (**cumulative novation**).

E.g. two parties enter into the purchase contract for the sale of 20 bottles of red wine from Moravia and before the fulfilment of the contract the purchaser changes his mind and would like 30 bottles of white wine instead of the red wines. He communicates with the seller who is willing to change the contract as well. This is a typical example of private novation where the original obligation ceases to exist and is replaced by the new one. Of course, the consent of both parties is necessary.

E.g. two parties enter into the lease agreement for an apartment in the Prague city centre for 1 year. After the term of the lease elapsed, both parties agree to prolong the contract under the same conditions for another year. They amend the original contract with the respective extension of the term. This is a cumulative novation. Again, the consent of both parties is necessary.

- (ii) **Settlement agreement** is of use if some provisions of a contract are unclear or disputable between parties and thus they must be replaced with new provisions in order to remove such dispute.

6.3.2 Extinction of obligations

There are several ways how an obligation can come to an end, either with or without satisfaction of the debt.

A. With satisfaction of the debt

- (i) **Fulfillment of obligation** is the easiest and most preferable option for both parties since the aim of the contract has been achieved. For example, a student comes to a coffee shop for a cup of coffee, he orders a coffee, pays the price and gets his

cappuccino. The deal is done, the contract is fulfilled and both parties are happy. There is no obligation left between them.

- (ii) An obligation may extinct by **mutual agreement** of both parties. To stay with the example with the coffee shop, imagine that the student, after he ordered his cappuccino and paid the price realizes that he has no time left and wishes to cancel his order. If the seller agrees, an obligation has extinct by mutual agreement and the seller will return the money to the student.
- (iii) If both parties have mutual rights and duties between each other, the claims may be **set off**. To give an example how it works in practice, imagine that Charles lent Lucy CZK 2000 because she ran out of money. A couple of days later, Charles lost his cell phone and did not want to invest much money in the new one and so Lucy offered him her old phone which was fully functional for CZK 2000. Charles was more than happy for such offer and asked Lucy to set off their mutual claims – his duty to pay the purchase price of CZK 2000 against his right to receive the loan of CZK 2000 back from Lucy. All duties were thus cleared and neither Charles, nor Lucy had to pay anything.

B. Without satisfaction of the debt

- (i) **Remission of debt** is the unilateral action of the creditor who releases the debtor from his debt. By remission, the obligation between the creditor and debtor becomes extinct.
- (ii) **Termination** is also a unilateral way how to extinct the contract but it is of use only where such possibility was agreed in contract or if such right arises from law. Typically, contracts concluded for indefinite period (such as lease contracts or employment contracts) may be terminated by the unilateral termination. The termination must be delivered to the other party and the contract then ends after the notice period elapsed. The length of the notice period is either agreed between the parties or is stated by law (3 months for leases of apartments, 2 months for employment contracts etc.).
- (iii) **Withdrawal** from the contract is again the unilateral way how to extinct the contract but such possibility must be explicitly agreed in contract or such right must arise from law. Under the Czech Civil Code, it is possible to withdraw from the contract only in case of a material breach of contract (e.g. some goods have defects even after several repairs). The result of a withdrawal is that the obligation is cancelled from the very beginning and thus parties must return the performance they accepted from the other party.
- (iv) **Death of debtor** leads to the extinction of the obligation only where the obligation was supposed to be fulfilled by the debtor personally, otherwise the obligation is subject of inheritance. E.g. If I want to have a famous photographer on my wedding and he dies before the wedding, such obligation becomes extinct with the death of a photographer because I simply have no interest in his heirs taking photos of my wedding. On the other hand, debts from loan agreement or purchase contracts with no specific subject-matter are subject to inheritance and thus do not become extinct with the death of debtor.

- (v) **Death of creditor** leads to the extinction of an obligation only if the performance was limited to his person only, for example damages for pain and suffering. Most of the receivables are, however, subject to inheritance.

6.3.3 Subjects of contracts

In order to have a valid contract, it must be concluded by persons who have a legal capacity to enter into contract. A capacity to enter into contracts of natural persons is being gained gradually until they reach 18 years of age when they get a full legal capacity. At the age of 18 thus humans have capacity to enter into all contracts no matter how complicated they are. What about youths or even children? Can they enter into a valid contract? Yes, they can enter into those contracts for which they are mentally and emotionally mature. It needs to be considered individually case-by-case taking into account the age of the youth and the respective contract. It is quite clear that a seven year old kid can buy an ice cream (a valid purchase contract) but cannot buy a car or a house. A fifteen year old kid can buy for example a motorbike (which the seven year old could not) and an 18 years old can buy whatever he/she likes provided that he/she has money for it. Apart from age, humans have to lack mental illness which would make them incapable to enter into contracts.

Legal persons (companies) get their capacity to enter into contracts upon their incorporation (registration in the commercial register). Since legal persons are an artificial construct made by law, they must act through their representatives – typically statutory bodies whose acts are binding for the company or their employees. Employees may act on behalf of the company in the field of their specialization – e.g. HR director is entitled to sign employment contracts on behalf of the company but not to sign purchase contracts with the suppliers which is outside the scope of his/her daily activities). In practice, these representatives of legal persons attach their signature next to the company's name in the contract.

6.4 Division of the contracts

A. Consensual x Real contracts

Consensual contracts are completed by the mere agreement of the contracting parties. Most of the contracts are consensual (purchase agreement, contract for work, credit agreement, employment contract etc.).

To complete a real contract, there must be something more than mere consent of both parties – the transfer of a thing from one party to the other. Examples of real contracts are loan of money or movable property pledge. A loan agreement is thus completed not in the moment both parties agree on basic elements of the contract (amount of money, due date etc.) but only once the money is provided to the debtor. The same is valid for movable property pledge, such contract is completed once the movable to which the pledge relates is transferred from the pledger to the pledgee.

B. Formal x informal contracts

Those contracts which require specific form (either written or even the form of a notarial deed) are called formal contracts. Such specific form might be required by law or by one or both parties to the contract. The Czech Civil Code is based on informality of contracts and thus most of the contracts do not require any specific form. There are some exceptions, e.g. § 560 of Civil Code states that legal action establishing or transferring a right *in rem* to **immovable property**, as well as legal action changing or abolishing such right requires written form (purchase or donation contract for a house, land, apartment etc.). In the field of commercial law, articles of association of capital companies (limited liability company, joint stock company) require the form of **notarial deed**.

Informal contracts are those contracts that do not require any specific form and can thus be concluded orally, in writing or even implicitly. Most of the contracts in the Czech law are informal.

C. Synallagmatic x asynallagmatic contracts

Synallagmatic contracts are those contracts in which parties obligate themselves reciprocally to one another so that the duty of one party is correlative to the duty of the other. E.g. purchase contract (one party provides money and the other provides **goods or services**, an employment contract, (the employer provides money as salary and the employee provides work), lease agreement (rent in exchange for use of property), contract for works (works in exchange for money) etc. Only such party who has already fulfilled its contractual duty or is ready to do so, can require performance from the other party – e.g. only the landlord who made the apartment accessible to the tenant may require rent.

Asynallagmatic are those contracts in which parties have no reciprocal duties. A typical example is a donation agreement where only a donor has a duty to provide a donation and there is no reciprocal duty of a donee.

6.5 Content of the contract

Parties to the contract either include all content into the contract itself but in commercial business, where a lot of similar contracts are concluded very often (insurance contracts, banking contracts,..), it is often practical to determine a part of the content of a contract by reference to standard commercial terms. Such terms must be either attached to the offer by the offeror or the parties must be at least aware of such terms. The pros of the commercial terms are that they are general, usable for a wide range of contracts and thus it is easier and cheaper for the entrepreneur to enter into contracts with many customers (a very simple contract to which general terms including the detailed provisions which are used for all the contracts are attached). It is also very simple to modify all the contracts by modification of general terms without the need to modify all the contracts one by one.

6.6 Adhesion contracts

As was said in the very beginning of this chapter, the Czech civil law is based on the principle of the protection of weaker party. In practice, it is very common that during a contracting process, one party is in a stronger position than the other (typically in case of an entrepreneur contracting with a consumer but also e.g. a big corporation contracting with a sole entrepreneur). The weaker party cannot influence (or can influence in a limited way only) the content of such contract. Usually, such party can only accept it or reject it but not modify it (e.g. insurance agreements, current account contract). The protection of the weaker party in these **adhesion contracts** is such that they cannot include clauses that are difficult to read (very small letters), that are difficult to understand for average person, or that are particularly disadvantageous without any reason. It is important to note that an adhesion contract is not a type of contract as such but it is any contract fulfilling the condition that one (weaker) party could not influence the content of the contract (all form contracts).

6.7 Consumer protection

The Czech Civil Code is based on the protection of a weaker party, especially a consumer who is always understood a weaker party. A consumer is every **natural person** who, **outside his/her trade or business**, enters into a contract or acts in other way **with an entrepreneur**.

Every contract with one party being a consumer and the other being an entrepreneur is called consumer contract (purchase contract concluded between an entrepreneur and a consumer, contract for works, credit contract etc.). Again, a consumer contract is no contractual type as such, it only expresses that one party to the contract is a consumer who benefits from the special legal protection.

What is the protection of a consumer then? First, prohibited are such provisions that create a material imbalance in the rights or duties of the parties **to the detriment of the consumer**. This does not apply to the subject-matter of the contract or contractual price to which the consumer protection does not relate (if a consumer agrees to pay a specific price for the goods or performance, he/she cannot later argue that such price is higher than a competitive price).

In particular, prohibited are contractual provisions that:

- exclude or limit rights of the consumer from defective performance of the entrepreneur or that exclude or limit right to be compensated for damage
- bind the consumer to perform his duties whereas an entrepreneur is obliged to perform his duties upon the conditions dependent on his will
- establish right of an entrepreneur to withdraw from a contract without stating the reason but a consumer does not have such right
- enable an entrepreneur to modify contractual rights and duties without the consent of the consumer
- restrict the right of the consumer to file an action.

The above provisions are prohibited by law and it is not possible to depart from such prohibition to the detriment of the consumer. Such provision would be invalid.

Moreover, if a contractual provision allows for a different interpretation, it shall be interpreted in the most favourable way for consumer.

6.8 Distance contracts

Further protection of a consumer relates to so called distance contracts. Those are the contracts entered into by consumers using the means of distance communications. It means that parties to the contracts are not simultaneously present (teleshopping, on-line shopping, catalogue, fax) and thus a consumer has no possibility to take a look at the goods and consider whether they fit to his/her needs. Thus, there are specific rights of a consumer (as opposed to the purchases in the brick-and-mortar store where a consumer can see the goods, try them, etc.) and specific duties of an entrepreneur, such as:

- If a contract is concluded using electronic means, an entrepreneur is obliged to provide consumer with written contract and Terms and Conditions
- An entrepreneur has **information duties** towards a consumer which must include: contact details of an entrepreneur, description of the goods or service and their main characteristics, specification of price, payment methods and delivery, costs of delivery, rights arising out of defective performance, warranty etc.
- And most importantly, a consumer has a right **to withdraw from the distance contract within 14 days upon the delivery** of the goods without any reason. This is the consequence of the fact that a consumer cannot see or try the goods in advance. The consumer must then return the goods without any delay (within 14 days upon the withdrawal at the latest) and the entrepreneur must return all money including delivery costs to the consumer. The consumer has a right to withdraw from the distance contract within 14 days upon delivery even if the goods were ordered on-line (phone/fax etc.) and picked up in person. The term of 14 days thus starts running on the day when the goods were picked up.

The right to withdraw from the distance contract within 14 days does not, however, apply to customized goods, grocery, newspaper, magazines or computer programmes if the original package was removed.

In case the entrepreneur delivers some goods which the consumer did not order (for marketing purposes with the hope that a consumer will order the goods next time), the consumer may keep them free of charge and does not have to even inform the entrepreneur of his/her decision.

6.9 Off-premises contracts

Special protection relates further to consumers entering into contracts outside the business premises of the entrepreneur or with an entrepreneur who does not have business premises at all (door-to-door contracts, contracts concluded with dealers on the street, roadshows etc.). In these cases, the entrepreneurs use the element of surprise, pressure on consumer, inability to compare the offer with the offers of other sellers and thus consumers are again protected.

Consumers who entered into off-premises contracts have a right **to withdraw from such contract within 14 days upon the delivery** of the goods without any reason. The consumer must return without any delay (within 14 days upon the withdrawal at the latest) the goods and the entrepreneur must return all money including delivery costs to the consumer.

6.10 Summary

The most common title for obligations are contracts which can be defined as an expression of the will of the parties to create an obligation between each other and to be bound by the content of such contract. A contract is created once an offer of the offeror is accepted by the acceptant. If the offer is accepted with modifications relating to the essential terms, there is no contract but it rather is a counteroffer which is subject to acceptance by the original offeror. An offer must also be accepted on time in order to have a binding contract. In case of oral offers or written offers toward a present person, they must be accepted immediately otherwise such offer expires. In case of the written offers, they must be accepted within the time limit stated in them or in a reasonable time limit. Czech Civil Code is based on informality of contracts and thus most of the contracts may take any form (oral, written, tacit, notarial deed) with the exception of the contracts relating to the real property which must be in writing and articles of association of capital companies which must take a form of notarial deed. Offers made in catalogues, advertisements, leaflets etc. are binding subject to out of stock.

The contracts may be changed in the subjects and the content. The change of the creditor is done either through the assignment of the obligation or the assignment of the whole contract. The change of the debtor can take the form of the take-over of the debt or the accession to debt. The change of the content of the contract takes the form of either novation agreement where the original obligation is terminated and replaced by the new one (private novation) or the original obligation is amended with new rights or duties (cumulative novation) or settlement agreement which is used for solving the disputes between parties. The obligations may become extinct with or without the satisfaction of the debt. With satisfaction of the debt, they become extinct upon the fulfillment of obligation, as a result of mutual agreement of both parties and by setting off the mutual claims.

The obligations may become extinct unilaterally without a satisfaction of the debt by the remission of the debt, the termination, the withdrawal from the contract and under some circumstances, the obligation becomes extinct upon the death of one of the parties (creditor or debtor).

A capacity to enter into contracts of natural persons is being gained gradually until they reach 18 years of age when they get a full legal capacity. Legal persons (companies) get their capacity to enter into contracts upon their incorporation (registration in the commercial register).

One of the dominant principles of the Czech Contract Law is the protection of a weaker party, especially a consumer. A consumer is every natural person who, outside his/her trade or business, enters into a contract or acts in other way with an entrepreneur. The protection of a consumer relates to the special information duties of the entrepreneur towards a consumer and to the right of a consumer to withdraw from the distance contract or off-premises contract within 14 days upon the delivery of the goods without any reason. Also, the provisions that create a

material imbalance in the rights or duties of the parties to the detriment of the consumer are prohibited.

6.11 Self-assessment questions

1. Are the following statements true or false?

- a) An oral offer must be accepted immediately.
- b) One of the dominant principles of contractual law is freedom of contracts.
- c) A consumer can be a legal person if he/she acts outside of his/her business.
- d) Most of the contracts in Czech law do not require any specific form.

Select one correct answer:

2. What is the specific legal protection of a consumers who buy goods online (i.e. without a possibility to actually see the product):

- a) He/she can only require a detailed description of the product together with the real photos.
- b) He/she can return the product without any reason within 14 days upon the delivery and he/she gets full price back.
- c) He/she can return the product within 24 months if he/she does not like it.

3. The contracts always become extinct in the following case:

- a) Death of credit
- b) Death of debtor
- c) Fulfillment of an obligation
- d) Selling the receivable to a third party

4. Answer the following questions briefly:

- a) What are obligations?
- b) When is a contract made?
- c) When do humans get their legal capacity to enter into contracts?
- d) How can an obligation arise?

5. Name one possible change of content of obligation. Explain shortly what such change means.

6.12 Further reading

Act no. 89/2014 Coll., Civil Code, as amended. For the English wording of the Czech Civil Code refer to: <https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/civil-code.pdf>

Chapter 7. Civil and criminal liability

1. Legal liability

The consequence of a breach of legal duty is a legal liability whether in the field of civil, criminal or administrative law. E.g. if you overlook a person on a zebra crossing and hit him/her by car, you can face criminal proceedings for battery, you can face civil lawsuit for compensation for personal injury and possibly you can face administrative proceedings for the breach of road traffic rules. The aims and results of those liabilities are different. The focus of this chapter is on the civil liability but we will explain also the difference between the civil and criminal liability. The administrative liability is outside the scope of this book.

2. General conditions of civil and criminal liability

Civil liability is of private nature (unlike criminal or administrative liability). Its main goal is to compensate, not to punish. Civil liability can be defined as a secondary, negative consequence of a breach of legal duty in the field of civil law. It means that liability may arise only if some primary legal duty was breached. It is basically a sanction for a breach of an original legal duty. Such original legal duty may arise directly out of legal act (statute), out of contract or rarely out of good manners.

Criminal liability, on the contrary, is of public nature. Its main goal is to prevent criminality, to punish criminals and to protect society against them (e.g. by detaining and imprisoning them).

1. Civil delicts v. crimes

When we talk about civil liability, we will say that a person liable committed a civil delict. In case of criminal liability, a person liable committed a crime. What is the difference between the two? A consequence of a civil delict is an obligation (relative property right). Obligation is a relationship between a delinquent and a person harmed by the conduct of the delinquent. There is no third person who would interfere with their relationship, it is just between those particular persons.

On the contrary, committing a crime results in the criminal relationship between the criminal and the state. The content of such relationship is the right and duty of the **state** to punish such criminal and the corresponding duty of the criminal to accept such punishment. The will of the victim of such crime is not important.

Example of civil delict:

Let's imagine that you lend a book to your close friend for a month. After a month, you request it back since you need to start preparing for an upcoming exam. Your friend admits that he has lost it. As a result, you have a right for compensation because it was your book and he breached his contractual duty to return it to you. He may either compensate you by buying exactly the same book and giving it to you, or alternatively, by giving you a purchase price so you can buy a new book yourself. Nevertheless, you probably feel that it is just between you two to solve

the issue with a lost book. Equally you can be so generous and say to your friend that it does not really matter and not claim any compensation at all. It is just up to you, there is no third person who would interfere with. This is quite an obvious example of civil delict.

Example of crime:

On the other hand, let's imagine that you steal a purse of your friend. The purse was very expensive itself and moreover it contained CZK 7000 because your friend was going to buy a new mobile phone. Unlike civil delicts, this relationship arising out of theft (which is a crime defined in the criminal code) is not just between you and your friend. It is a state that interferes with criminal liability because there is a general interest of the whole society to punish criminals. So you may expect a police investigation and a punishment imposed by a criminal court. Even if you return the purse to your friend on a voluntary basis, you would still be investigated and eventually punished by the state. A possible forgiveness of your friend would be of no relevance in that.

You see that in case of civil delict only **compensation** matters (once you buy a new book or provide a money equivalent of the book, the relationship of you and your friend is settled), while in case of crime, compensation is not enough. Criminal liability imposes **repressive** and **preventive** function, so even if you compensate the victim (you return the purse and the money to your friend) you may still expect a punishment imposed by criminal court. Such punishment is believed to prevent people from committing crimes.

2. Preconditions for civil liability for damage to arise

There are four basic conditions which have to be cumulatively met in order for liability for damage to arise:

1. *Unlawful conduct*

First is **unlawful conduct** (breach of primary legal duty). That is an act which is contrary to law whether arising out of the statute, contract or good manners (that is rare in practice). If we want to talk about the liability for damage, we always have to ask whether some legal duty was breached at all.

In our example with the lost book, a friend breached his duty to return the book. It was his contractual duty arising out of the borrowing agreement. The first precondition for civil liability for damage to arise was thus met.

7.2.2.2 *Existence of damage*

Second precondition is the existence of damage. It can take two forms – an **actual damage**, i.e. property damage consisting in decrease, lowering, loss, destruction or other loss of value of the property. It corresponds to the property values which have to be spent to restore the property back to its original state (to the state it would have been in if there was no damage).

In the lost book case, the actual damage is the purchase price of the exactly same book. If you damage a car of your neighbour, the actual damage equals to a price he needs to pay to get it fixed.

The second form of a damage is a **lost profit**. It means that the property of the injured party has not increased due to unlawful conduct of the other party. Such profit must be, however, reasonably expectable. Some sort of hypothetical profit is not subject to a compensation.

Lost profit cases are quite typical in business contracts. Let's imagine that you ordered premium cotton with a delivery date by the end of this month since you have a customer who wants to buy from you 10 shirts for CZK 2000 each. According to the contract with your customer, you are obliged to deliver him 10 shirts by the end of next month. Unfortunately, your cotton supplier failed to deliver you cotton by the end of this month as agreed which means that you are not able to make the shirts on time. It is clear that you expected to earn CZK 20 000 for those 10 shirts but due to the failure of the cotton supplier you get nothing. CZK 20 000 is your lost profit which you can claim against the cotton supplier.

7.2.2.3 Causal link

Causal link between unlawful conduct (cause) and damage (consequence) must always be present in order to talk about liability for damage. It means that an unlawful act must **cause** a damage. There are two dominant theories how to determine whether a damage is a consequence of a relevant conduct.

- a) **Theory of but-for causation** which says that all actions without which certain harm would not have occurred are material causes of such harm. This theory is more suitable for criminal law because it is corrected by fault (see example below).
- b) **Theory of adequate causation** considers relevant those causes without which harm would not have occurred plus a damage is a **typical** consequence of such cause. It means that not all actions that somehow could lead to a damage are relevant, but only those actions that typically lead to such damage. Such damage must thus be a **foreseeable consequence** of such cause. This theory is more suitable for civil delicts where objective liability is possible.

Let's imagine the following example. During a car accident, an injury of one driver was caused. The injury was not very serious but it required medical treatment. An injured person was thus transported to the hospital, where, due to the medical malpractice of the doctors, the patient dies. According to the but-for causation theory, the driver causing the accident would be liable for the death of a patient because if there was no car accident, the patient would not require medical treatment, he would not have been transported to the hospital and thus there would be no death. BUT, you probably intuitively feel that such solution is absurd. The theory of adequate causation is more suitable in this case. According to this theory, the driver causing the accident is liable for the minor injury of the patient but not for his death. It is because the death is not a

typical consequence of such injury. If there was no malpractice of the doctors, the death would not occur.

So where is the theory of but-for causation usable? Mainly in criminal law where fault is always necessary to establish criminal liability. In the case described above, it is clear that the death was not a fault of the driver but of the doctors (at least in the form of negligence) so the criminal liability of the driver is not established even though we would conclude that the car accident was one of the relevant causes of the subsequent death. On the contrary, the driver's fault of the minor injury of the other person is clearly established.

7.2.2.4 Fault

Fault is the last precondition of a civil liability for damage but unlike the first three aspects (unlawful conduct, damage, causal link), fault **does not need** to be present in all cases. It is a subjective aspect which can be defined as an internal, mental relationship of the delinquent to his/her conduct and its consequences. It requires aspects of **knowledge** and **will**. Fault may take four forms:

- (i) First is a **direct intention** which means that you **know** (aspect of knowledge) that your conduct is unlawful and that you may cause damage and you **want** (aspect of will) to cause it.
- (ii) The second form of fault is an **indirect intention** which means that you **know** (aspect of knowledge) that your conduct is unlawful and that you may cause damage and you **do not want** to cause it but you accept that damage may be caused.
- (iii) The third form is a so called recklessness which means that you **know** that your conduct is unlawful but you unreasonably rely that damage will not be caused.
- (iv) And the fourth form is a so called negligence meaning that **you do not even know** that your conduct is unlawful but you should have known (ignorance of law excuses no man).

As we said already, crimes always require fault. Mostly in the form of intention (at least indirect intention), e.g. murder always requires intention. Sometimes, however, even negligence is enough to be criminally liable (causing bodily injury negligently is crime too).

Some civil delicts, on the contrary, do not require fault at all. It is called an **objective liability** or **liability for result** (e.g. damage caused by operation of means of transport, damage caused by animal or **all damage caused by the breach of contractual duty**).

Remember that breaching contractual duty does not require fault. This is quite a new concept in civil law established by the Czech Civil Code effective as of 2014. It makes the position of the claimant (a person injured) much easier since it is not necessary to claim or prove the subjective aspect. In the example of the lost book it would thus be sufficient to prove that your friend breached a duty to return the book (unlawful conduct), how much was the book (actual

damage) and causal link is obvious here (his breach led to your loss). You see that it is absolutely irrelevant why your friend lost the book. He is simply liable for the result – losing your book.

3. Delictual capacity v. criminal capacity

1. *Delictual capacity*

If the liability is subjective (fault needed), a person must have capacity to commit delict, otherwise he/she is not liable. This so called delictual capacity includes two aspects: **an intellectual one** which means the capacity to presume the consequences of one's own conduct, and an aspect of **will**, i.e. the capacity to control one's own conduct. Both aspects must be present simultaneously in order to establish delictual capacity.

Human beings gain full delictual capacity at the age of 18 (positive assumption) provided that they do not suffer from any mental illness which would exclude the intellectual aspect or the aspect of will (negative assumption). Human beings who do not meet those two assumptions for full delictual capacity may, however, have still limited delictual capacity. It is the case of children (youths who did not reach 18 years) or persons who suffer from some sort of mental illness. It is up to the court to consider case by case whether such person was able to presume the consequences of his/her conduct and whether he/she was able to control his/her conduct. In case of children, the closer the child gets to the age of 18, the more likely he/she is going to be held at least partially liable. Jointly liable with such child or a person suffering from mental illness is a person who neglected supervision upon them (typically parental supervision). In case a very young child who could clearly not control his/her behaviour and is therefore not liable at all, causes a damage, it is only the parents who are fully liable.

It is important to note that using drugs or alcohol which objectively influence our ability to control our conduct does not exclude or limit our liability.

If the liability is objective (no fault needed, liability for result), a person causing the damage does not have to have delictual capacity and is still liable.

What about legal persons (corporations)? They get delictual capacity since their **incorporation**, i.e. their registration in the commercial register.

7.2.3.2 *Criminal capacity*

In the Czech Republic, every human being is criminally liable once he/she reaches 15 years of age and sanity (the capacity to presume the consequences of their own conduct and the capacity to control their own conduct). Youth criminals (who reached 15 years but did not reach 18 years of age) must moreover be sufficiently mature in order to be liable. This is to be considered case by case.

Contributory fault

If the damage was partly caused (or was increased) by the fault of the injured party, the injured party is partly liable and the liability of the breaching party is lowered accordingly. Typically in case of a car accident with a cyclist. Even though the car driver caused an accident and the cyclist suffered serious injuries, we always have to think whether the cyclist could have avoided or at least lowered his injuries by e.g. wearing the helmet. It would be the question for expert opinion to say whether wearing the helmet would affect the scope of the injuries and how.

7.2.4 How is the damage compensated?

The Czech Civil Code is based on the preference of **restitution**, i.e. a return to previous state. In the case of lost book, the preference would be that your friend buys you a new book. There are two exceptions from the restitution. First, sometimes restitution is not possible. E.g. if somebody damaged your original painting from Picasso, you can hardly be compensated by some other painting, it is just unique. The other exception is the case when the injured party requires pecuniary (money) compensation rather than restitution. So if you say to your friend that you require the purchase price of the book rather than buying a new book, he is obliged to provide you with the money.

3. Compensation for personal injuries

So far we talked mainly about damage, i.e. material harm which is relatively easy to express by money equivalent. If you remember the case with the lost book or damaged car, the damage in those cases can be quite easily determined because it equals to the loss of value of some property.

But what about personal injury? If a person is injured by somebody else, it is obvious that an injured person suffered harm (non-pecuniary) which is, however, not that simply expressible by money equivalent. However, such non-pecuniary harm is always to be compensated by reasonable satisfaction **in money**.

What are the potential claims of a person injured?

There are several potential claims a person injured can claim against a person who caused the injury. Again, in order to establish liability at all, the three, or four basic assumptions must be met: unlawful conduct, harm (injury), causal link and (fault – this is not the case of e.g. injury caused by operating means of transport because such liability is objective).

1. Compensation of pain and suffering

When personal injury is caused, it is always linked to some degree of pain and suffering. The intensity of that differs according to the seriousness of the injury. The aim of the compensation is to fully compensate pain and other non-pecuniary harms which include stress, discomfort, and fear from serious health injuries or death. It is of course not possible to calculate pain or stress in money but the Supreme Court created guidelines on the compensation of non-

pecuniary loss for personal injuries which contain a set of rules granting the compensation of such injuries. Such guidelines are supposed to create legal certainty and help judges to apply general legal rules on particular cases. The guidelines are based on the system of points. In each case an expert (a medical doctor) should examine a patient and allocate certain number of points to each pain he/she suffered. One point equals to 1 % of an average gross monthly salary (in 2014 it was a gross amount of CZK 251 for 1 point). This system is more flexible than the previous one which allocated CZK 120 to one point. If the economy grows, the compensation for personal injury will grow too. It is, however, still very low. Just to make few examples, if somebody breaks your rib, you get a compensation of approximately CZK 5000. For a broken tight, you would get CZK 38 000.

7.3.2 Compensation for aggravation of social position

Another dominant compensation a person injured can get is a compensation for aggravation of social position. It is important to note that this compensation comes into play only in case of **permanent consequences of the harm**. If a person suffers an injury which did not have permanent consequences, he/she does not have this claim at all (unlike pain and suffering compensation). To be able to say whether a person has any (and what) permanent consequences, it is necessary to wait for some time, usually one year, to let the health condition get stabilized.

Such compensation then includes **limitations in all thinkable aspects of human life**, mainly work, communication, movability, self-care, life in household. This concept is really wide and includes also frustration from permanent injury, stress, loss of opportunities, an abstract loss of the ability to be employed and to participate in all aspects of human life.

The seriousness of the permanent injury is expressed as a percentage of loss of life opportunities (loss of better future) in all aspects of human life. Here again, the guidelines of the Supreme Court are applicable. In case of 100 % limitation in all aspects of human life, i.e. a person is still alive but basically cannot participate in any aspects of human life, the compensation equals to CZK 10 051 200. It is again up to the court in the cooperation with the expert to determine the percentage of such limitation in each aspect of human life. It should be applied on the case-by-case basis, i.e. the court should distinguish whether such permanent consequences were suffered by a young or old person, whether a person was active in some sport or whether there are any further circumstances which would justify an increase of the compensation. According to the guidelines, the courts have a possibility to increase the compensation by 10 % if the harm was caused to a person in the age of 35 – 44, by 20 % if the harm was caused to a person in the age of 25-34 and by 30 % for a person in the age of 0-24. On the contrary, the base amount is decreased by 10 % in case of 55-69 years old person or by 20 % in case of a person 70 years old or older. The courts shall take into consideration also the activity in social life of an injured party before the injury. The compensation can be increased by 10 % if a person was more active than average, by 20 % if its activity was exceptionally intense, by 30 % when absolutely extraordinary.

7.3.3 Compensation of pecuniary loss as a result of personal injury

Usually also some pecuniary losses are connected to personal injury such as medical bills, loss of income (in case a person injured was either employed or self-employed), loss of pension.

In case of death, it is clear that a victim has hardly any claims against a person who caused it. However, there may be a number of persons who suffer mentally from such death. They are especially a husband, a parent, a child but even other close persons. These persons have a right to be compensated financially for their **mental suffering**. The guidelines of the Supreme Court are not applicable to these secondary victims and thus it is only up to the courts to determine the exact amount. The amount will of course depend on the closeness of relationship with the victim or for example on the dependency on the victim (typically in case of a child-parent relationship).

In its case law the Supreme Court expressed the opinion that in a standard case (if there are no specific circumstances such as a special relationship between a person who died and his/her relative), the basic compensation for a child, parent and husband should be CZK 240.000 – 500.000 each.

7.4 Summary

This chapter addressed the basics of the civil liability in the Czech Republic and how it differs from the criminal liability.

Civil liability is of private nature and its main goal is to compensate a person harmed, while criminal liability is of public nature meaning that it is a state that investigates criminal offences and punishes criminals.

The general conditions of civil liability are (i) unlawful conduct, (ii) existence of damage, (iii) causal link between unlawful conduct and the damage, (iv) fault (fault, however, does not need to be present always – objective liability).

If the liability is subjective, a person must have capacity to commit delict, otherwise he/she is not liable. Such capacity includes an intellectual aspect and an aspect of will. Human beings in the Czech Republic gain full delictual capacity at the age of 18 provided that they do not suffer from any mental illness which would exclude the intellectual aspect or the aspect of will. Legal persons gain their full delictual capacity upon their incorporation.

Criminal capacity is a capacity to commit a crime and is gained at the age of 15 on the condition of full sanity. The youths between 15 and 18 years old must moreover be sufficiently mature to consider consequences of their criminal behaviour in order to be liable.

The Czech Civil Code prefers the compensation of damage in the form of **restitution**, i.e. the return to the state before the breach. Thus, if you lose the book of your friend, you should primarily buy exactly the same book and return it to your friend rather than paying the purchase price. There are, however, two exceptions from this rule. First, if the harmed party wishes money equivalent rather than restitution, such pecuniary compensation prevails. Second, if

restitution is impossible (e.g. it is not possible to get such book in the shops anymore), the pecuniary compensation also prevails.

Personal injuries (non-pecuniary harm) is always to be compensated by reasonable satisfaction **in money**.

7.5 Self-assessment questions

1. What are the general requirements for liability for damage to arise?
2. What potential claims does a person injured by some other person have?
3. When does a natural person obtain full delictual liability?
4. What does the theory of adequate causation mean?
5. How is the property damage primarily compensated? What are the exceptions?

7.6 Further reading

Selected provisions (section 2894 and subseq.) of the Czech Civil Code no. 89/2012 Coll., in English available at: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

Chapter 8. Labor Law

1. Labour relations

Labour law regulates relations between the employers and the employees. These are the relations arising in connection with the performance of **dependent** work. A dependent work (as opposed to entrepreneurship) is carried out within the relationship of the **employer's superiority and his employee's subordination** in the **employer's name** and according to the **employer's instructions** (orders) and that is performed in person by the employee for his/her employer, performed for **wage, salary or other remuneration**, at the **employer's cost and liability**, at the employer's **workplace** or some other agreed place within the **working hours (40 hours weekly)**.

An entrepreneurship is, on the contrary, defined by independency, it is a profit-making activity carried out on the entrepreneur's own account and responsibility with an intention to do so systematically and for the purpose of making the profit.

2. Sources of the Czech Labour Law

The basic source of the labour law in the Czech Republic is the act no. 262/2006 Coll., Labour Code, as amended. Also, labour law is regulated by the act no. 435/2004 Coll., on Employment, as amended, an act no. 2/1991 Coll, on Collective Bargaining, as amended, and further acts.

3. Basic principles of labour law

Even though labour law belongs rather among private law fields (as civil law, commercial law, family law etc.), the labour relationships are much more strongly regulated than other private relationships. The freedom of contract in the field of labour law is limited and the employee who is understood a weaker party is protected.

The labour law is thus characterized by several basic principles, such as the specific legal protection of the employee status, requirement of satisfactory and safe working conditions for performance of work, fair remuneration for an employee as well as a proper performance of work by an employee in accordance with the employer's justified interests and the equal treatment of employees and prohibition of their discrimination (i.e. principle of equal treatment for all employees as regards working conditions, remuneration for work, vocational (professional) training and opportunities for career advancement (promotion).

1. Prohibition of discrimination

As is mentioned above already, one of the basic principles of labour law is the prohibition to discriminate employees as regards their working conditions, remuneration for work, vocational

training and opportunities for their promotion. The main principles of prohibition of discrimination can be found in the act no. 198/2009 Coll., on Equal Treatment and on the Legal Means of Protection against Discrimination and it relates also to the access to employment. Equal treatment is thus required even before employment relationship commences (interviews, job advertisements etc.).

The act distinguishes direct and indirect form of discrimination where both forms are equally prohibited. **Direct** discrimination is more obvious, easier to identify. It can be defined as treating one person less favourably than other person in a comparable situation, on the basis of sex, race, ethnical origin, nationality, religion, age, sexual orientation, health disability, etc.

A typical example of a direct discrimination would be different remuneration of men and women or job advertisement looking only for male lawyers because the boss of the law firm believes that men are better lawyers than women.

The **indirect** form of discrimination means the application of a seemingly neutral provision, criterion or practice which however leads to the less favourable position of one person against others.

Imagine that 20 % of all employees in the firm are women taking care of small children and for this reason working only afternoons. The boss who is aware of that starts organizing morning trainings for all employees which subsequently leads to the promotion of the employees who attend them. At first sight, such practice seems to be equal for all employees because *in theory*, every employee can attend the trainings. However, due to the fact that all mothers work only the afternoons and thus cannot, *in practice*, attend the trainings and thus achieve the promotion. They are indirectly discriminated as regards career advancement.

8.3.1.1 Exceptions from prohibition of discrimination

Even though prohibition of discrimination is a general and broad principle, there are few exceptions from such prohibition. It means, there are cases when unequal treatment is not prohibited, simply because it is, for some reason, justified.

The first category of such exception relates to the nature of occupational activities. If the nature of work requires different treatment, such unequal treatment is justified and thus not prohibited.

E.g. If you require a couple of dancers and you already have a man, you can require that only women apply for the position without breaching discrimination prohibition.

The second category relates to the protection of specific groups of employees such as pregnant women or disabled persons.

E.g. If an employer requires that all employees work full time (does not allow for part-time jobs in his/her firm) except for pregnant women who can get flexible part-time job upon their request, it is quite obvious that such treatment is unequal for the benefit of the pregnant women who belong to the protected group and thus it is justified.

And the third category of exceptions belong to specific jobs where requiring minimum age, specific qualification or duration of practice is necessary for its due performance. It relates to the positions of judges, attorneys, architects, auditors etc.

4. Subjects of labour relations

The labour relationship is two-sided with an employer on one side and the employee on the other. An employer can be any natural or legal person (it is very common to be employed by the corporations represented by its directors). The capacity of an individual to assume rights and duties in labour relations as an employer through own legal acts arises on the attainment of the age of 18 years. Legal persons gain such capacity upon their incorporation, i.e. typical upon their registration in the commercial or other register. An employee, on the other hand, can only be a natural person with the capacity to bear rights and duties as an employee as well as the capacity to acquire these rights and take on such duties through his own legal acts. Such capacity is gained on the day such person reaches the age of 15 years on the condition that he/she has completed the compulsory education.

5. Establishment of an employment relationship

In the vast majority of cases the employment relationship is established by the employment contract, i.e. a bilateral legal action. An employment contract requires a written form but if the contract was concluded orally and the employee starts working according to the contract, the employment relationship has been validly established even without an employment contract. This is an expression of the special protection of an employee principle. On the other hand, if an employment contract has been concluded only orally and an employee changes his/her mind and does not start working according to such contract, an employer cannot force him/her anyhow since there simply is no employment contract. The protection relates only to the employee. The employer who is understood a professional should have known that employment contract requires a written form and cannot benefit from the orally (and thus invalidly) concluded contract.

1. Mandatory terms of an employment contract

An employment contract may be very simple. Its obligatory contents include only (i) the type of work to be carried out by the employee, (ii) the place or places where an employee will perform work and (iii) the date of commencement of an employment. Why are these terms so necessary? First, the type of work matters so much because it clearly defines the working duties of an employee. It says what activities an employee is obliged to do according to the contract and what activities not.

Imagine that a lady is hired by a law firm as a receptionist. She is thus obliged to answer the phones, welcome clients, etc. If the boss requires that she starts vacuum cleaning the whole office or doing his/her personal shopping, these activities are clearly outside the scope of the contract (out of the scope of receptionist's work) and thus she is not obliged to do them.

The place of work means usually the specification of town, it is thus not necessary to include a precise address since it would be very impractical to amend all the employment contracts in

case of moving the employer to another office. However, it is necessary to specify the town(s) because it again protects an employee who cannot be required to move to a different town for work.

E.g. if an employer is based in Prague but has a subsidiary in Brno, it is possible that he/she will require that some of the employees go from time to time to Brno to do some work over there. The employees who have Prague as their place of work in the contract may refuse to go to Brno because they are simply not obliged to go there. And if they agree to go, it will be considered a business trip with all the compensation such as travel costs, meal vouchers etc.

The date of commencement is an obligatory element of any employment contract because that is the day on which an employee is obliged to start performing the work according to his/her employment contract within the scheduled weekly working hours and comply with the duties arising from his employment relationship and an employer is obliged to assign work to an employee, pay the wage and create all conditions for due performance of work.

You may have noticed, from your own working experience, that usually an employment contract includes also a wage, a trial period or holiday (4 weeks for private sector and 5 weeks for state employees). Those are very common but not obligatory elements of such contract. Thus they might be missing in the contract as such and may arise from some internal rules of the employee. Such solution is quite practical because they may be easily changed by a unilateral amendment of such internal rule without the need to amend all the employment contracts.

Apart from employment contract which is definitely the most common way of establishing an employment relationship, such relationship can arise also out of an appointment. An appointment relates, however, mostly to the top managerial positions in the public sector and we are not going to describe it in detail here.

8.5.2 Term of employment

An employment relationship may be agreed to last for a specific period of time or for an indefinite period. As we know already, the term is not an obligatory element of an employment contract so what if a specification of term is missing in the contract? In such case the term of an employment is for an indefinite period which is convenient for an employee (as we explain in the subchapter about the termination of an employment relationship below). The same is valid in case both parties agree that the employment shall last for more than 3 years – such contractual provision is invalid and thus indefinite period of employment applies. You can see that the contractual freedom is limited for the benefit of the employee for whom the indefinite period is convenient. To sum it up, an employer and an employee may agree in the contract on the term of up to 3 years. If they agree on longer term or if they skip this element (which is not obligatory), the term is automatically for an indefinite period of time.

Another form of protection of an employee relates to the continuation of employment after the expiry of the fixed term. Where after expiry of the agreed term (up to 3 years) the employee continues to perform his/her work and the employer is aware of it, such employment relationship shall be deemed to change into an employment relationship for an indefinite period.

8.6 Termination of the employment relationship

An employment relationship may be terminated by several specific legal reasons: (a) mutual agreement; (b) termination within the trial period; (c) notice of termination; (d) immediate termination, (e) death of an employee, (f) the expiry of the agreed period (in case of fixed-term employment).

(a) Agreement on termination of the employment relationship

An agreement to terminate employment relationship is definitely the smoothest way how to terminate an employment. It is simple and quick and the only thing that both parties must adhere to is an obligatory written form of such agreement. This agreement, as any other agreement, is a bilateral legal action which means that both an employer and an employee must agree with such termination – and that is usually the problem due to which many employments must be terminated by other ways. If, however, both parties agree to terminate the employment relationship, they also agree on the date as to which the relationship ends and possibly to some other conditions.

(b) Termination within the trial period

The trial period is an agreed period between an employer and an employee which starts in the beginning of the employment and lasts up to three months. The goal of the trial period is to allow both parties to find out whether they are happy in this type of relationship and if they wish to continue further. During this period, the relationship is very flexible for both parties and it is very easy (compared to the rest of the term) to terminate it. Both parties may, if they are not happy, unilaterally terminate employment within this period immediately even without stating the reason. Such termination must be in writing and must be delivered to the other party but apart from that, it is very informal. The mere letter stating that the employee terminates the relationship within the trial period and does not show up at work next day is completely lawful. Such termination must be made on the last day of the trial period at the latest.

(c) Notice of termination

In case that one party of the employment relationship wishes to terminate it but the above mentioned ways (an agreement or termination within trial period) cannot be used (e.g. because the other party does not agree or the trial period has already elapsed), the employment relationship may be unilaterally terminated by a notice of termination.

The notice of termination must again be in writing and must be properly delivered to the other party. While an employee may terminate the employment by notice for any reason or even **without any reason**, an employer may terminate the employment with an employee only for specific reasons. These reasons are:

- (i) the employer's undertaking, or its part, is closed down;
- (ii) the employer's undertaking, or its part, relocates;
- (iii) the employee becomes redundant owing to the decision of the employer to change the activities (tasks), to reduce the number of employees for the purpose of increasing labour productivity (efficiency);

- (iv) the employee is not allowed to perform his/her current work due to an industrial injury, an occupational disease or due to threat of an occupational disease;
- (v) the employee has lost, long-term, his/her capability to perform his/her current work due to his/her state of health;
- (vi) there are reasons on the employee's side due to which the employer could immediately terminate the employment relationship, or if the employee has seriously breached some obligation arising from statutory provisions and relating to work performed by him/her.

In case that the employment relationship is terminated by the notice (by any party), an employment will come to an end upon the expiry of the notice period lasting 2 months.

E.g. An employee delivers the notice of termination to the employer on 15 September 2018. The notice period of 2 months starts on 1 October (always from the next month following the delivery of the notice) and will elapse on 30 November. The employment ends on 30 November 2018.

If the employer terminates the employment relationship for the reasons stated in a) – c) above, the employee is entitled to receive **redundancy payment** at least in the amount equal to once his/her average (monthly) earnings if an employment relationship to the employer lasted less than one year, twice his/her average monthly earnings if an employment relationship to the employer lasted at least one year and less than two years, triple his average monthly earnings if an employment relationship to the employer lasted at least two years.

(d) Immediate Termination of an Employment Relationship

Apart from the notice of termination, both parties may unilaterally terminate the employment relationship by an immediate termination which means without any notice period. Such immediate termination, however, requires a serious reason for both parties. It is thus, as opposed to the termination notice, not that easy for an employee to terminate the employment immediately. Again, such termination must be done in writing and must be properly delivered to the other party. If an immediate termination is valid, the employment relationship ends upon the delivery of the termination.

An employer may immediately terminate an employment relationship only:

- (i) if an employee has been sentenced, under a final verdict, for an **intentional** criminal offence to a term of an unconditional imprisonment of **over one year** or **for an intentional** criminal offence committed in connection with the performance of work to a term of an unconditional imprisonment of **over 6 months**.
- (ii) if an employee has breached an obligation that arises from the statutory provisions and relates to his/her work performance in an **especially gross manner**. What constitutes such a vague notion of “especially gross manner” has to be considered case by case. You would probably agree that being 5 minutes late in the morning is not that serious breach which could justify an immediate termination to such employee. Also, you probably feel that having some residual alcohol in blood after the birthday party is

different in case of a secretary and in case of a bus driver. Quite a typical example of such especially gross breach is an embezzlement of an employer's assets.

An employer may **never**, however, immediately terminate the employment relationship with an employee belonging to the protected group such as pregnant woman, a female employee who is on maternity leave or an employee who is on parental leave. These employees fall under the specific protection which does not mean that even if they commit some serious breach, an employer cannot fire them – it only means that an employer cannot give them an immediate termination but will need to terminate such employment with a notice period.

An employee may immediately terminate his/her employment relationship only if:

(i) an employee cannot perform his/her work any longer without a serious threat to his/her health and the employer has not transferred the employee to perform some suitable alternative work within 15 days

(ii) an employer has not paid the wage within 15 days after the due date

An employee who immediately terminated an employment relationship is entitled to receive compensatory wage in the amount of his/her average earnings for a period equal to the length of the notice period (2 months).

(iii) the employment relationship always ceases by death of an employee

(iv) if the employment was agreed as fixed-term, it also ends upon the expiry of the agreed period.

8.6.1 Void Termination of an Employment Relationship

Most legal disputes in the field of labour law relate to the termination of an employment relationship which one of the parties considers void. Such nullity of the termination (either notice of termination or an immediate termination, rarely the agreement to terminate an employment relationship) may be caused by e.g. oral instead of written form of such termination, the lack of proper delivery of such termination to the other party or absence of valid reason to terminate (apart from the notice of termination given by an employee who does not include any reason). Such nullity can be claimed by either party before the competent court (district court in the district in which the seat of the defendant is) within two months after the employment relationship was supposed to end according to such termination.

E.g. An employer gives the notice of termination to an employee on 20 September 2018. An employee, however, considers it invalid because it does not include a legal reason for such termination. According to the notice, the employment relationship would end on 30 November 2018 (2 month notice period). On 1 December 2018 thus starts a period of 2 months for filing an action before a competent court. Such action must be filed on 31 January 2019 at the latest.

But what happens in the period before the competent court decides whether the termination was valid or not? It is clear that both parties are in dispute – one claims that the employment relationship has already finished and the other claims that the employment relationship still lasts. If notice or the immediate termination given by the employer is void, the employee should

inform the employer in writing that he/she insists on being further employed by this employer, the employer shall thus pay compensatory wage or salary to this employee for the period before the legal dispute is resolved. We talk about compensatory wage because obviously the employee does not work during this period (because the employer does not count with him/her anymore) but since the termination was invalid, formally the employment relationship lasted and thus an employee is entitled to get his/her money.

If notice or the immediate termination given by the employee is void, the employer should notify this employee in writing of his/her insistence on the employee's continuation of work performance. If the employee does not comply with the employer's notification, the employer may apply for compensation of damage caused.

E.g. Imagine that an employee was supposed to work on a very important project which had to be finished on a specific date. The employee terminated his/her employment relationship by a notice which the employer considers invalid (for example because it was oral). If the employer notifies the employee that he/she insists on the employee's continuation of work performance on this project and the employee does not comply with that, the employer can apply for compensation of damage caused by not finishing the project on time (suppose that the employer does not get paid for the project by his client).

7. Liability for damage caused by the employee

An employee can, while performing his/her work tasks, cause a damage to his/her employer. For example if a worker breaches, by accident, a very expensive machine or if a junior lawyer misses the deadline for filing an action to the court and thus loses the case or the bus driver having an accident and destroys a bus. All of these breaches lead to damage on the side of the employer and may, sometimes, way exceed the earnings of the employee. As we said in the beginning of this chapter, labour law is based on the principle of a special protection of an employee which is visible also in these kind of cases. The liability of an employee is usually limited to 4,5 times of average monthly wage of such employee. It means that an employee earning CZK 20 000 monthly will be liable for CZK 90 000 maximum even if he/she causes much bigger damage. Such limitation, however, does not apply if the damage was caused intentionally or under the influence of alcohol or other drugs.

In order to hold an employee liable for damage at all, the general conditions for such liability must be claimed and proved. They are (i) breach of duty of the employee, (ii) damage on the part of an employer, (iii) causation, and (iv) **fault** – in the form of negligence or intention. For more details about the general conditions of liability for damage see the respective chapter.

8. Agreements on work performed outside an employment relationship

So far we have focused on an employment relationship established by an employment contract. In practice, however, sometimes more flexible legal forms of performing work are of bigger use. Typically, if you look for a summer job or some part-time flexible job during your studies, it may be cheaper and more flexible for both parties to choose other form of cooperation than an employment contract. The two basic forms for such work are:

- (i) An agreement to complete a job, and
- (ii) An agreement to perform work.

Both agreements are less formalized but must still be in writing. The flexibility consists in their easier and quicker termination for both parties (notice period of 15 days rather than 2 months), it usually does not include any right for paid holiday which makes it cheaper for the employers.

Agreement to Complete a Job

The work performed under this type of contract may not exceed 300 hours in one calendar year for one employer. It is thus suitable for ad hoc works or even regular works with limited monthly hours. If the earnings do not exceed CZK 10 000, the health insurance and social security insurance is not payable so net earnings are relatively high. On the other hand, if such employee gets sick, he/she has not right to obtain sickness benefits.

Agreement to Perform Work

The work performed under this type of contract may not exceed 20 hours per week (1/2 of the standard working hours). Health insurance and social security insurance is payable once the monthly salary exceeds CZK 2500.

8.9 Summary

This chapter addressed the basics of labor law in the Czech Republic.

Labor relationships were distinguished from entrepreneurship and the notion of a dependent work was defined. Even though labor law belongs rather among the private law disciplines, it is regulated much more strictly for the benefit of an employee who is understood a weaker party.

The basic principles of labor law are thus a specific legal protection of the employee status, requirement of satisfactory and safe working conditions for the performance of work, fair remuneration for an employee as well as a proper performance of work by an employee in accordance with the employer's justified interests and also equal treatment of employees and prohibition of their discrimination. The special protection of employees is expressed also by the limitation of their liability for damages which is an exception from other civil liabilities.

An employment contract which is the dominant legal title for establishing the employment relationship must include the type of work, the place of work and the commencement date. All other elements are optional.

An employment relationship may be terminated for several specific legal reasons: (a) mutual agreement; (b) termination within the trial period; (c) notice of termination; (d) immediate termination, (e) death of an employee, (f) the expiry of the agreed period (in case of fixed-term employment).

8.10 Self-assessment questions

1. What are the basic features of every employment contract?
2. The easiest way to terminate the employment for both parties is to terminate it in the _____ period.
3. Compare an entrepreneurship with a dependent work.
4. For how long is the employment concluded if no specific term is stated in the contract?
5. Name at least three ways how to terminate the employment relationship.
6. Is the liability of an employee for damage somehow limited? If so, how?

8.11 Further reading

Selected provisions of the Czech Labour Code no. 262/2006 Coll., in English available at:
https://www.mpsv.cz/files/clanky/3221/Labour_Code_2012.pdf

PICHRT, Jan a Martin ŠTEFKO. *Labour law in The Czech Republic*. Second edition. Alphen aan den Rijn, The Netherlands: Kluwer Law International, [2015]. ISBN 9041156739.

Chapter 9. Litigation

9.1 Definition

The preceding chapters mostly related to substantive law, i.e. to the law which defines rights and duties of individuals. The knowledge of substantive law is important but without the knowledge of procedural rules, it is of little practical use. In other words, you have to know what your right is but also you need to know how to enforce such right. And the set of procedural rules defining how to enforce substantive law is what we call **procedural law**. The legal proceeding in a court is then called litigation.

The purpose of litigation

The purpose of litigation is thus to enforce rights or duties stemming from substantive law.

E.g. If you enter into the loan agreement as a creditor, the loan agreement says that a debtor is obliged to return you the money in one year. That is what we call substantive law because it clearly defines your right. If, however, the debtor does not return the money to you in one year, you have to enforce your substantive right before the competent court to actually get the money back. That is what we call litigation.

From the legal point of view it is quite simple. If you have a substantive right, you can file an action before a competent court to enforce such right. Is, however, a business point of view always the same as the legal one? There are many cases where a person has a right and does not file an action. Sometimes you have to think whether it is worth to enforce your right or not from the perspective of the costs and benefits of such action. It is always the decision made under uncertainty because you never know surely if your action will be successful, what the costs of litigation will be and how much you actually get in the end. For that reason, not all substantive rights are actually enforced in practice because it is not always worth it. We can conclude that from the business point of view, the purpose of litigation is to find an efficient and fair resolution of a dispute.

The subjects of litigation

The subjects of any litigation always include a **court** with its independent position and the **parties** of a dispute. The function of the court is to hear both parties and fairly decide the case. The position of the parties is usually contradictory – they have the opposite interest. These parties are called a **plaintiff and a defendant**. The plaintiff (together with his/her solicitors) sits on the right hand side of the justices and the defendant on the left hand side of the justices.

The types of procedure in the Czech Republic and the judicial system

The basic types of procedures in the Czech Republic are civil, criminal and administrative ones and a special constitutional procedure. The court system in the Czech Republic is pretty simple. Most civil law cases start before district courts which are the lowest instances. Only more specific, complicated civil cases will start straight at the regional level (regional courts) such as intellectual property cases, disputes arising out of mergers and acquisitions, competition law

disputes etc. Similarly, most criminal cases start before a district court and again, more serious criminal cases start straight at the regional level, such as all crimes punishable by deprivation of liberty for a minimum of 5 years, crimes allowing for exceptional punishment (lifetime imprisonment), acts of terrorism, human trafficking etc. The administrative cases typically start before regional courts and rarely (matters relating to political parties or disputes about authority of different courts to resolve the case) before the Supreme Administrative Court which is a specialized court for solving administrative cases. The special constitutional law cases are resolved before the Constitutional court which is a separate judicial authority, standing outside the system of ordinary jurisdiction.

9.2 Judicial system in the Czech Republic

The judicial system in the Czech Republic consists of the “ordinary system of courts” (district courts, regional courts, high courts, the Supreme Court and the Supreme Administrative Court) and the Constitutional court which stands outside the ordinary system of courts.

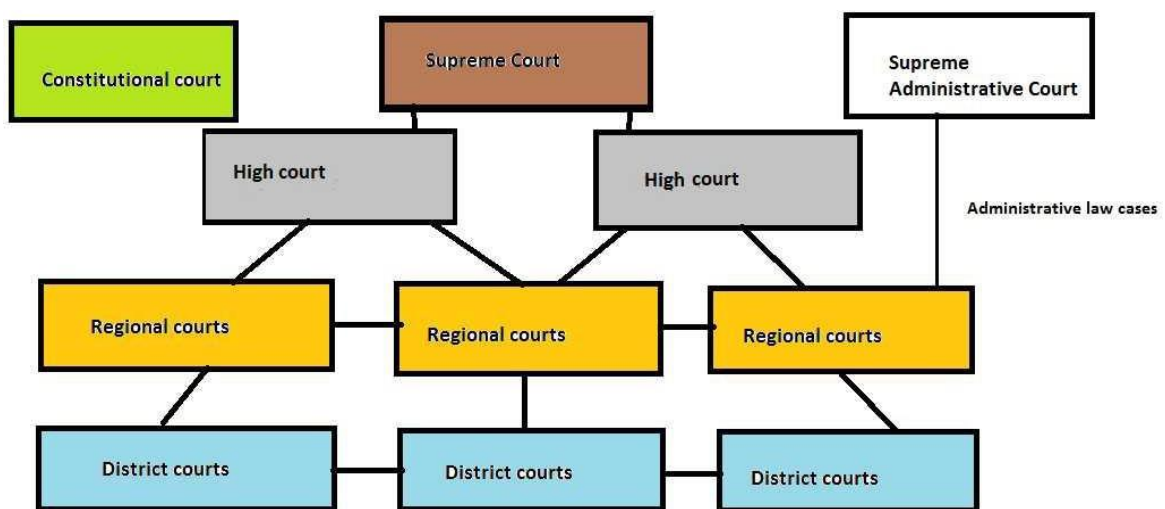


Figure 1 Judicial system in the Czech Republic

District courts

There are 74 district courts in the Czech Republic and these courts decide most civil and criminal cases as the courts of first instance. They mostly decide by a single judge and rarely by a chamber composed of one judge and two lay judges (labour law cases, criminal law cases punishable by deprivation of liberty for a maximum of 5 years).

Regional courts

There are 8 regional courts in the Czech Republic and they mostly work as appellate courts in civil and criminal law – in that case they always decide by senate composed of three judges. They, however, also decide some severe criminal cases, highly specialized civil (commercial) law cases and all administrative law cases as the courts of first instance. If a regional court is a first instance court, it usually decides in a chamber and where stated by law, it decides by a single judge (some commercial cases, insolvency cases).

High courts

There are two high courts in the Czech Republic (Prague and Olomouc) and these courts decide appeals in cases where a regional court was the first instance court. They always decide in chambers.

Supreme Court

The Supreme Court is the highest instance in all fields except for administrative law cases (for which the Supreme Administrative Court has been established). The seat of the Supreme Court is in Brno and it decides cases only in chambers. Its main function is to unify case-law by deciding about extra-ordinary remedies and writing opinions on judgements of lower courts.

Supreme Administrative Court

The Supreme Administrative Court is the highest instance in administrative law, its seat is again in Brno and it also decides in chambers. Most of its agenda is composed of extraordinary remedies in the field of administrative law (cassation complaint). It also decides some specialized administrative law cases as a first instance court (disputes relating to political parties, disputes about the authority of different courts to decide a case etc.).

Constitutional Court

As was already mentioned, the Constitutional Court is out of the ordinary judicial hierarchy. Its seat is also in Brno and it serves as the main body for the protection of the Constitution. Its tasks include the review of the constitutionality of statutes and the protection of constitutional order and fundamental rights guaranteed by the Constitution.

The Court consists of 15 Justices, all appointed by the President with the consent of the Senate. The Justices are appointed for a 10-year term of office, and there is no restriction on their reappointment.

9.2.1 Administrative justice

As is already stated in the above sub-chapters, the administrative cases are resolved by the specialized chambers of regional courts and by the Supreme Administrative Court. The aim of the administrative justice is to protect the **public** subjective rights of individuals and legal persons.

In particular, the Courts of administrative justice decide on:

- a) complaints against decisions made in the sphere of public administration (these create the vast majority of the whole workload of administrative courts and they may relate to e.g. review of decisions on permanent residence, decision imposing a fine for damaging environment, decision imposing a fine for illegal employment etc.),
- b) protection against the inaction of an administrative authority (e.g. you apply for building permit to the building authority and the building authority has not decided within the statutory deadline – you may file an action before the administrative court who can then issue an order to the building authority to take a decision),
- c) protection against an unlawful interference of an administrative authority,
- d) competence complaints (disputes over the authority of different courts to decide a case).

Courts of administrative justice furthermore decide on

- a) election matters and in the matters of a local referendum, and
- b) matters concerning political parties and political movements.
(Act no 150 / 2002 Coll, Code of Administrative Justice).

9.2.2 The civil/commercial litigation

The aim of civil litigation is to protect, as opposed to the administrative one, **private** subjective rights of individuals and legal persons by deciding legal disputes in the field of private law (civil law, family law, commercial law, corporate law, IP law etc.).

The rules of litigation are set by the Civil Procedure Code (Act no. 99/1963 Coll.).

Such litigation is initiated upon a motion of a plaintiff who submits an action before a competent court. Thus, typically there must be a plaintiff who submits an action in order for the court proceedings to commence (with some exceptions where a court can initiate a proceedings itself, such as custody over minors' cases). The plaintiff has to pay a court fee for the initiation of the litigation (the amount differs depending on the type of proceedings – for example in case of an action for payment the fee is 5 % of the requested amount). Such fee is an income of the state budget and helps to finance the judiciary system. If the plaintiff does not pay the fee, the litigation will be stopped by the court except for cases when the plaintiff cannot afford paying it without endangering his/her sustenance (ill people who cannot work, retired people who spend most of their pension for rent etc.). In such case, the court may relieve the plaintiff of his/her duty to pay a court fee.

It is not necessary to be represented by an attorney before a court of ordinary jurisdiction except for filing an extraordinary remedy to the Supreme Court.

An action to be complete must include:

- a) Name of the court it is addressed to
- b) Names of both parties of the dispute and their address (including their representatives)
- c) Type of the action (what is claimed)
- d) Description of relevant facts
- e) Description of evidence suggested by the plaintiff
- f) The particular plea (a suggestion how the court should decide)
- g) Date and signature

If some of these elements are missing, the court will request their completion.

How can such an action look like?

To the District Court of Prague 3

Plaintiff: Jan Novak, Italska 8, Prague 2

Defendant: David Richter, Seifertova 20, Prague 3

Action on damages

On 8 August, 2017, the defendant drove his car negligently and hit my car (Evidence: photos, testimony of a witness, a police report). He caused damage which had to be repaired and which cost CZK 20 000 (Evidence: a bill from a garage). Hereby I claim that the defendant is responsible for the damages.

I suggest that the court orders to the defendant the following:

The Defendant is obliged to pay to the plaintiff CZK 20 000 within 3 days following the legal force of this judgement.

In Prague on 25/09/2017

Jan Novak

(signature)

9.2.3 Criminal procedure

The aim of criminal procedure is to find out if a crime was committed, who is the perpetrator and then decide on guilt, impose a penalty and enforce it.

All the rules of criminal procedure are set by Criminal Procedure Code (Act no. 141/1961 Coll.).

Any criminal procedure has several stages with different prosecuting authorities involved. In the beginning of any criminal procedure, it is a police that investigates whether a crime was committed at all and looks for suspects. In this stage, a prosecutor supervises police and is allowed to instruct them. The role of the court in this stage is rather marginal – it decides on custody, approves search warrants etc.

After an investigation is finished and an individual person is charged, a second stage of a criminal procedure commences – a stage before a competent court. At this stage, the role of police is marginal and the dominant prosecuting authorities are now a court as an independent body that decides on guilt and imposes penalty, and a prosecutor who is in a contradictory position of an accused and who aims to prove his/her guilt.

After a court decides on guilt and imposes penalty, a third stage of a criminal procedure commences – an execution. An imposed penalty has to be executed, it means that a convicted person will serve a prison sentence, pay a monetary penalty etc.

9.3 Right to a fair trial

Right to a fair trial guarantees an independent and an impartial judiciary and thus belongs to the main pillars of any legal and democratic state. This right guarantees that anybody can look for protection of his/her rights before an independent court. Right to a fair trial is one of the fundamental human rights guaranteed by the Charter of fundamental human rights and freedoms and many international treaties, primarily stated in the Article 6 of the European Convention on Human Rights (ECHR) which is one of the broadest and most important articles of the whole convention. Article 6 of the European Convention on Human Rights relates not only to criminal proceedings, but also to the civil and administrative ones. It, however, establishes fundamental rights of persons charged with criminal offence and thus has a special importance in the field of criminal proceedings.

Article 6 of ECHR reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him*
- to have adequate time and facilities for the preparation of his defence*
- to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*

- *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*
- *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

If any of the articles of the European Convention on Human Rights are breached, you may submit a special action before the European Court of Human Rights based in Strasbourg (for more details see the chapter 5 Czech Constitutional Law and the Protection of Human Rights of this book).

4. Alternative Dispute Resolution

So far we have dealt with litigation as a way of dispute resolution which is guaranteed by state and may be used for any legal dispute even without the consent of the defendant. Sometimes, however, quicker, cheaper and more flexible ways of dispute resolution may be used. We call it Alternative Dispute Resolution (ADR) which means that these methods are alternatives to litigation which is of general use.

There are several ways how to resolve a legal dispute outside the courtroom. We will shortly deal with the most popular ones – the mediation and commercial arbitration.

1. Mediation

Mediation is a method for dispute resolution using an independent and impartial mediator who tries to lead the parties to the agreement which would resolve the dispute and would be acceptable for both of them. This method, unlike litigation, is fully voluntary and is not necessarily about finding a perfectly lawful decision but rather a mediator tries to achieve a mutual consensus between parties. If a mediation is successful, both parties leave a mediator satisfied with a result while litigation usually ends with one party unhappy. Thanks to the fact that a mediator does not look for a perfect solution from the legal point of view, the whole procedure may be way quicker than litigation where all the necessary evidences must be carried out. Moreover, if a mediation leads to the satisfaction of both parties, such method is more efficient than litigation since both parties actually accept the deal and there is no space for appeals. The result of a mediation is a so called mediation agreement which is directly enforceable if approved by a court*. The mediation is all about building trust between the parties and a mediator, and finding the acceptable solution for all the disputed parties. A mediator does not have to be a lawyer but he/she has to have a university degree and must pass a special mediation exam and be registered in the list of mediators maintained by Ministry of Justice of the Czech Republic.

* In some EU Member States, such as Bulgaria, a negotiated mediation agreement is directly enforceable. This means that parties to mediation do not need to have the agreement approved by the court to have it enforced.

9.4.2 Commercial arbitration

Arbitration is another alternative to litigation which means that both parties to the dispute must agree to resolve their case before an arbitration court or before a single arbitrator.

Institutionalized arbitration

An institutionalized arbitration takes place before permanent arbitration bodies. There are currently only three such bodies in the Czech Republic – Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, International Arbitration Court of the Czech Commodity Exchange and Exchange Court of Arbitration. Such institution has its permanent arbitrators, administrative personnel, its own building etc. These institutions are usually highly representative and trustworthy. Again, contrary to standard litigation before competent courts, arbitration is quicker, more efficient and also has more specialized arbitrators for commercial legal disputes as opposed to judges who have to deal with cases from different legal fields and thus they often lack specialization (especially at district courts).

Ad hoc arbitration

Arbitration may be used by the parties to a dispute also on a case by case basis. It means that parties agree in advance that in case of legal disputes between them, such disputes will be resolved by a particular arbitrator (or three arbitrators). The parties thus themselves in advance formulate the conditions of their future dispute resolution.

International arbitration

International arbitrations are more and more popular among international companies because they provide for desired independency compared to local courts. These institutions are again quick, efficient and highly specialized. Their verdict (called “award”) is final and binding for both parties. One of the leading international arbitration courts is the International Court of Arbitration of the International Chamber of Commerce in Paris.

9.5 Summary

This chapter related to litigation and alternative dispute resolution. Procedural law was distinguished from substantive law and the purpose of litigation which is the enforcement of rights or duties stemming from substantive law was highlighted.

The subjects of any litigation are a **court** and the **parties** of a dispute. These parties are called **a plaintiff and a defendant**.

The basic types of procedures in the Czech Republic are a civil, criminal and administrative ones and a special constitutional procedure. The court system includes district courts, regional courts, high courts, the Supreme Court and the Supreme Administrative Court. There is also the Constitutional Court which is not a part of the ordinary court system, though.

The protection of rights of individuals by independent courts guaranteed by the state is called a right to a fair trial and it belongs to fundamental human rights guaranteed by the Charter of

fundamental human rights and freedoms and many international treaties. Article 6 of the European Charter of Human Rights which is binding for Czech Republic guarantees a right to fair trial including the principle of presumption of innocence and another minimum rights of the persons charged with a criminal offence.

Apart from litigation, the chapter dealt with Alternative Dispute Resolution, more particularly mediation and arbitration.

9.6 Self-assessment questions

1. Could you describe the hierarchy of Czech courts?
2. What does “litigation“ mean?
3. Is it better to initiate standard litigation or arbitration?
4. What are the three fundamental types of procedure in Czech law?
5. What are the mandatory/necessary elements of an action?
6. What are the authorities involved in the criminal procedure?
7. In which cases is it better not to initiate a litigation?
8. What is the role of the Czech Constitutional Court?

9.7 Further reading/listening

Chapter 2.4 “The Judiciary“ of An Introduction to the Czech Legal System and Legal Resources Online by Michal Bobek, available online at:

http://www.nyulawglobal.org/globalex/Czech_Republic.html

The very basics of mediation and arbitration can be listened to in the video called Alternative Dispute Resolution – What is ADR? by David P. Hersh, available at:

<https://www.youtube.com/watch?v=5IfPqPIPSmI>

Study resources on mediation as well as short theoretical videos and longer videos with mock mediation are available on the Online Study Mediation Platform at <https://mediation.turiba.lv>

Chapter 10. Czech Corporate Law

The following chapter is dedicated to the topic of Czech Corporate Law. It aims to cover primarily the areas listed below (please note that these are – based on the authors' opinion and necessary selection – seen as the most critical areas for introducing the Czech business and/or corporate law to our international students, even though the topic itself is much broader and detailed):

- (a) Introduction to Czech business law (including the recent process of so called “recodification of the Czech private law”);
- (b) Czech commercial register;
- (c) Czech business corporations: general provisions of the Czech corporate law (act No. 90/2012 Coll.);
- (d) A limited liability company: specific provisions of the Czech corporate law (act No. 90/2012 Coll.); and
- (e) A joint stock company: specific provisions of the Czech corporate law (act No. 90/2012 Coll.).

1. Introduction to Czech business law

The focus of this sub-chapter is primarily placed on major sources, history, principles, and key legal terms & definitions from across the area of Czech business law. In addition, it also introduces a high-level legal scheme for acting on behalf of Czech entrepreneurs.

1. Recodification of the Czech private law

Recodification of private law in the Czech Republic is represented by a set of three formally and materially interconnected acts. These are as follows:

(1) Act No. 89/2012 Coll., Civil Code (the number “89” has not been chosen randomly – it shall be seen as a symbol for the changes that took place back in 1989);

(2) Act No. 90/2012 Coll., Business Companies and Cooperatives Act, the so called “Business Corporations Act”, which replaces the corporate part of the previously enacted Commercial Code (*i.e.* Act No. 513/1991 Coll., Commercial Code); and

(3) Act No. 91/2012 Coll. International Private Law Act, which regulates the private-law relations with a foreign (international) element.

All these acts came into force on **1 January 2014** and they represented an imaginary end of the recodification works commenced already in the year 2000 – on an initiative of Czech ex-minister of justice, JUDr. Otakar Motejl. This reform shall be seen as **the largest change of the Czech private law over the past 25 years**.

The **aim** of this reform was to remove socialist relics from the Czech legal order and to follow up on the traditional continental law culture. As a result of this, Czech experts from across dozens of industries, business companies (corporations), judicial bodies, universities *etc.* and also the general public have recently faced several extremely difficult tasks – all related to the implementation of related legislative changes into the real life (including all of the accompanying changes in areas such as tax and procedural law). Given the fact that the New Civil Code includes 3,081 provisions, repealed about 238 existing legal regulations or their parts (*e.g.* Family Act, Commercial Code, Securities Act *etc.*), wholly united the contractual (obligations) law and introduced a huge number of new legal institutes, it is obvious that all lawyers, notaries, corporate lawyers, Czech judiciary, but also the entrepreneurs as well as “ordinary” Czech citizens had to familiarize themselves with plenty of new rules and contextual changes.

The Business Corporations Act, whose main author is JUDr. Bohumil Havel, Ph.D., forms an integral part of the private law recodification in the Czech Republic. This Act was approved by the Chamber of Deputies on 16 December 2011, by the Senate on 25 January 2012, and signed by the President of the Czech Republic on 20 February 2012. The Business Corporations Act then came into force on **1 January 2014**. It is an essential legal regulation for our corporate business world which, on one hand, changed the whole range of already existing legal institutes and, on the other hand, introduced plenty of entirely new corporate institutes and terms, such as the term “**business corporation**” itself – which compiles **business companies** (the personal as well as the capital ones and also the European companies and associations), and **cooperatives**. This liberal regulation offers mainly **non-mandatory rules**, with the exception of those statutory provisions which must be insisted on in the interest of public order, good morals or the protection of weaker and/or third parties.

As mentioned above, the Business Corporations Act replaced the corporate part of Act No. 513/1991 Coll., Commercial Code, as amended, which has been repealed as at 1 January 2014. Whilst **commercial obligations**, which formed Part 3 of the original Commercial Code, were fully transferred to the New Civil Code (which has led to a complete “unification of the law of obligations”), **the business companies and cooperatives** (*i.e.* business corporations) are now regulated by the Business Corporations Act. In addition to the above, the original Commercial Code contained also a number of general provisions. Those were also passed to the New Civil Code, **whereby the Business Corporations Act becomes a special law** (towards the general civil-law regulations), **which regulates exclusively business companies and cooperatives**.

In terms of its structure, the Business Corporations Act is divided into: (a) a **general part on business corporations**, which regulates a number of general issues and legal matters on all forms and types of business corporations, and (b) a **specific regulation of individual legal forms and types of business companies**. Besides, we must not forget the **general provisions on legal entities in the New Civil Code** – as each and every business corporation shall be seen as an **independent legal entity**.

The Business Corporations Act applies to **all business companies and cooperatives in the Czech Republic regardless of their size or subject of business**. The effect of the Business Corporations Act impacts (among others) the corporate governance rules, the conduct of members of the management and supervisory bodies, as well as normal daily activities of the Czech business companies and cooperatives. The duty of due managerial care, introduction of a business judgement rule, insolvency test and introduction of the rule of personal liability for

wrongful trading are primarily concerned in the corporate governance area. The authors of this Act were inspired by **modern legislative trends in the laws of many other countries in Europe, the USA and elsewhere**, e.g. legislation in Germany, the Netherlands, Austria, Poland, Italy, Switzerland, Great Britain, Russia and, of course, the requirements of EU laws. According to the ex-minister of justice, Mr Jiří Pospíšil, this is “the crucial act for Czech entrepreneurs which brings in a modern commercial law and which is extremely positive for the overall business community.”² The increase of the **competitiveness of the Czech corporate law** in the competition with other legal orders was one of the main objectives that the authors of the Business Corporations Act wished to achieve from the very beginning. Any modern corporate law would take into account that business companies and cooperatives are not limited by borders or legal orders of individual states, but on the contrary, they should be able to utilize those regulations that are attractive enough for them. Legislative stability and application legal certainty along with sufficient variability of doing business, which provides effective protection of rights and minimizes administrative and cost burden on individuals, are considered to be the **key attributes of business attractiveness**.

2. Sources of the Czech business law

Considering the above, it can be summarised that the **major sources of the new Czech business law** are therefore the following codes and/or acts:

- **Act No. 89/2012 Coll.**, New Civil Code (available [here](#)³);
- **Act No. 90/2012 Coll.**, “Business Corporations Act” (available [here](#)⁴);
- **Act No. 91/2012 Coll.**, International Private Law Act (available [here](#)⁵);
- **EU law** (various European regulations and directives as listed in the individual chapters and sub-chapters of this textbook);
- **Other private-law and/or public-law acts** (such as, for example, the “Trade Licensing Act”⁶, “Registry Act”⁷, anti-trust regulation(s)⁸ *etc.*).

3. Principles of the Czech business law

The **main principles of the Czech business law** are as follows:

- **The principle of freedom of contract**, *i.e.* a judicial concept which holds that contracts are based on mutual agreement and free choice;
- **The principle of equal position of concerned parties**, *i.e.* a key private-law attribute which states (confirms) that the private-law parties shall always be seen in the equal position (meaning on the same level – there is no subordinated party);
- **The principle of good faith and protection of third parties**, *i.e.* a confirmation that every party has to act in good faith in exercising its rights and performing its obligations (which

² Source: <http://www.podnikatel.cz/clanky/zakon-o-obchodnich-korporacich-prosel-snemovnou/>

³ <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

⁴ <http://obcanskyzakonik.justice.cz/images/pdf/Business-Corporations-Act.pdf>

⁵ <http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf>

⁶ Act No. 455/1991 Coll. which defines the operation of a „licensed trade“ as an ongoing activity, performed independently, in one's own name, at one's own responsibility, for the purpose of achieving profit and under the conditions set forth by the trade licensing law.

⁷ Act No. 304/2013 Coll., on public registers of legal entities and individuals (available here: http://obcanskyzakonik.justice.cz/images/pdf/Act_on_Public_Registers.pdf).

⁸ Please see the chapter dedicated to Competition Law.

shall be seen as the basis for performance-related obligations and obligations to protect and maintain);

- **The principle of fair business (fair business practices and trade)**, *i.e.* an attribute which relates to equal opportunities, transparency and accountability, fair trading practices, fair pricing strategies, ensuring no child and forced labour, ensuring good working conditions, respect for the environment *etc.*; and
- **The principle of professionalism**, *i.e.* a standard of personal conduct by a professional (an entrepreneur) in his/her business dealings. Whilst regulations and guidelines for acceptable and expected entrepreneurial behaviour vary from industry to industry, personal principles that typically focus on ethics, code of conduct, appropriate personal interactions and workplace integrity shall always remain the same.

4. Key legal terms & definitions

The main objective of the Czech business law is to **regulate the so called business relations**. Thanks to the above, business law must be seen as the **law of professionals (entrepreneurs)**.

An **entrepreneur** shall be understood as a person (or legal entity), who (which) is **professionally engaged** in a specific **business activity**.

Business activity shall then be understood as:

- A continuous activity;
- Carried out by an entrepreneur;
- Independently;
- In his/her/its own name and at his/her/its own account (responsibility);
- For the purpose of gaining profit.

Professionally engaged means that the business activity is carried out on the basis of an authorization granted in accordance with respective public laws. The most common and frequent type of this authorization is the above mentioned trade authorization, *i.e.* **trade license**.

Entrepreneurs can either be **individuals** or **legal entities**, *i.e.* **business corporations** (business companies and cooperatives), **foundations** *etc.* The most frequent and also common forms of Czech entrepreneurs are **business companies**, and **sole entrepreneurs**, *i.e.* **individuals**.

When speaking about distinguishing features of the Czech entrepreneurs, these relate to (a) name / trade name; (b) seat (registered office) / place of doing business; and (c) entrepreneurial registration number.

5. Acting on behalf of entrepreneurs

Entrepreneurs – individuals can mostly act:

- By their own acts (**directly**), or
- Through a legal representative acting on the basis of power of attorney (**indirectly**).

Entrepreneurs – legal entities can only act through:

- A **legal representative** (agent);
- **Statutory body** (respectively member of a statutory body); member of a statutory body may act on behalf of the legal entity concerned **in all matters**. **Any internal restriction of statutory body's authority is not effective towards third parties even if published;**

- Other persons on the basis of **power of attorney**;
- Other persons on the basis of **procuration** (a special general “power of attorney” related to business relations and operating).

Employees and other persons entrusted with performance of certain activity within respective legal entity always represent the legal entity **to the extent appropriate to their position and tasks as known to the public**.

Anyone who is entrusted with performance of a certain activity within the specific legal entity is authorized to undertake all legal acts (contracts) which **usually occur in the course of this activity**; this includes also employees and other persons working for this legal entity.

10.2 Czech commercial register

Czech Commercial Register is a **public register which maintains data concerning entrepreneurs prescribed by the law** (e.g. trade name, seat, registration number, details on the statutory body and its members *etc.*).

The leading principle of the commercial register is a **principle of publicity**. We distinguish between **material** and **formal publicity**. **Material publicity** confirms that any entry in the commercial register can be claimed against third persons only after its publication (protection of reliance in good faith on published data). **Formal publicity** says that commercial register is available to anybody and that any entry must always be published.

The Czech commercial register is **maintained by courts** – it is available in an **electronic form** and **accessible through electronic means**. Any entry is effective towards third persons (parties) **upon its publication**. The entries into the Czech commercial register must be supplied in an **electronic form** (see above).

Entities that must be entered into the Czech commercial register:

- Business companies and cooperatives (*i.e.* business corporations);
- Foreign entrepreneurs;
- Individuals upon request (please note that several exceptions apply); and
- Entities required by special laws.

Facts that must be registered in the Czech commercial register:

- Main **identification data** concerning an entrepreneur (trade name, seat, legal form, statutory body *etc.*);
- Data relating to **important events and changes** in organizational structure and subject of business (e.g. registered capital and its changes, termination of a business corporation, changes in statutes and/or founding documents *etc.*).

The Czech commercial register is available on www.justice.cz.

Task: Go to www.justice.cz, copy in the name of any chosen Czech business corporation and review the records entered into the commercial register. Compare those to the theoretical part above and make sure you also review the attached documents.

3. Business corporations – general provisions of the Czech corporate law

1. General introduction

Business corporations are considered as **legal entities** and **include business (commercial) companies** (hereinafter also “**companies**”) and **cooperatives**.

Companies include an **unlimited partnership** and a **limited partnership** (“partnerships”), a **limited liability company** and a **joint stock company** (“capital companies”), as well as a **European Company** and a **European Economic Interest Grouping**.

Cooperatives include a cooperative and a European Cooperative Society.

The **European corporations**, *i.e.* a European Company, a European Economic Interest Grouping and a European Cooperative Society shall be governed by the provisions of the Business Corporations Act **to the extent permitted by directly applicable legislation of the European Union** governing the European Company, the European Economic Interest Grouping or the European Cooperative Society.

Task: Based on the above information, draw a simple scheme of business corporations in the Czech laws. Please do not forget to split them into business companies and cooperatives, and subsequently also into partnerships and capital companies. Make sure your scheme includes the European companies, as well.

A **partnership** can only be established for the purpose of doing business or for the purpose of managing its own assets.

Activities that may only be carried out by a natural person pursuant to other legal regulations may constitute the objects or activity of a business corporation, provided that **such activities are performed by persons authorised to this end pursuant to other legal regulations** (*e.g.* doctors).

Legal acts governing the establishment, incorporation, modification, dissolution or **winding up** of a business corporation must be in **written form with certified signatures**, otherwise the legal will be seen as invalid.

Where a **capital company or a cooperative** includes information about its **registered capital** in its **commercial documents**, such information may only concern the part of the registered capital that has been **subscribed and paid-up**.

A **joint stock company** shall release information, which it is obliged to include in commercial documents, as well as other information prescribed by the Business Corporations Act, without **undue delay after its incorporation** and thereafter on a **continuous basis**, in a manner allowing **remote access**, which is **free of charge** for the public, so that the information is easily accessible upon entering an e-mail address (the “**website**”).

2. Establishment

A Czech business corporation shall be established by a **memorandum of association**. A memorandum of association on the establishment of a **capital company** shall have the form of an **authentic instrument**. A memorandum of association on the establishment of a **cooperative** under the Business Corporations Act shall be **concluded upon its adoption at the foundation meeting**.

If permitted by law for a company to be established by a **sole founder** (please see the details below), the company shall be established by a **deed of foundation** in the form of an **authentic instrument**.

Not filing the application for registration of a company in the commercial register within **6 months after the date of its establishment** shall be conclusively presumed to have the same effect as a withdrawal from a contract.

The period referred to above **may be modified in the memorandum of association**.

3. Single member company

A **capital company** may be established by a **single founder**. A capital company may also have a **sole member** as a result of all its business shares being held by that member. In a single member company, the powers of the supreme body shall be exercised by its member.

4. Contribution

A **contribution** is the **monetary value of the subject of the contribution into the registered capital** of a business corporation. In case of a **joint stock company**, the contribution shall be expressed as **nominal or book value of a share**.

The **subject of the contribution** shall be an item which a member or a future member (the so called “contributor”) undertakes to contribute to the business corporation in order to acquire or increase a business share in the business corporation concerned (the “contribution obligation”).

The **contribution obligation** may be met by a cash payment (the “**cash contribution**”) or by contributing another item whose value can be expressed in monetary terms (the “**contribution in kind**”).

The **contributor** shall fulfil the contribution obligation within the period of time and in the manner prescribed by the Business Corporations Act and by the memorandum of association.

The **value of a contribution in kind** shall be specified in the memorandum of association of the business corporation concerned (and always assessed and evaluated by an expert).

A contribution in kind **may not consist of work or services** (please note that exceptions apply).

5. Contribution administrator

Before the incorporation of each business corporation, the subjects of the contribution or parts thereof that have been paid up or contributed shall be received and administered by the **contribution administrator** appointed in the memorandum of association. The founder or one of the founders may also act as the contribution administrator.

Where the contribution in kind consists of an **immovable property**, the subject of the contribution shall be contributed by the contributor by handing over the immovable property to the contribution administrator together with a written statement on the contribution of the immovable property, with certified signature(s).

Where the contribution in kind consists of a **movable property**, the subject of the contribution shall be contributed by handing the item over to the contribution administrator, unless provided otherwise in the memorandum of association.

If, by nature, it is **impossible to effectively hand over the movable property**, it shall be handed over through the delivery of the data carriers or other media capturing the item to be handed over, and the documentation describing the nature, contents and other facts relevant for the possibility to use the contribution in kind.

Where the contribution in kind consists of an **enterprise or a part thereof**, the subject of the contribution shall be contributed on the effective date of the contribution agreement. The relevant provisions of the Civil Code on purchases shall apply *mutatis mutandis* to a contribution agreement of an enterprise or a part thereof.

Where the contribution in kind consists of a **receivable**, the subject of the contribution shall be contributed on the effective date of the agreement on the contribution of the receivable. The relevant provisions of the Civil Code on the assignment of receivables shall apply *mutatis mutandis* to an agreement on the contribution of a receivable. The contributor shall be liable for the collection of the receivable up to its valued amount.

In all other cases, the contribution in kind shall be contributed on the **effective date of the contribution agreement** between the contributor and the contributor administrator.

A **cash contribution into capital companies** shall be paid into a designated account held with a bank or a savings and loan cooperative (the “bank”) to be opened by the contribution administrator. The bank shall not make these funds available for disposal before the incorporation of the capital company unless necessary for the payment of incorporation expenses or refund of issue prices to the founders.

A contribution in kind shall be fully contributed to the capital company prior to its incorporation.

A written declaration on the fulfilment of the contribution obligation or a part thereof by the individual contributors shall be issued by the contribution administrator to the person who is entitled to file the application for registration in the commercial register. Such declaration shall be attached to the application for registration in the commercial register, unless it is not required by law to register the extent in which the contribution obligation is fulfilled in the commercial register.

10.3.6 Registered capital

The **registered capital** of a business corporation shall be equal to the sum of all contributions. The Business Corporations Act specifies the minimum required amount thereof within the individual types of companies (please see the details below).

7. Business share

A **business share** represents the member's interest (participation) in a business corporation concerned and the rights and duties attached thereto.

Each member may hold **one business share** only in the same business corporation. This shall not apply to an interest in a capital company and to business shares of a limited partner.

Where a business share in a commercial company is in **joint ownership**, the joint owners shall act as co-member and their interest shall only be administered by the administrator of joint property *vis-à-vis* the commercial company.

8. Profit share

A **profit share** shall be determined on the basis of ordinary or extraordinary financial statements approved by the supreme body of the business corporation concerned. It can only be distributed among the **members**, unless provided otherwise in the memorandum of association.

A profit share of capital companies shall be due and payable within **3 months** after the date when the supreme body of the business corporation adopted the decision on profit distribution, unless stipulated otherwise in the memorandum of association or by the supreme body. A profit share of a partnership shall be due and payable within **6 months** after the end of the accounting period, unless stipulated otherwise in the memorandum of association.

Decisions to pay a profit share are made by the **statutory body**.

9. Share of liquidation balance

Upon a business corporation's winding-up with liquidation, each member shall be entitled to a **share of the liquidation balance**. Such share shall be paid out in **cash**, unless stipulated otherwise in the memorandum of association or in a separate agreement between the members and the corporation concerned.

The liquidation balance shall be first distributed among the **members up to the level at which they met their contribution obligation.** Where the liquidation balance is **insufficient** for such distribution, it shall be distributed among the members according to the proportion of their paid-up or contributed contributions.

Where none of the members was subject to a contribution obligation, the liquidation balance shall be distributed **equally** among the members.

10. Business corporation bodies

The **supreme body** of a partnership is all of its members; the supreme body of a capital company is the general meeting; and the supreme body of a cooperative is the members' meeting.

For the purpose of the Czech Business Corporations Act, the **supervisory body** of a business corporation shall be the supervisory board, the auditing committee or other similar body.

A **collective body** shall appoint its chairman, whose vote shall be decisive in the event of a tie, unless stipulated otherwise for this case in the memorandum of association. This shall not apply to partnerships.

Each member of a partnership shall act as its **statutory body**. In a limited-liability company, each executive shall act as the company's statutory body, unless the memorandum of association stipulates that multiple executives shall act as a collective body.

Any decision taken by a body of the business corporation shall be effective *vis-à-vis* the business corporation **upon its adoption**. Any decision taken by the sole member acting as a body of the business corporation shall be effective *vis-à-vis* the business corporation **upon its receipt by the business corporation**. Any decision taken by a body of the business corporation shall be effective *vis-à-vis* third parties as **from the time when they became aware or could have become aware thereof**.

The representative of a legal entity which is a member of a body of a business corporation must fulfil the **requirements and preconditions for the execution of the function** defined by law for the members of the body themselves. **Compensation for any damage** caused by the representative shall be provided to the business corporation by the representative and the legal entity he or she represents, acting jointly and severally.

11. Rules of conduct of members of corporate bodies

A person shall be deemed to act with **due care** and the **necessary knowledge** where, in **business-related decisions**, he or she could in **good faith** and **reasonably** assume to be acting on an **informed basis** and in **justifiable interest** of the business corporation concerned (the so called „**Business Judgement Rule**“). The foregoing shall not apply in cases where such decision-making was carried out without the **necessary loyalty**.

A member of the statutory body of a capital company may **request instructions from the supreme body** of the business corporation regarding the management of its business; however, the same shall be without prejudice to his or her obligation to act with due care.

When **assessing whether a member of a body acted with due care**, the care that would be exercised in a similar situation by another reasonably diligent person if they would be in the position of a member of a similar body of the business corporation shall always be taken into account.

A person who **violated the duty of due care** shall return to the business corporation any **benefit obtained** in connection with such behaviour. Where such return of the benefit is impossible, the obliged person shall pay an equivalent amount to the business corporation in **cash**.

12. Conflicts of interest rules

If a member of a body of a business corporation **becomes aware of a conflict that may arise between his or her interest and the interest of the business corporation during the exercise of his or her office**, he or she shall **inform**, without undue delay, other members of the body of which he or she is a member as well as the supervisory body, if established, or, failing that, the supreme body. The same shall apply *mutatis mutandis* to **potential conflicts of interest** of persons who are closely related to the member of a body of the business corporation, and persons influenced or controlled by that member.

Where a member of a body of a business corporation intends to **sign a contract with the corporation**, he or she shall **inform**, without undue delay, the body of which he or she is a member as well as the supervisory body, if established, or, failing that, the supreme body. At the same time, the member shall indicate under which conditions the contract is to be concluded.

The same shall apply *mutatis mutandis* to **contracts between the business corporation and any person who is closely related** to the member of a body of the business corporation, and persons influenced or controlled by that member.

10.3.13 Executive service agreement

The rights and duties between a business corporation and a member of its elected body shall be governed, *mutatis mutandis*, by the provisions of the Civil Code governing an **order**, unless implied otherwise from the **executive service agreement**, where concluded, or from the Business Corporations Act.

An executive service agreement for a **capital company** and its subsequent modifications shall be agreed **in writing** and **approved by the company's supreme body**.

Unless **remuneration** is agreed in the executive service agreement in accordance with the Czech Business Corporations Act, it shall be conclusively presumed that the exercise of the office is **free of charge**.

An executive service agreement for a capital company shall also include the following details on remuneration:

- Definition of all **remuneration components** which the member of the body is or may be entitled to, including any benefits in kind, payment to the complementary pension insurance scheme or other benefits;
- Specification of the **amount of remuneration** or the **method of its calculation**, and its form;
- Definition of **rules for the payment of special bonuses and profit share** for the member of the body, where these may be granted; and
- Information about the **benefits or emoluments** for the member of the body consisting in the transfer of participating securities or in the possibility of the acquisition by the member of the body or a person closely related to him or her, where the remuneration is to be provided in such form.

10.3.14 Resignation

A member of a body of a business corporation may **resign from his or her office**. However, he or she may not do so at a time which is **inappropriate for the business corporation**.

The above stated inappropriateness shall be explained as any situation which is very important in the life of each business corporation concerned – *e.g.* financial problems, entering new markets *etc.*

Unless determined otherwise in the memorandum of association or the executive service agreement, the resigning member shall notify his or her resignation to the **appointing body**, and his or her office shall terminate **one month after the delivery of such notification**, unless the competent body of the business corporation **approves a different office termination date** at the request of the resigning member. Where the competent body is a **sole member**, the office shall terminate one month after the delivery of the resignation notification to the sole member, unless they agree on a different office termination date.

10.3.15 Expulsion from office of a member of the statutory body of a business corporation

During **insolvency proceedings**, the insolvency court shall, even *ex officio*, decide that a member of the statutory body of the bankrupt business corporation who was in office at the time of the ruling on bankruptcy or afterwards may not hold the office as a member of the statutory body of any business corporation or act as a person in a similar position (the "expulsion") **for a period of 3 years after the expulsion decision became legally effective**.

A court may also, even *ex officio*, decide to **expel a member** if it turns out that, in the past 3 years, the member of the statutory board repeatedly and seriously breached the duty of due care or, where applicable, any other duty of care associated with the exercise of his or her office pursuant to another legal regulation.

Task: You were already explained about the Czech “duty of care (loyalty)”. Can you think of any practical situations which would be seen as a breach of this duty? Can you think of any similar situations in your domestic jurisdiction?

10.3.16 Nullity of a business corporation

After the incorporation of a business corporation, it shall be **pronounced null** by a court, even *ex officio*, if:

- The memorandum of association was not drawn up in the prescribed form;
- The provisions concerning the minimum amount of registered capital to be paid up were not complied with; or
- The court finds legal incapacity of all the founding members.

10.3.17 Dissolution and winding-up of a business corporation and liquidation provisions

A court, on the basis of a petition of a person who has a legal interest therein or a petition of the prosecutor’s office, shall also dissolve a business corporation and order its liquidation, where the court finds a **substantial public interest** to do so, in the event that:

- The business corporation **lost all its business licences**; this shall not apply in case the business corporation was also established for the purpose of managing its own assets or for a purpose other than doing business;
- The business corporation **has not been able to perform its activities** and, consequently, **serve its purpose for more than 1 year**;
- The business corporation is not able to perform its activities because of **insurmountable differences between the members**; and/or
- The business corporation, without making recourse to natural persons, **carries out an activity which may only be performed by natural persons pursuant to other legal regulation**.

4. Specific provisions of the Czech corporate law – a limited liability company

1. Introduction to specific provisions of the Czech Business Corporations Act

Both a limited liability company and a joint stock company must be established by a **notarial deed** executed by a Czech notary. Before registering in the Commercial Register, the founders must pay the **monetary contributions** into a **special bank account** opened specifically for this purpose. The bank will not allow the company (or anybody else) to use the money deposited in such bank account before the registration of the company in the Commercial Register, unless the money is to be used for the payment of establishment-related costs. This bank account will be opened on the basis of an **agreement** concluded between the bank and the contribution administrator of the company. The **contribution administrator** is an individual (either a founder or another person) responsible (before the registration in the Commercial Register) for the payment of contributions (both monetary and also non-monetary). The contribution administrator can also be a foreign person.

Before registering in the Commercial Register, both branches and business companies must obtain a **trade licence** from a trade licensing office corresponding to the activities they intend to undertake, or some other form of business authorisation. For this purpose, they must appoint a **responsible representative** who is responsible for the company's compliance with the conditions of the trade licences. The appointment of a responsible representative is not required for any of the 80 general business activities covered by the so-called **free trade licence**. One responsible representative may be responsible for more than one trade licence of the company. On the other hand, one responsible representative may not perform this function on behalf of more than four entrepreneurs. The company has the option to submit a single application to the trade licensing office; in such an application it will apply for both (i) trade licence(s), and (ii) registration with the tax office – along with the application for a trade licence.

Shareholders of a joint stock company do not guarantee the company's obligations. **Partners** of a limited liability company jointly and severally guarantee such company's obligations only up to the sum of unpaid contributions to the company's registered capital.

As mentioned above, executive directors, directors and board members of Czech business companies are obliged to perform their respective offices with **due care** (and are liable for any damage caused to such company by any breach on their part of this obligation).

In some cases, the so called **shadow directors** (*i.e.* persons who *de facto* control a Czech business company, even if they do not have any official position in such a company) or other companies from the same **group of companies** can be liable for damage caused to such Czech company by exercising their influence over such Czech company to its detriment.

The Czech legal system recognises the concept of the **criminal liability of legal entities**; such liability can be in some cases effective beyond the Czech Republic's borders. This concept allows for, in some cases, the prosecution of a legal entity where a crime has been committed to the benefit of such legal entity by its director, employee or other associated person.

2. Establishment

A limited liability company is commonly used only for **small and medium-sized businesses**. It may be **established** either by means of (i) a founder's deed by one entity (whether an

individual or a legal entity); or (ii) a memorandum of association concluded by several entities or individuals. Such founder's deed or memorandum of association must be executed in the form of a **notarial deed**.

3. Registered capital

The **registered capital** of a limited liability company is composed of the contributions made by the shareholders (partners). The **minimum contribution of each shareholder** to the registered capital is **CZK 1**. However, in the event of such a low contribution, the risk of insolvency (and related consequences for executive directors and shareholders) should be considered.

Non-monetary contributions must be fully settled before the company's registration in the Commercial Register. The founder's deed or memorandum of association must specify the non-monetary contribution, its value (which is determined by an expert) and the expert who determined its value.

At least **30 per cent of subscribed monetary contributions** must be paid up before the registration of the company in the Commercial Register.

4. Ownership interest

A limited liability company does not issue shares. The **ownership interest** represents the shareholder's participation in the company and the rights and duties derived from such participation.

The size of the ownership interest is basically **determined by the ratio of a particular shareholder's investment contribution to the company's registered capital**.

A limited liability company may **have more than one type of ownership interest**, to which different rights and obligations attach. For example, the obligation to work for the company can attach to one ownership interest and the obligation to contribute a higher sum of capital to the company can attach to another one. A shareholder may **hold more than one ownership interest** (provided that the founder's deed or the memorandum of association allows so). An ownership interest in a limited liability company is **not as easily transferable** as the shares in a joint stock company. It requires a **written agreement** (with notarised signatures).

A shareholder may transfer his/her ownership interest to another shareholder **without the approval of the general meeting** (unless the memorandum of association stipulates otherwise). A shareholder may also transfer his/her ownership interest to a third party **with the approval of the general meeting** (unless the founder's deed or the memorandum of association stipulates that such approval is not required).

5. Corporate bodies

The corporate governance of a limited liability company is much **simpler** than that of a joint stock company.

A limited liability company **does not have a board of directors**. Its executive body is made up of **one or more executive directors**. The law does not restrict their **number**, but their number must be stipulated in the founder's deed or the memorandum of association. The executive director is **appointed** by the general meeting (the supreme body of the limited

liability company) or by the sole shareholder exercising the powers of the general meeting. Each executive director represents the company **independently**, unless the founder's deed or the memorandum of association stipulate otherwise. The founder's deed or the memorandum of association may stipulate that the executive directors form a **collective body**, which will make the legal position of executive directors closer to that of the board of directors in a joint-stock company.

The law does not require the limited liability company to establish a **supervisory board**; however, a supervisory board can be established, provided that the founder's deed or memorandum of association stipulates so.

10.4.6 Advantages and disadvantages of a limited liability company

The main **advantages** of a Czech limited liability company are the following aspects:

- Relatively low registered capital;
- Relatively low administrative requirements;
- Protection of the members from the company's creditors by a corporate veil;
- Optional supervisory board (please note that exceptions apply).

The main **disadvantages** of a Czech limited liability company are the following aspects:

- Shareholders are jointly and severally liable up to the amount of the unpaid registered capital as recorded in the Commercial Register if the full payment of the registered capital has not been registered in the Commercial Register yet;
- The procedure of the transfer of the ownership interest is more complicated than in the joint stock company.

10.5 Specific provisions of the Czech corporate law – a joint stock company

1. Establishment

A joint-stock company is usually used for **large businesses**. It is established by **articles of association** by **one or more shareholders** (individuals or legal entities). The articles of association must be executed in the form of a **notarial deed**.

2. Shares

A joint-stock company could have issued either **bearer** or **registered shares** in the form of either **certificated** or **book entered** shares. However, please note that as of 1 January 2014, the certificated bearer shares are no longer allowed and existing certificated bearer shares must be either immobilised (physically deposited) in a bank or exchanged for book entered shares.

The **transferability** of registered shares may be restricted (*e.g.* by requiring that the general meeting approves share transfers) but not excluded by articles of association. The transferability of bearer shares may not be restricted. Registered certificated shares are transferred by means of, an oral/written agreement, an endorsement and a hand-over of the shares. Book-entered

shares are transferred by virtue of the registration of the new owner with the Central Securities Depository.

3. Registered capital

The **minimum registered capital** is CZK 2,000,000 (or EUR 80,000 for companies which are allowed by a special law to keep their accounts in EUR).

At least **30 per cent of the registered capital** must be paid up before the application for the registration of the joint stock company in the commercial register is filed (or earlier, if the articles of association stipulate so).

4. Corporate bodies

The executive body of a joint-stock company is a **board of directors**. Members of the board of directors are **elected** and **recalled** by the general meeting (or by the supervisory board if the articles of association stipulate so). The board of directors **decides on all matters that are not reserved for the general meeting or the supervisory board**.

A joint-stock company must establish a **supervisory board**, which monitors the activities of the board of directors and the operations of the joint-stock company.

Alternatively, instead of a board of directors and a supervisory board, a joint stock company can have an administrative board and a single director (**monistic system**). The choice of the corporate bodies' structure (*i.e.* either dualistic, or monistic) must be stipulated in the **articles of association**. If the articles of association stipulate so, the administrative board can have only one member who can, at the same time, perform the office of a director.

10.6 Summary

The **Czech private law recodification** provided citizens of the Czech Republic with a number of changes and it significantly changed the legal environment for doing business and for activities of business companies and cooperatives, the so called business (commercial) corporations. The key codes of this reform include the New Civil Code, the Business Corporations Act and the International Private Law Act (all of those came into force on 1 January 2014). In addition to these basic pillars, there were also many changes made in the accompanying legislation. The aim of the recent recodification was to remove the remains of the laws from the socialist era and to modernize and liberalize the Czech private law following the example of many countries of the European Union, the USA *etc.*

The Czech **joint stock company** and the Czech **limited liability company** are legal persons, whereas the so called **branch office** is not a separate legal entity. As far as the company's liability is concerned, both joint stock company and a limited liability company are **liable** by its entire property for its breach of obligations. However, shareholders of a joint stock company are not liable for breaches of company's obligations at all. Members of a limited liability company are jointly and severally liable for the company's obligations up to the unpaid contributions of all members to the registered capital. Branch office is not liable for breach of its obligations (the parent company is liable therefor).

The Czech joint stock company's **minimum amount of the registered capital** is CZK 2,000,000. Limited liability company's minimum amount of the registered capital is CZK 1

(per shareholder/partner). For the establishment of a Czech branch office, there is no registered capital required.

Obligatory bodies of a Czech joint stock company are General Meeting, Board of Directors and the Supervisory Board (please be aware of the monistic system, as well). Obligatory bodies of a Czech limited liability company are General Meeting and Executive(s). The Czech branch office must have a Head of Branch who is entitled to act on behalf of the parent company with regards to the branch office concerned.

10.7 Self-assessment questions and tasks

1. Explain the process of so called recodification of the Czech private law. Why is it so important? What changes did this reform bring? What are the key – new – codes? Do we still have the Czech Commercial Code?
2. What are some of the sources of Czech business/corporate law?
3. Define the term business corporation.
4. Define the principle of freedom of contract.
5. Define the principle of equal position of concerned parties.
6. Define the principle of good faith and protection of third parties.
7. What are the other principles of Czech business law?
8. Who is an entrepreneur?
9. What is a business activity?
10. What are the key distinguishing features of Czech entrepreneurs?
11. Who can act on behalf of Czech legal entities?
12. How would you write a power of attorney?
13. Where can the Czech commercial register be found?
14. Which entities MUST be registered in the Czech commercial register?
15. Explain the principle of publicity.
16. Name all the possible forms and types of business corporations in the Czech Republic.
17. Must a joint stock company have its own websites?
18. How is a Czech business corporation established? Is there any difference in this process – with regards to partnerships and capital companies?
19. What is a difference between single member and single founder?
20. Make sure you are able to define the following: contribution, subject of contribution, contribution obligation, contributor, monetary contribution, non-monetary contribution, and contribution administrator.
21. Which types of Czech business corporations must have a registered capital?
22. What is a business share? How is this called in the joint stock company?
23. What are the conditions for paying the profit share?
24. Who is the recipient of the share of liquidation balance?
25. What is the difference between single and collective body?
26. Explain the business judgement rule. What does it stand for? Why is it important?
27. Name one situation where there is a conflict of interest between the member of a business corporation and the corporation itself. How would you solve such situation – practically? What do you need to do with regards to Business Corporations Act?
28. What is the executive service agreement? What are its mandatory parts and clauses?
29. Can a member of a statutory body be expelled from his/her function? Can he/she resign? What are the legal conditions for the above?
30. Name at least 7 key features and characteristics of a limited liability company.

31. Name at least 7 key features and characteristics of a joint stock company.
32. What is a branch office?

10.8 Further reading/listening

Legislation: selected provisions of the Czech Civil Code; selected provisions of the Business Corporations Act; selected provisions of the International Private Law Act; selected provisions of the Trade Licensing Act.

Printed books:

- HAVEL, B. *et al. Business Corporations Act with updated explanatory report and index (in Czech)*. Ostrava: Nakladatelství Sagit, a.s., 2012. ISBN 978-80-7208-923-9.
- MACGREGOR, R. *Introduction to Law for Business*. Ostrava: KEY Publishing s.r.o., 2012. ISBN: 978-80-7418-137-5.

Online resources: www.justice.cz (Czech commercial register).

Documentary video(s): I Am Fishead: <https://www.youtube.com/watch?v=bcRRZsag0Io>.

Chapter 11. EU Competition Law

The following chapter is dedicated to the topic of **EU Competition Law**. It aims to cover primarily the areas listed below (please note that these are – based on the authors' opinion and necessary selection – seen as the most critical areas for introducing the EU competition law to our international students, even though the topic itself is much broader and could be presented in a more detailed way):

1. Introduction – the system of competition law (including unfair competition and sanctions for competition law breaches);
2. EU antitrust law – cartels and monopolies;
3. Competition law authorities (including dawn raids); and
4. Mergers.

1. Introduction – the system of competition law

The focus of this sub-chapter is primarily placed on major sources, history, principles, and key legal terms & definitions from across the area of EU competition law. In addition, it also introduces a high-level legal scheme for so called unfair competition.

1. Competition law in general

Competition law governs how individual entrepreneurs and business corporations **interact with their competitors, partners, suppliers and customers**. It requires them to **compete fairly** in the markets that they operate in, ultimately to the benefit of their **customers**.

The idea is that **fair competition leads to customers getting the best price, quality and choice of products and services possible**.

Complying with competition law brings the business world closer to its often proclaimed objective to be a customer obsessed organisation that customers can **trust**. Nowadays businesses need to stay on the right side of the law also because of their **reputation**.

2. Consequences of competition law breaches

Breaching competition law can be really **easy to do**. One does not need a formal contract to do so – a throwaway comment to a friend might be illegal, too. And there can be **serious consequences**:

- **Huge fines** – in some cases up to 10 % of global turnover;
- Years of **expensive litigation** as the victims may sue the entrepreneurs and/or business corporations to recover (compensate) their damage(s);
- **Imprisonment, disqualification and personal fines** for directors (statutory bodies) in certain territories;
- Serious **brand and reputational damage**, which often results in a drop in share price;
- Important **contracts being void and unenforceable**.

The **most serious infringements of competition law** include:

- Price fixing;
- Bid rigging or market sharing;
- Collective boycotts;
- Exchanging highly sensitive information with competitors; and
- Resale price maintenance.

Examples: It is really easy to breach the competition law. This is a list of suggested (potential) business conversations that can get the individual entrepreneurs and/or business corporations into trouble:

- *“It is your turn to win – we will sit this one out.”*
- *“We will distribute for you, but you must not undercut our resale price.”*
- *“You are our supplier – you cannot bid against us – that is a betrayal of our relationship.”*
- *“We are going to hold our pricing next quarter – what are your plans?”*
- *“Let’s both stop supplying that company – they are undermining our business models.”*
- *“We are going to reduce our agents’ commissions – you could do that too.”*

3. Protection of commercial competition in general – across majority of legal traditions and legal systems

1. *Public law (i.e. antitrust) – quick scheme/overview*

- **Sources of law**
 - EU law
 - National public law
- **Target**
 - Monopolies (the so called „abuse of a dominant position“)
 - Cartels (horizontal as well as vertical cartels)
 - Mergers
- **Enforcement**
 - State administrations (national competition authorities, *i.e.* NCAs, such as the Office for the Protection of Competition in the Czech Republic or Office of Fair Trading in the UK)
 - Administrative and civil court proceedings

11.1.3.2 Private law (i.e. unfair competition) – quick scheme/overview

- **Sources of law**
 - Mostly **national private law**
 - Within legal systems sharing the continental law tradition, the regulation of unfair competition is included either in a **code** (e.g. the New Civil Code in the Czech Republic) or in a **special statute** (e.g. the German Act against Unfair Competition)
- **Target**
 - **General prohibition** (i.e. a general clause prohibiting certain types of behaviour with a potential for being unfair competition), such as section 2976 of the Czech Civil Code (Act No. 89/2012 Coll.)
 - **Specific prohibited behaviour** named in a non-exhaustive list (often in a set of provisions in the Commercial or Civil Code), such as misleading advertisement, misleading description of goods and services *etc.*
- **Enforcement**
 - Enforced by **private parties** (individuals and entities under the private law), sometimes also by the involvement of various trade and consumer interest groups
 - **Civil** (commercial) **courts**
 - **Remedies** (injunctions, compensations, satisfaction)

2. EU antitrust law

1. Introduction – what is EU antitrust law for?

The EU antitrust law shall be seen as a **political commitment to free and open market-based economy**. It is a system in which goods, labour and capital can all move freely. In the EU, this is mostly enshrined in the **EU Treaty** (the “Treaty on the Functioning of the Europe Union”, i.e. **TFEU**⁹). Apart from the EU, the most developed countries also have a domestic system with similar aims to **promote consumer welfare** and **efficient allocation of resources**.

In the EU, firms (companies or corporations) **must not distort the operation of the market and the development of the single market through their behaviour, either individually or collectively**. EU competition law applies where there may be an effect on trade between member states; national competition law applies where effects are confined to a single territory or an area within a territory. The EU competition law generally **applies to all businesses, large and/or small**.

In a nutshell, the EU competition law **consists of the following**:

- Article 101 TFEU → Anti-competitive agreements (cartels)
- Article 102 TFEU → Abuse of a dominant position (monopolies)
- Separate merger control regime (mergers)

⁹ Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

11.2.2 Why is competition law awareness so important these days?

In some countries, **criminal sanctions** apply to individuals for serious infringements of competition law. First individuals were sentenced to 24-36 months in prison back in 2008 (marine hose cartel in the UK). Apart from that, the individuals also subject to **finances**. In addition, in some countries the **company directors' disqualification** orders as well (up to 10-15 years). Last but not least, we should also highlight the significance of damages to companies' **reputation**.

Fines are increasing! These are some of the examples of the highest fines for individual firms (companies/corporations) since the y. 2007

- *Ideal Standard (y. 2011) – EUR 326 million*
- *E.ON (y. 2010) – EUR 553 million*
- *St. Gobain (y. 2009) – EUR 896 million*
- *Thyssen Krupp (y. 2008) – EUR 479 million*
- *ENI SpA (y. 2007) – EUR 272 million*

11.2.3 Cartels (anti-competitive agreements)

The Article 101 of TFEU (Chapter 1) – Anti-competitive agreements reads as follows:

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- *Directly or indirectly fix purchase or selling prices or any other trading conditions;*
- *Limit or control production, markets, technical development, or investment;*
- *Share markets or sources of supply;*
- *Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- *Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*

We can thereby **summarise** that: this article applies to agreements between independent firms (not intra-group agreements); covers formal agreements, but also verbal agreements or informal understandings; applies to agreements between firms at different levels of the production chain; some types of agreements are „anti-competitive by object” and are always illegal.

In other words, the EU competition law prohibits **agreements** between firms (written or informal) at the same or different levels of the production chain and **decisions** of trade associations whose **object or effect** is to restrict competition within the EU. The **most obvious types of restrictive practices** are price fixing, market sharing, bid rigging and exchanging sensitive information with competitors.

Agreements that infringe EU competition law are **void and unenforceable** and are also **subject to fines of up to 10 % of a company's worldwide turnover**.

The **national competition law** generally mirrors provisions of EU competition law.

Generally speaking, there are 3 areas of prohibited cooperation:

1. **Hard-core cartels (always illegal)**, *i.e.* price fixing, restriction on output, collusive tendering, collective boycotts, information exchanges *etc.*
2. **Other collaboration (might be illegal)**, *i.e.* trade associations, joint purchasing, joint production, joint marketing, collective standards, sub-contracting *etc.*
3. **Agreements “de minimis” (legal)**, *i.e.* those agreements where the combined market share is lower than 10 % and no hard-core restrictions apply.

Task: Have a look at the following list of conduct that is likely to be unlawful (from the competition law perspective). Think about the reasons and explain why. What are the major risks?

- A phone call between competitors regarding the verification of their price to a particular customer or business area.
- Listening to a lunch break discussion of a trade association meeting dealing with the topic on „How competitors will adapt their commercial pricing strategies in the future“.
- One competitor calls the other one to find out its reaction to their intended price increase.
- An agreement between competitors in which they agree to focus on a different market segment.
- Discussion between competitors on what they are paying or are willing to pay to a particular supplier or on not agreeing to purchase goods or software from a particular supplier.
- Discussion between competitors on how to eliminate a potential new entrant or competitor (for example by collectively refusing to supply him or buy from him).

11.2.3.1 Information Exchanges as an example of anti-competitive agreements

Accessing information is fundamental for markets to function. It increases transparency, enhances efficiency and also stimulates the competition. Therefore, competitors need access to information to compete effectively. However, exchange of “competitively sensitive” information between competitors will raise authorities’ concerns. It could lead to collusion and reduce uncertainty on the market (to the detriment of end-consumers – higher prices and slower innovation).

Exchanges of certain types of commercial information between competitors may be viewed as **facilitating co-ordination of conduct**. Information exchanges may also be viewed as **evidence of some other anti-competitive practice**. **Forums and conferences** (*e.g.* trade association meetings) do not make it legitimate. Always remember that a “standard industry practice” or “everyone does it” does not serve as a defence.

To sum up, information that could be assessed as **confidential** or **sensitive** should not be revealed to a competitor. Such information includes:

- Past/present/future price data (wholesale or retail);
- Details of customer base;
- Details about production and new investments;
- Details about capacity;
- Details relating to costs;
- Commercial strategy; and
- Details on market shares.

Example: Can the information below be shared?

Do not share: unpublished information on prices, sales volume, customer data, costs; price-setting factors, pricing trends; marketing strategy; bidding strategy; expansion strategy; capacity; investment plans; information received from competitor or ex-employee of competitor.

“Grey area”: current public pricing information; future public – non-binding – pricing information; aggregated data; benchmarking data on product standards.

OK to share: publicly available information; purely technical information; compliance with legislation; fraud or security issues; safety issues; business aspects on which the company/corporation does not compete; information received from a customer.

Not all exchanges of information are considered as being anti-competitive. Information exchanges can **promote efficiency in the industry, encourage the spread of new technologies**, and also **benefit the consumer** (by promoting transparency). What information can therefore be **legitimately shared**?

- Data that is historic;
- Data that is aggregated or anonymized;
- Information relating to industry studies;
- Issues of interest to the industry (*e.g.* technological developments);
- Exchanges of opinions or experiences;
- Information on lobbying activities.

11.2.3.2 Price fixing

„People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.“

(Adam Smith: The Wealth of Nations, 1776)

Price fixing, as another example of anti-competitive agreements, is **illegal** under EU competition law **where**:

- It involves competitors (*i.e.* horizontal price fixing);
- It involves firms (companies/corporations) at different levels of the production chain – *e.g.* supplier and retailer (*i.e.* vertical price fixing).

Price fixing leads to significant **financial penalties** for the firms (companies/corporations) involved. As mentioned above, in some countries even the **criminal sanctions** apply (*i.e.* possibility of imprisonment). There is a high potential for discussions on price strategies with competitors at the above mentioned **industry meetings**.

Firms **cannot** enter into discussion with competitors about current or future **prices or pricing strategies**. In addition, when entering into vertical agreements, firms cannot consider:

- Fixing a minimum resale price;
- Fixing a set resale price;
- Fixing discounts from particular price level;
- Linking rebates or subsidies to observance of particular price levels;
- Use of threats (*e.g.* contract termination) to ensure compliance with price levels.

What **can**, however, **be permitted**?

- A maximum price;
- Recommended resale prices;
- Fixed wholesale prices.

Information exchanges and price fixing in the real life

“During my eight-month sentence – 241 days and nights, and believe me, I counted every single one of them – I had a lot of time to reflect on how a typical British executive, balancing the demands of a challenging business life and a full and happy personal life, ended up in prison. To go to prison in the US and pay a \$20,000 fine was something I never imagined in my worst nightmares. The closest I ever thought I would get to breaking the law would be the odd speeding ticket or parking fine.”

Keith Packer, former Commercial General Manager at British Airways World Cargo (source: <http://www.legalweek.com/legal-week/analysis/2110631/cautionary-tale-exec-consequences-competition-law-infringement>)

What happened in the story above?

- 11 cargo airlines concluded a price fixing cartel in 1996-2006 colluding to inflate fuel surcharges (British Airways, Air France – KLM, SAS, Air Canada, Qantas and others).
- Number of dawn raids took place in February 2006 around the world after Lufthansa, as one of the cartelists, “blew the whistle”.
- Since the fuel surcharge also applied to flights departing from the U.S., the U.S. state authorities investigated the case, as well.
- To prevent his extradition to criminal prosecution in the U.S., a 10 year sentence and USD 1 million penalty, Keith Packer decided to cooperate with the investigators and accepted a plea offer of 8 months in jail and a fine of USD 20,000.

And what are the consequences?

- In the US, the Department of Justice charged 18 airlines and several executives over USD 1.6 billion.

- The European Commission fined 11 airlines almost EUR 800 million (highest fine of EUR 340 million to Air France – KLM, EUR 104 million to BA).
- Keith Packer accepted a plea offer of 8 months in prison in Pensacola and a fine of USD 20,000.
- Several customers who paid the fuel surcharges claimed their damages under the private law procedures.

11.2.4 Abuse of a dominant position (monopolies)

The Article 102 of TFEU – Abuse of dominant position reads as follows:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- *Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- *Limiting production, markets or technical development to the prejudice of consumers;*
- *Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- *Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*

We can thereby **summarise** that this article makes any abuse by one or more undertakings of a dominant position within the internal market/substantial part thereof prohibited so far as it may effect trade between Member States.

Dominance (dominant position) shall be seen as a high degree of market power which causes significant independence of competitors, customers, consumers etc. The dominance/dominant position is possible but unlikely in cases where the market share is 40 % and below. The dominance/dominant position is presumed where the market share is 50 % and above (rebuttable rule).

1. Dominance: a quick overview

The EU competition law prohibits individual firms from engaging in abusive practices that ultimately harm consumers. Such prohibition applies to firms that have certain **market power**. Market power is an economic concept and is measured with reference to a particular market (usually presumed where a firm has a market share of 50 % or more).

The abusive practices include (examples only):

- Discriminatory pricing;
- Refusing to supply products;
- Tying or bundling products together;
- Pricing below cost or excessively.

11.2.4.2 Predatory Pricing as an example of abusive conduct

A nice example of abusive conduct is so called **predatory pricing**.

Predatory pricing is when a dominant undertaking deliberately reduces its prices to **below-costs levels** (which it can afford to do because of its size and market strength) in the **short-term** in order to **prevent a rival from being able to compete**. In order for predation to be abusive, the exclusion should be instrumental in protecting or strengthening the predator's dominant position. **Once that rival has exited the market or increased its prices, the dominant undertaking is then expected also to raise its prices.**

As a rule of thumb, there is a **rebuttable assumption of dominance where an undertaking holds a market share of 50 % or more** and there may be a position of dominance under that market share benchmark.

3. Competition Law Authorities and their Powers

1. Investigatory powers of competition law authorities

The main enforcer of EU competition law is the **European Commission** (sometimes assisted by the National Competition Authorities – NCAs). The **NCAs** enforce national competition law (*e.g.* the OFT in the UK, ÚOHS in the Czech Republic¹⁰ *etc.*). European Commission and NCAs have **wide ranging powers** to investigate potential infringements of competition law. These can take the form of:

- A requests for information; or
- A “dawn raid”.

11.3.2 Dawn raids

Dawn raid is a **surprise inspection conducted by the European Commission or an NCA**. It usually follows a tip-off to the European Commission or the NCA by a **whistle-blower** (typically a competitor or a customer). The **purpose** of dawn raids is to review and take copies of documents and to conduct an investigation into suspected breach of competition law. **Firms are required to co-operate** with the authorities and must not do anything to compromise the investigation; failure to do so can have serious consequences.

What can inspectors do during a raid?

- Enter any business premises, examine and take copies of any business records (including e-mails, diaries, handwritten notes *etc.*) relating to the investigation;
- Off-site locations can now also be searched (homes and cars);
- Ask any employee factual questions (typically explanations of technical language or handwriting on documents);
- Take oral statements (with consent);
- Seal premises for up to 72 hours;
- There is, however, no right to view legally privileged documents and also business secrets must be kept confidential.

¹⁰ Please note that ÚOHS is a Czech abbreviation only.

What shall the concerned firms/corporations do during the raid (inspection)?

- Check inspectors ID and authorization
- Check the scope of the inspection
- Prepare meetings rooms, copiers and shredders
- Shadow the inspectors at all times
- Prepare the internal and also external communications
- Record everything: what was seen, what was asked, what was answered, which documents were taken *etc.* (copies, documents, oral statements and others)
- Protect legally privileged documents
- Protect seals and customer facing IT systems
- Fully engage with the competition law authority
- Review the case post the inspection (assess the possibility of leniency) *etc.*
- Consolidate all materials and notes

11.3.3 Office for the Protection of Competition in the Czech Republic

Office for the Protection of Competition is the **Czech central authority** of state administration responsible for creating conditions that favour and protect competition, supervision over public procurement and consultation and monitoring in relation to the provision of state aid. It was **established** by the Czech National Council by the Act No. 173/1991 Coll. on 26 April 1991. The Czech NCA started its activity on **1 July 1991**. In order to declare independence of the decision-making process, **Brno** has become its headquarters, although Prague is usual seat of all administrative bodies.

Task: Watch the movie below and answer the following questions (“Basics of Competition Law”, the Czech Office for the Protection of Competition:

<https://www.youtube.com/watch?v=uZO2So-wrXQ>):

1. Why should all competitors follow the rules?
2. What are the consequences of a healthy competition?
3. What happened to the Czech telecommunications market several years ago?
4. Can only the producers and sellers influence the competition? Where is the role of consumers?
5. What kind of prohibited practices were mentioned in the video?
6. What is a cartel agreement about?
7. What is a dominant position?
8. Is it possible that a merger will be considered as a breach of competition law?
9. What does competition advocacy mean?

4. Mergers

1. Mergers in the European Union – a quick overview

There is a mandatory notification if:

- Combined worldwide turnover („t/o“) of undertakings concerned > €5bn; **AND**
- Community-wide t/o of each of at least 2 undertakings concerned > €250m; **UNLESS**
- All undertakings concerned each have > 2/3 of community-wide t/o in one and same Member State

OR

- Combined worldwide t/o of undertakings concerned > €2.5bn; **AND**
- In each of at least 3 Member States, combined domestic t/o of all undertakings concerned > €100m; **AND**
- In each of those 3 Member States, at least 2 undertakings concerned each has domestic t/o > €25m; **AND**
- Community-wide t/o of each of at least 2 undertakings concerned > €100m; **UNLESS**
- All undertakings concerned each have > 2/3 of community-wide t/o in one and same Member State.

Timing: Phase I – 25-35 working days / Phase II – 90-125 working days.

11.4.2 Mergers in the Czech Republic – a quick overview

There is a mandatory notification if:

- Combined domestic t/o > CZK1.5bn (approx. €57.9 m) **AND** at least 2 undertakings concerned each has domestic t/o > CZK250m (approx. €9.6 m)

OR

- Domestic t/o of at least 1 undertaking concerned (if merger or joint venture) or acquired business/target (if business sale/acquisition of assets) > CZK1.5bn (approx. €57.9 m) **AND** worldwide t/o of another undertaking concerned > CZK1.5bn (approx. €57.9 m).

Timing: Phase I – 30-45 calendar days / Phase II – 5 months + 15 calendar days.

11.5 Summary

Competition law governs how individual entrepreneurs and business corporations **interact with their competitors, partners, suppliers and customers**. It requires them to **compete fairly** in the markets that they operate in, ultimately to the benefit of their **customers**.

Fair competition leads to customers getting the best price, quality and choice of products and services possible.

Breaching competition law can be really **easy to do**. One does not need a formal contract to do so – a throwaway comment to a friend might be illegal, too. And there can be **serious consequences**.

The **most serious infringements of competition law** include:

- Price fixing;
- Bid rigging or market sharing;
- Collective boycotts;
- Exchanging highly sensitive information with competitors; and
- Resale price maintenance.

The EU antitrust law shall be seen as a **political commitment to free and open market-based economy**. It is a system in which goods, labour and capital can all move freely. In the EU, this is mostly enshrined in the **EU Treaty** (the “Treaty on the Functioning of the Europe Union”, *i.e.* **TFEU**). Apart from the EU, the most developed countries also have a domestic system with similar aims to **promote consumer welfare** and **efficient allocation of resources**.

In the EU, firms (companies or corporations) **must not distort the operation of the market and the development of the single market through their behaviour, either individually or collectively**. EU competition law applies where there may be an effect on trade between member states; national competition law applies where effects are confined to a single territory or an area within a territory. The EU competition law generally **applies to all businesses, large and/or small**.

To sum up, the EU competition law **consists of the following**:

- Article 101 TFEU → Anti-competitive agreements (cartels);
- Article 102 TFEU → Abuse of a dominant position (monopolies);
- Separate merger control regime (mergers).

The main enforcer of EU competition law is the **European Commission** (sometimes assisted by the National Competition Authorities – NCAs). The **NCAs** enforce national competition law (*e.g.* the OFT in the UK, ÚOHS in the Czech Republic¹¹ *etc.*). European Commission and NCAs have **wide ranging powers** to investigate potential infringements of competition law.

11.6 Self-assessment questions and tasks

Answer the following self-assessment questions. If unsure, go back to the theory explained above.

1. What is competition law about?
2. What is a dawn raid?
3. What are the inspectors’ powers during a raid?
4. What are possible sanctions for breaking competition law?
5. What is a cartel?
6. Why is price fixing considered to be illegal?
7. What is bid rigging?
8. What might be wrong about the trade association meetings (or other events and conferences)?
9. What are other examples of agreements that might cause competition law concerns?

¹¹ Please note that ÚOHS is a Czech abbreviation only.

10. What does abuse of dominant position mean?
11. What are examples of abusive dominant position?
12. Can you remember the criteria for a dominant position?

Think about the following case and answer the question on market sharing.

Imagine that you are a Senior Commercial Manager in the Asia Pacific region. You are negotiating a contract with an independent third party supplier. This supplier is particularly strong in cloud and hosting and your telecoms company wants to enter this market next year. In the contract, the supplier requests that when your company enters the market, it will not offer cloud and hosting to large corporates in Singapore. In return, the supplier will not target small and medium-sized enterprises.

Can you agree to this clause?

- a) Yes – we haven't even launched yet, so there cannot be any impact on competition.
- b) No – competition law bites on agreements between actual and potential competitors and this could amount to market sharing.
- c) Yes – the supplier is more established, so it makes sense for them to focus on bigger players.

Help you teammate Sue!

Imagine that your team member, Sue, calls you with the following question: "I heard that you can go to jail in some countries for competition law breaches. Is that true?"

What do you think? Select an option below:

- a) True
- b) False

Think about the following case and answer the question on online issues.

Imagine that you are working in an EU-based telecoms company and that you receive a phone call from one of your new independent resellers. "Hi, just to say that we are setting up a website to advertise a range of products and services online, including yours. Is this OK?"

What should you do? Select an option below:

- a) You already have a website for retails customer in your country. A second website would only duplicate – so tell them this is not really viable.
- b) Agree in principle, but ask that the reseller only accepts payments from cards registered in your country.
- c) Agree to the request but flag that your company will need to work with the reseller to protect its brand integrity.

Help you teammate Sue!

Imagine that your team member, Sue, calls you with the following question: "I have heard that only e-mails and formal project documents can be seized by competition law authorities if they suspect a company/corporation has breached the competition law rules. Is that true?"

What do you think? Select an option below:

- a) Yes.
- b) No.

Help your teammate Sue!

Imagine that your team member, Sue, calls you with the following question: “I know you are not meant to receive competitively sensitive information directly from a competitor. But what about if we receive it from a supplier or a distributor? Could this still be a breach of competition law rules?”

What do you think? Select an option below:

- a) Yes.
- b) No.

11.7 Further reading/listening

Legislation: selected provisions of the Czech Civil Code (for the area of unfair competition).

Printed books: MACGREGOR, R. *Introduction to Law for Business*. Ostrava: KEY Publishing s.r.o., 2012. ISBN: 978-80-7418-137-5.

Online resources: Treaty on the Functioning of the European Union (available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>).

Documentary videos:

- OFT competition law film from June 2011; available here: <https://www.youtube.com/watch?v=ACA9vdlNqek&t=35s>.
- Basics of competition law, the Czech Office for the Protection of Competition; available here: <https://www.youtube.com/watch?v=uZO2So-wrXQ>.

Chapter 12. Corporate Governance, Ethics and Compliance in Doing Business

The following chapter is dedicated to the topic of **corporate governance, ethics and compliance in doing business**. It aims to cover primarily the areas listed below (please note that these are – based on the authors' opinion and necessary selection – seen as the most critical areas for introducing corporate governance, compliance and ethics to our international students, even though the topic itself certainly is much broader and could be presented in a more detailed way):

1. Management liability under Czech laws – introduction and basic legal overview;
2. Duty to act with due managerial care and business judgement rule (including majority of related legal aspects such as, for example, managers' remuneration and concern law);
3. Compliance and compliance programs (introduction and a brief history of compliance, effective implementation of internal compliance programs *etc.*); and
4. Criminal liability of Czech legal entities (details on the new “compliance amendment” and its link to corporate governance and business ethics).

1. Introduction – management liability under Czech laws

The new legal regulation of Czech private law (mainly the New Civil Code¹² (hereinafter also the “NCC”) and the Business Corporations Act¹³ (hereinafter also the “BCA”)) has brought in plenty of changes, many of which also impacted on **the status of company managers**, *i.e.* business corporations’ statutory management. It was the ambition of this new regulation to create rules that are (a) **fairer** (towards the Czech entrepreneurs), and (b) making the general concept of carrying on business **easily available**. As a result, we encounter **new terminology**, **systematics** and also **several new corporate governance institutions**. In the field of business corporations’ management, the previously existing rules are now specified in more details and are more clearly arranged. On one hand, there is certain loosening in the decision making by managerial bodies of Czech business corporations, on the other hand, there is **a strong tightening of sanctions for certain cases of their failure**.

However, we certainly cannot ignore **other forms of “management liability” in Czech laws**, such as “interference” within groups of companies (concerns) under the BCA (see below), or respective provisions of the Czech Labour Code¹⁴ dealing with responsibilities and obligations of individual employees and employed (delegated) managers towards their employer.

1. Management liability under Czech laws – a quick overview

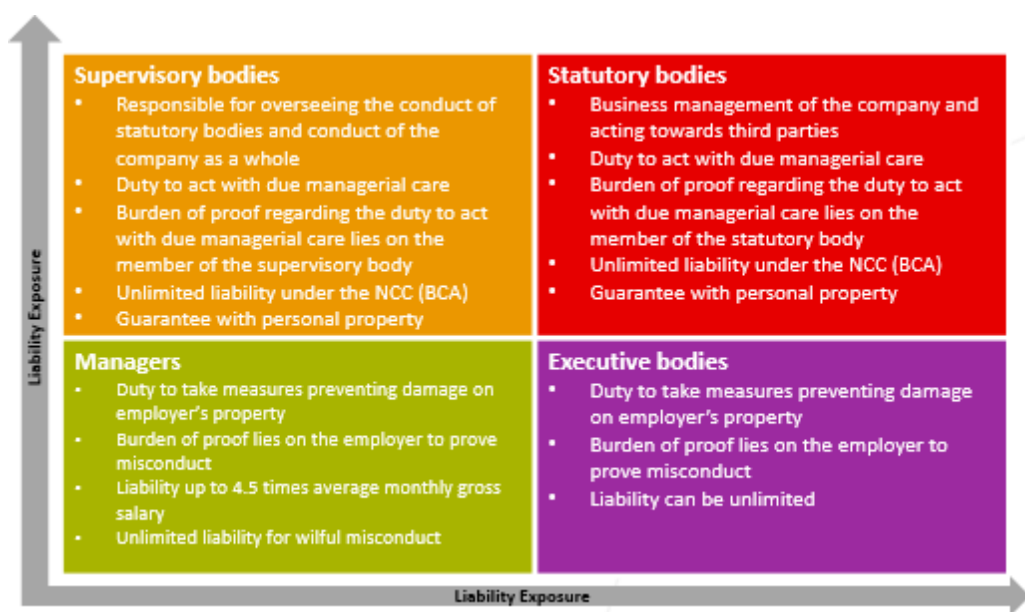
The picture below summarises the **potential legal liability of various types of corporate managers**, *i.e.* members of supervisory and statutory bodies (who are performing their office in compliance with respective provisions of the New Civil Code and Business Corporations Act), as well as so called “employed or delegated” managers – either individuals or members

¹² Act No. 89/2012 Coll., Civil Code, as amended.

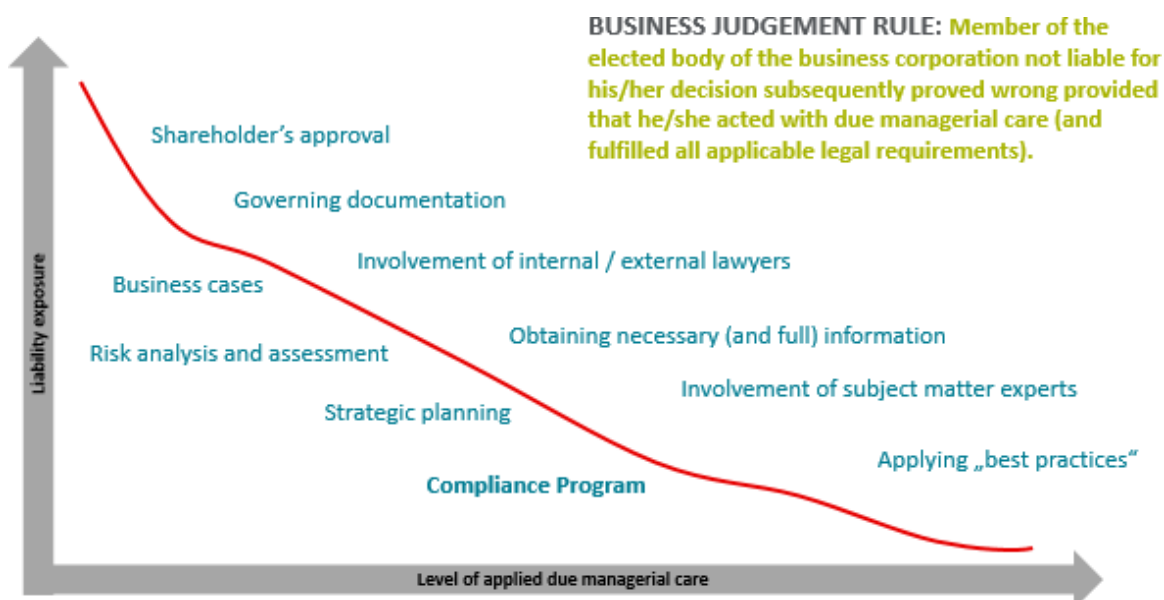
¹³ Act No. 90/2012 Coll., on Business Companies and Cooperatives (Business Corporations Act), as amended.

¹⁴ Act No. 262/2006 Coll., Labour Code, as amended.

of different internal executive bodies and committees (who are performing their obligations in compliance with respective provisions of the Czech Labour Code¹⁵).



Picture 1: A brief overview of various types of management liability under Czech laws



Picture 2: A brief overview of various practical tools that may either fully eliminate and/or somewhat limit the management liability

¹⁵ Available at: https://www.mpsv.cz/files/clanky/3221/Labour_Code_2012.pdf

2. Duty to act with due managerial care

Section 159 (1) of the New Civil Code stipulates the following: *“Who accepts an office as a member of an elected body, he/she undertakes to execute the office with necessary loyalty and required knowledge and care. It is understood that a person who is not able to act with due managerial care, although he/she must have known it when accepting the office or when executing it, and does not draw consequences for himself/herself, acts carelessly.”* To sum up, this is how the Czech Republic legally defines the so called **„standard of quality of care“**. A **conflict** with due managerial care may occur, however, a member of an elected body must **react to the situation without undue delay**, *i.e.* to inform the concerned company (corporation) about the conflict, to propose appropriate solution, to ensure an external consultant or other professional, to delegate the activity to a third party *etc.* Therefore the law does not automatically assume that such a situation is defective, however, it emphasizes the fact that a member of an elected body must properly solve it. Thus the due managerial care is observed also by such a member of an elected body of the company who evaluates his/her own inadequacy and simultaneously finds a solution how to remedy the situation.

The law imposes a duty of loyalty upon the **members of elected bodies of Czech business corporations** (supervisory, statutory and potentially also other corporate bodies). This means such conduct that is in the interest of the corporation concerned. It is therefore expected that a member of an elected body never pursues his/her own interest (or interest of another person) if he/she would endanger the interests of the corporation concerned thereby.

1. Legal assessment of the duty to act with due managerial care

Section 52 (1) of the Business Corporations Act (BCA) stipulates the following: *“When assessing whether a member of the body acted with due managerial care, always the care that would be taken in a similar situation by another reasonably careful person if he/she was a member of a similar body of a business corporation will be considered.”* The question on whether a particular member of an elected body of a specific business corporation acted in a particular case with due managerial care or not **is being assessed with regards to what kind of care in a similar situation would be taken by another reasonably careful person** (not with regards to what level of care is typical for a particular member of the body of the company), *i.e.* an **objective approach** always applies.

12.2.2 Business judgement rule

In addition to the above, the section 51 (1) of the Business Corporations Act further introduces the so called **Business Judgement Rule**: *“A person acts carefully and with necessary knowledge if, when making a business decision, this person presumes in good faith that he/she acts on an informed basis and in the defensible interest of a business corporation; this will not apply if such a decision is not made with the necessary loyalty.”*

What is, however, the purpose of such institute? The duty to act carefully and loyally may, at least at the first glance, look so rigidly that some members of elected bodies could be **afraid to make any risky business decisions**. Therefore, the BCA introduces a business judgment rule which offers those members of elected bodies, who act within the limits and under the conditions laid down by the law, some form of a protection shield. **A member of the elected body is not responsible for a bad decision if he/she comes to such decision in a proper manner, therefore, as stated above, loyally, in justifiable interests of the business corporation and being well-informed.** According to the Czech legislation, the **burden of proof** is borne by the member concerned (*i.e.* he/she must prove that he/she had the necessary

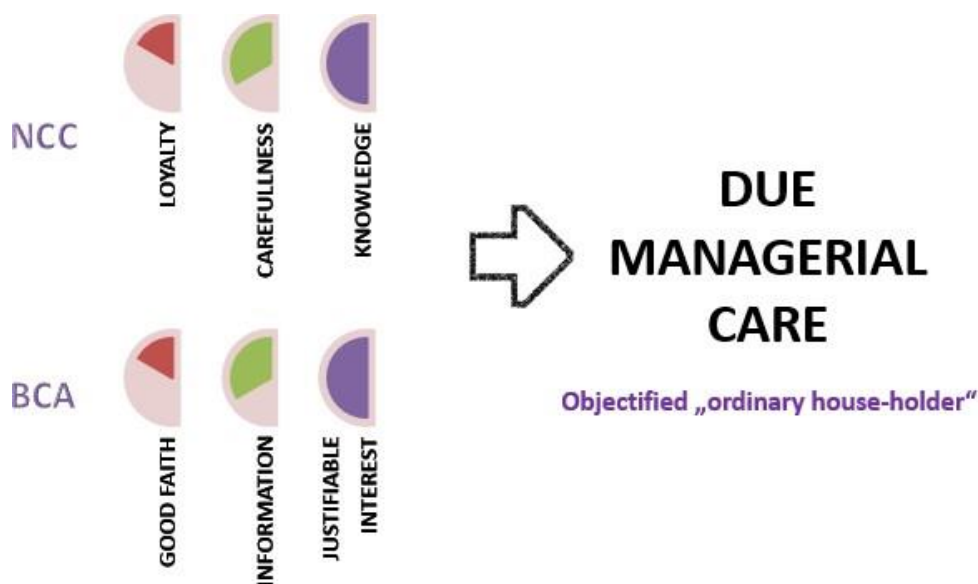
information which he/she properly evaluated, and subsequent decision was made in the interests of the corporation, thus he/she has to prove that the loyalty was not breached).

This rule shall be seen as a **practical reaction** of the Czech legislation to the fact that the members of elected bodies often have to act so as **not to cause damage**, but at the same time so that to **maximize profit of the corporation**, whereby they expose themselves to certain **commercial and business risks**.

However, it is also necessary to think about the **practice of the Czech justice** in this context. In connection with the business judgment rule, the courts should decide not only on the basis of the law, but they should also take into account certain economic aspects of individual cases. To simplify their decision-making process, the law stipulates that the **business judgment rule test has three elements**; the courts should therefore examine whether a member of an elected body:

- (1) Acted in good faith;
- (2) Could reasonably assume that he/she acted on informed basis; and
- (3) Could reasonably believe that he/she acted in the honest belief that the action taken was in the best interest of the company.

The aim of the business judgment rule is therefore to review **how the member has acted**, not **what the result of the act was**.



Picture 3: A summary of key legal elements of the due managerial care – both from the NCC and also from the BCA perspective

12.2.3 Consequences of a breach of the duty to act with due managerial care

Remember that breaking the duty to act with due managerial care may have **severe legal consequences**:

- **Surrender of benefit** – *i.e.* an obligation of a person who acts in contradiction with the rules of due managerial care to surrender to the company the benefit, which he/she obtained in connection with his/her acting. If such surrender is not possible, the obliged person must compensate the benefit in cash.
- **Liability for damage** – according to former legislation, no fault of a member of the elected body of a business corporation was required to claim responsibility of such member for caused damage, thus the so-called objective responsibility was concerned. However, the NCC turns over this philosophy and stipulates the duty of a member of an elected body to compensate damage caused by a breach of his/her statutory duty as follows: a wrongdoer is responsible for violation of the legal obligation only if it is caused by his/her fault, *i.e.* **subjective liability applies**. The **burden of proof** concerning the absence of fault is borne by the member himself/herself, not by the company.
- **Disqualification from the exercise of the office as per the court's decision** – a member of the elected body may be disqualified from the exercise of his/her office, both for serious and repeated breach of the duty to act with due managerial care and for such conduct and performance of the office which brought the corporation concerned into bankruptcy. Besides, if the business corporation is not fully satisfied with the performance of the office by respective member, it may recall him. In addition, it is also possible for the members to resign from their function, however, the BCA states that this can only be done when the time is appropriate.

12.2.4 Remuneration of managers and agreement on office performance

It is solely an **internal matter** of a business corporation concerned how and when it will remunerate its members. The Czech laws stipulate only the **rules for related monitoring**. The rules for remunerating members of elected bodies are viewed as one of the most important elements of monitoring the **performance of their duties**. Therefore, the law does not care at all about what, how and when members of elected bodies receive the remuneration, it is in the interest of the law that the remuneration is made in a **fully transparent manner**. In case of capital Czech business companies (corporations), it is therefore necessary that any remuneration is always **approved by the general meeting**, otherwise it cannot be provided.

The position of a member of an elected body may be created in different manners, however, both the codification and the previous legislation clearly prefer contractual arrangements, *i.e.* the situation where the relationship between a member of an elected body and the business corporation is regulated by an **agreement on the office performance**. If the agreement on the office performance is not entered into it does not mean that the position of a member of an elected body is not created; in such a case, the new legislation offers alternative solution (a supporting provision in the BCA referring to adequate application of the provisions of the NCC on the mandate agreement would apply).

The new legislation treats the remuneration of members of elected bodies as a tool used to **increase their motivation for proper conduct** when it introduces the **possibility of refunding the remuneration paid in the past as a penalty for failure in the performance of their duties**. An example may be an obligation of a director, who did not carry out all necessary and reasonably foreseeable things to prevent impending **bankruptcy** of a joint stock company of which he/she knew or should have or could have known (a breach of duty to act with due managerial care), to return the benefits derived from the agreement on the office performance for the period up to two years before the decision on the company's bankruptcy becomes final. This sanction does not – logically – apply to **crisis management**.

12.2.5 A brief excursion into concern law

A new legal regulation of concern law (section 71 and following of the BCA) added a new level of influence, so called “**interference**” (apart from “controls” and “concerns”):

1. *Anyone who influences (directly or indirectly) business conduct of a corporation to its harm shall compensate such harm, unless he/she proofs that he/she could have assumed in good faith and reasonably that he/she is acting informed and in defendable interest of influenced person.*
2. *Such harm must be compensated before the end of fiscal year in which the harm arose otherwise such harm needs to be compensated to shareholders.*

12.3 Compliance programs

“If ethics are poor at the top, that behaviour is copied down through the organization.”

Robert Noyce

12.3.1 Keith Packer: “You may be held liable for what your people do.”

Task: Re-read the story about Keith Pecker below and think about other than competition law related consequences.

Do you still remember the story about Keith Packer?

“During my eight-month sentence – 241 days and nights, and believe me, I counted every single one of them – I had a lot of time to reflect on how a typical British executive, balancing the demands of a challenging business life and a full and happy personal life, ended up in prison. To go to prison in the US and pay a \$20,000 fine was something I never imagined in my worst nightmares. The closest I ever thought I would get to breaking the law would be the odd speeding ticket or parking fine.”

Keith Packer, Former Commercial General Manager at British Airways World Cargo

(source: <http://www.legalweek.com/legal-week/analysis/2110631/cautionary-tale-exec-consequences-competition-law-infringement>)

What happened?

- 11 cargo airlines concluded a price fixing cartel between 1996-2006 colluding to inflate fuel surcharges (British Airways, Air France – KLM, SAS, Air Canada, Qantas and others).
- Number of dawn raids took place in February 2006 around the world after Lufthansa, as one of the cartelists, “blew the whistle”.
- Since the fuel surcharge also applied to flights departing from the U.S., the U.S. state authorities investigated the case as well.
- To prevent his extradition to criminal prosecution in the U.S., a 10 year sentence and USD 1 million penalty, Keith Packer decided to cooperate with the investigators and accepted a plea offer of 8 months in jail and a fine of USD 20,000.

What were the consequences?

- In the US, the Department of Justice charged 18 airlines and several executives over USD 1.6 billion.
- The EC fined 11 airlines almost EUR 800 million (highest fine of EUR 340 million to Air France – KLM, EUR 104 million to BA).
- Keith Packer accepted a plea offer of 8 months in prison in Pensacola and a fine of USD 20,000.
- Several customers who paid the fuel surcharges claimed their damages under the private law procedures.

What would you say that this story means for us – from the compliance and business ethics perspective? Not sure? Then have a look at the summary below.

A. There really is a personal liability for a business infringement

The concept of personal liability of employees and managers derives directly from the Czech Labour Code, the New Civil Code and the Business Corporations Act. Personal liability is, however, stipulated in other legislations, as well, such as the Czech Act on Personal Data Protection (fines up to CZK 100.000 for an individual, meaning also an employee), or the Czech Act on Protection of Commercial Competition (the offence of infringement of competition law rules with imprisonment up to 8 years).

B. The punishment does not avoid the top managers

Even a high managerial position does not protect the concerned individual from his/her punishment, quite the contrary. Managers' liability is not derived from their acting only, *i.e.* from the specific violation, but also from the fact how he/she fought for the infringement not to occur, *i.e.* typically what **preventive measures** have been considered in order to prevent a breach of binding rules. **The greater the role, the higher the responsibility.**

C. The punishment may follow even for misconduct of someone else

As in case of Keith Packer, the punishment may follow for the manager who did not committed the infringement by himself/herself directly. Such manager is, from the legal perspective, responsible for activities of his/her subordinates, *i.e.* for cases when he/she **did not timely intervene, did not involve the lawyers** and therefore **did not prevent from the violation of respective laws.**

2. So how does compliance help and why business ethics matter?

1. *What is compliance?*

Compliance means **knowing and following the relevant laws, rules, principles, standards and procedures**. It is making sure that **the organizations adhere to all applicable legal and other requirements**. Compliance must be seen and understood as a **detailed and complex process**. For any particular situation one must be aware of all potentially applicable laws and regulations (such as international and local laws and also internal company-instituted rules). As this is not a possibility (*i.e.* something we would call “nice-to-have”) but a strict obligation, a strong compliance program is absolutely necessary to protect the organizations both internally and externally. **Ignorance of the law is no excuse**. A legal and/or natural person cannot escape a criminal charge or civil liability by claiming that he or she did not realize that the law was

broken. The role of compliance is therefore (1) making sure that people know the rules beforehand; as well as (2) helping to ensure that they continuously follow them.

However, knowing the law and following it is only one side of compliance. It is obvious that businesses also have to know **where and to what it applies**. Once they have this information, they must **implement it into an effective compliance program**. To get the word “effective” out of its theoretical meaning, it is highly recommended that the organizations hire experienced **compliance professionals**, issue detailed **policies** and guidance, institute and roll out respective **training** and promote all **other aspects of the compliance program**. The aim of these compliance activities is to spread the knowledge to all who need it. It should be highlighted that the above described process must be **continuous**. The compliance program is the heart of compliance putting all of the elements above into effect. To sum up, true compliance should go beyond the borders of knowing and following the law, *i.e.* beyond the minimum requirements. In other words, simply following the law so that one does not get into trouble is not full compliance. Effective compliance develops and sustains a culture based on values, integrity and accountability; it ensures consistency of actions to lessen or eliminate the opportunities for harm from criminal conduct or other compliance failures. It is therefore very important that true compliance involves the ongoing commitment from senior executives in the organization to promote ethical conduct and compliance with the law. *“Leading by example and establishing the tone at the top set the stage for every other element of compliance”* (Biegelman, 2008, p. 3 – see below). Simply said, **human beings mirror their leaders**.

There are **two significant obstacles that might occur in terms of compliance program’s implementation**. The first one can be described as “using compliance as an excuse”. Some executives might tend to use compliance program to mask their own negligence or even wrongdoing. It must be highlighted that this attitude is even more dangerous than having no compliance program at all. That is because it gives shareholders, employees, vendors and also the public a false belief that the organization cares about following the legal and other requirements when, in fact, all it wants is just to misguide others into believing it. Plenty of organizations that faced corporate scandals had, for example, implemented the code of conduct. But, in the end, these codes showed up to be nothing more than empty words. The second obstacle which might go in hand with compliance program’s implementation is when the program itself is not sufficiently supported by skilled personnel, meaningful awareness, management engagement *etc.* This is not only risky from the perspective of all stakeholders concerned, but also counterproductive. True compliance means that one believes in what one is doing day in and day out. The organizations cannot have effective compliance programs without that. If their management believes in compliance and reinforces it by its actions, people will follow its lead. An under-funded and unsupported program is predestined to fail. Without sufficient support from the organization and its management, a compliance program cannot fulfil its objectives of changing and influencing employees’ behaviour. To sum up, true compliance requires **direct input by company leadership** and the **key support of a qualified compliance officer running a reliable compliance department providing the organization with an appropriate direction**.

12.3.2.2 A brief history of compliance

What is today known as corporate compliance is the result of **many years of growth and evolution**. Various laws and rules covering businesses have been developed over the years into a more formal and complex structure. Such regulation started slowly in the **19th century** as a response to **several individual scandals**. By the 1960s, with increasing complexity in both the

business and regulatory areas, the foundations of modern compliance began to emerge. This trend continued in 1970s and 1980s, until it reached a tipping point with the release of the **USSC Organizational Guidelines**¹⁶. Although many compliance programs existed well before these Guidelines came into force, they gave them a major push into the mainstream of business. The compliance framework has further been developed with the passage of other well-known laws and regulations, such as the **U.S. Sarbanes-Oxley Act** from 2002 or **UK Bribery Act** from 2010. The above described evolution resulted into increased importance and role of compliance officers in the 21st century.

In many ways, **the history and development of business parallels the history of scandal**. This idea could be described as an ongoing tug of war between regulators who seek to reign in corporate excess and business that resists regulation in order to achieve greater flexibility and innovation. Particularly, **regulators** have stepped in during the wake of massive corporate scandals. As these scandals have been extremely devastating, they have forced lawmakers to step in. This pattern lies at the heart of majority of related corporate governance regulations. Let's consider the American corporate regulation as an example. Skeel (2005) concludes that it has consisted of periodic, dramatic regulatory interventions by federal lawmakers after a major scandal, together with more nuanced ongoing regulation by the states. In the aftermath of these scandals, the public outrage and calls for justice transform into broad support for tangible reform that would otherwise be impossible had the scandals not occurred.

Compliance has always been around, in some form or another, since the establishment of organized business activities and commerce. Walsh and Pyrich (1995) propose that self-regulation of business stretches back to Middle Age merchant and craft guilds setting business standards for themselves. Businesses have adopted their own codes of conduct, often in the wake of other companies' scandals. However, these types of self-imposed regulations were voluntary, informal, and relatively simple. As regulation grew in the middle of the 20th century, some companies had to find new ways to make sure they followed the law. They needed a more formal and structured way to deal with the **complexity of modern regulation**. Most authors agree on the fact that modern compliance programs were first created after the electricity industry's antitrust scandal in the early 1960s. *"A widespread bid-rigging and price-fixing conspiracy involving electrical equipment manufacturers such as General Electric and Westinghouse resulted in dozens of individuals and corporations convicted of antitrust violation. The enormity of the case and related publicity of the first prison sentences handed down in the 70-year history of the Sherman Antitrust Act spurred the development of antitrust compliance codes of conduct and programs. In this period, companies in the most heavily and complexly regulated industries began internal compliance efforts, particularly involving the above-mentioned antitrust issues. With further scandal, these compliance efforts would start to reach other industries"* (Biegelman, 2008, pp. 49-50 – see below). It is therefore obvious that the **public outrage** combined with **governmental pressure** encouraged businesses to adopt much-needed reforms. Last but not least example underlining the above introduced idea is the enactment of U.S. Foreign Corrupt Practices Act ("FCPA"). The FCPA has been enacted shortly after the Watergate investigation (conducted in 1977) which discovered that companies were paying bribes to foreign and domestic officials using funds maintained "off the accounting books". Therefore, the Foreign Corrupt Practices Act makes it crime for American companies, as well as individuals and organizations acting on their behalf, to bribe any foreign government official in return for assistance in obtaining, retaining or directing business.

¹⁶ Available at: <https://www.ussc.gov/guidelines/organizational-guidelines>.

As mentioned in the introduction, the United States Sentencing Commission issued several organizational guidelines recommending **minimum requirements for an effective compliance program**. As the Sentencing Guidelines for Organizations focus (among other measures) on prevention and deterrence of law violations that include self-reporting and acceptance of responsibility, they gave companies a strong incentive to establish and maintain truly effective compliance programs, either to receive a lessened sentence or mandated as part of probation. The original seven steps to achieve effective compliance introduced by USSC in 1991 have been significantly enhanced by 2004 FSGO Amendments (more details below).

12.3.2.3 Compliance challenges and objectives

Ideally, a compliance program should be both **industry-specific and unique**. It should be tailored to fit the requirements of the organization concerned, its needs and the overall compliance requirements of its particular industry, as well as to reflect the compliance requirements imposed on all organizations and the laws they must follow. Each organization must therefore ensure that its compliance program is getting the **individualized attention** it needs to enhance the **corporate compliance culture**. The focus on individuality rather than on image of the compliance program itself produces great **benefits**. A strong compliance program can create better employee **productivity and morale**, **higher profits** and a **stronger reputation** among **customers** and **investors**. It can also help to catch problems before they reach the level where they can hurt the company and its **stock price**. Least but not last, with a strong and effective compliance program, an organization can have a more beneficial position when **dealing with state prosecutors** should any problems arise.

Running an ethical organization that places its values on compliance is not simply a good idea; it also makes a good business sense. Over the past years, a lot has been written about the **importance of business ethics**, the damage that can be caused by compliance scandals and about related legal requirements and benefits. However, less has been published about how an ethical business with strong corporate governance outperforms organizations that do not focus on ethics. Senior executives can damage their business and its future if they do not properly value ethics. Copeland (2007) points out that too many corporate executives regard an ethics program as an expense that adds nothing to a company's bottom line. Even more disturbing, some executives fear that an emphasis on business ethics could put their company at a competitive disadvantage. They are unconvinced that ethics and profits are reconcilable. Enlightened business leaders, however, know that building an ethical business culture is a powerful means of maximizing shareholder value and increasing business profits. In the end, ethics increases the bottom line. The strong link between corporate management's public commitment to ethics and the corporation's financial performance has been borne out by numerous studies. According to Verschoor (2004) well managed companies that take their ethical, social, and environmental responsibilities seriously have stronger long-term financial performance than the remaining companies in the S&P 500 Index.

The challenges to developing an ethical culture are therefore more than great. In the first place, **cultural change takes time**. Culture cannot happen overnight. The compliance and ethical values might be possibly written very quickly, but culture is not imbedded until everyone acts on those values. In order to achieve a successful and lasting compliance culture, the program has to be more than simply using a check-the-box and it-is-done approach. It is the management's responsibility to drive a culture of true compliance and build it element by element until all employees understand every single component of the compliance program.

12.3.2.4 Warning signs of compliance and ethics failures

An excellent overview of **several major indicators of ethical collapse** has been identified by Jennings (2006). These seven signs are as follows: (1) the pressure to maintain the business numbers; (2) a culture of fear and silence; (3) a “bigger than life” CEO and awe-struck direct reports that will not go against their leader; (4) a weak board of directors; (5) a practice of conflicts of interest; (6) a belief that the organization is above the law; and (7) that “goodness in some areas” such as corporate giving “stones for evil in others”. Although these seven signs are not a guarantee of an ethical collapse, they can definitely be used as potential announcers of ethical challenges.

12.3.2.5 Ethical culture, integrity and proper business conduct

The major compliance failures of recent years resulted in significant changes to corporate lives and cultures. Suddenly, **integrity and accountability** are considered as key elements for every single organization. Senior executives and other leaders are constantly confronted with the day-to-day realities of business compliance. They must ensure compliance with the organizations internal rules and policies. In addition, all organizations must follow respective local and sometimes also international laws, and, moreover, in most of the legal orders there is usually a stricter regulation being applied to publicly held businesses. Some of these regulations even mandate the creation of compliance programs, other constitute stern restrictions from anti-bribery rules to free trade provisions. A flagship among these requirements is the idea of **ethics**. Ethics should lie at the heart of every corporate governance requirement.

Ethics include integrity and proper business conduct. It refers to standards and values by which an individual or an organization behaves and interacts with others. Aristotle (1962) argued that moral behaviour is acquired by habituation and that without question moral behaviour is good. This principle has not changed despite years. Ethics and compliance are clearly on the minds of senior executives and leaders, as well as investors, public and government. Thanks to many corporate scandals of the past decades, business ethics has become a hot topic. However, despite the increased awareness given to ethics and compliance, the problem has not been solved. Ethics and ethical behaviour are not the things that could be created and attained merely through corporate expenditure. They require a far deeper commitment that can only be achieved through time, effort and yes, also expenditure. Quality matters here far more than quantity. A commitment to ethical conduct cannot be accomplished by simply initiating a compliance program and then just checking the box that the process is complete. Building an ethical culture takes time. Integrity and character bring out the best in people and are therefore critical components of ethics and compliance. *“Yet, human beings are not perfect creatures and tend to falter from time to time. The importance of ethical conduct needs to be nurtured, reinforced, and repeated over and over again lest people forget and stray from the course”* (Biegelman, 2008, p. 6 – see below). Therefore, building and maintaining an effective compliance program requires smart decisions that are necessary to achieve true compliance over the long term.

Ethics can also bring benefits in other areas, such as **hiring and retaining top quality employees**. Unethical behaviour, as indicated in the previous chapter, not only impacts a company’s bottom line, but it also impacts its workforce. Such a behaviour and attitude affect current employees as well as the company’s ability to attract qualified staff. A study conducted

by the consulting company LRN¹⁷ provides evidence that links a company's ability to foster an ethical corporate culture with an increased ability to attract, retain and ensure productivity among U.S. employees. Some of the study's findings conclude that: (1) 94 % of employees say it is critical that they work for an ethical company; (2) more than one third of respondents reported leaving their job for ethical reasons; (3) 56 % of respondents say their employer embraces ethics and corporate values in everything it does; (4) 30 % of employees say their company merely toes the line by following the law and company policies; and finally (5) 5 % say they work at a company where they do what they are told, are not encouraged to ask questions about what is right or wrong, or they often see management and peers acting in questionable ways. To sum up, employees are very sensitive to business ethics. They are intensely aware of their organization's culture and pay attention to the tone set from the top and around them. Unethical behaviour has a strong effect on employee morale and distracts employees from the company's business. One in four employees reported seeing unethical or even illegal behaviour in the organization they work with; of those who saw unethical behaviour, 89 % said it affected them.

12.3.2.6 Establishing an effective compliance program

Previously, a documented and reasonably functional compliance program was adequate. Today, this is not enough. The compliance program must also be **effective**. An effective program should, at a minimum, include a **compliance officer**, an **employee training program**, **internal policies, procedures** and **controls**, and an **independent audit function** to test it. Such a program should be understood as living efforts that need to continually evolve with time and circumstances. To be effective, however, one needs to **combine compliance with ethics**. Employees need to know more than the "dos" and "do not's" of compliance; they should believe in the organization's **values** and judge their conduct and decisions according to them. Ethical conduct goes beyond the perception and definition of compliance and deciding between right or wrong. **Ethical conduct means choosing the best and most ethical course of conduct by applying the organization's values**. Fortunately, such a conduct can be taught to most employees regardless of a lack of prior ethics training.

A commonly recommended best practice for public and private companies to establish a meaningful compliance program is to design it according to the seven requirements outlined in the FSGO. Following the **FSGO recommendations**, however, does not ensure an effective ethics and compliance program. It only means that the organization have met the minimum required components and, as already mentioned, effective compliance requires more than a "bare bones" program. The "seven steps plan" for establishing a compliance and ethics program as described in the FSGO therefore serves as a pure backbone which should further be developed. The plan requires the organizations to take the following actions: (1) establish standards of conduct reasonably capable of reducing the likelihood of criminal conduct; (2) assign overall responsibility for compliance to a specific high-level officer; (3) do not delegate discretionary authority to individuals with a history of illegal conduct or other conduct inconsistent with a compliance program; (4) communicate standards and procedures to employees and agents; (5) establish monitoring, auditing and reporting systems; (6) enforce

¹⁷ New Research Indicates Ethical Corporate Cultures Impact the Ability to Attract, Retain, and Ensure Productivity among U.S. Workers, LRN, 3 August 2006, retrieved from www.lrn.com/about_lrn/media_room/press_releases/263. LRN specializes in legal, compliance, ethics and governance solutions.

standards with discipline and incentives; and finally (7) take reasonable steps to respond to discovered criminal conduct.

- **Compliance standards and procedures**

Each organization shall establish relevant standards and procedures to prevent and detect criminal conduct and ensure compliance with the law. The cornerstone of those standards and procedures is usually an ethics code called **code of conduct**. This code is an integral component of the compliance program pointing out on organizations values. Following criteria should be taken into account when assessing the codes effectiveness: public availability; tone at the top; readability and tone; non-retaliation; commitment to stakeholders; risk topics; learning aids; presentation and style *etc.* The corporate ethics code should always fit the organization. Therefore, it might be very advantageous to involve the organizations employees into assessing it. The biggest mistake is to simply “copy-paste” another organization’s code and substitute its heading with the name of the organization.

- **Organizational leadership and a culture of compliance**

The organizations governing authority (usually represented by the CEO, CFO and the board of directors) should be knowledgeable about the content and operations of the compliance and ethics program. In addition, the governing authority should exercise reasonable oversight with respect to the implementation and also effectiveness of the program. Specific individual(s) within the highest levels of the organization shall be assigned overall responsibility for the compliance program. Other individual(s) within the organization shall be delegated day-to-day operational responsibility for the program. The individual(s) with operational responsibility shall report periodically to high-level personnel and to the governing authority. To carry out such responsibility, the individual(s) shall be given adequate resources, appropriate authority and also direct access to the governing body.

- **Reasonable efforts to exclude prohibited persons**

“The organization shall use reasonable efforts not to include within the substantial authority personnel who the organization knew, or should have known through the exercise of due diligence, have engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program” (Biegelman, 2008, p. 169 – see below).

- **Training and communication**

The organization should take reasonable steps to communicate regularly and in a practical manner its standards and procedures and other important elements of the compliance program by conducting an effective training (preferably the face-to-face one) and otherwise disseminating information appropriate to such individuals respective roles and responsibilities. Training shall be provided to members of the governing authority, other high-level leaders, employees and also the organization’s agents.

- **Monitoring, auditing and evaluating program’s effectiveness**

The organization shall take reasonable steps to evaluate the program’s effectiveness. It shall also take reasonable steps to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, where the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation, such as ombudspersons or hotlines. As Biegelman (2008) highlights, compliance will always begin and end with people. That includes everyone from the CEO to the newest intern. His words emphasis that people who are willing to speak up and be heard, even when it is culturally not popular to do so, are extremely valuable and necessary in terms of an effective compliance and ethics program. Senior executives must therefore ensure a corporate culture where employees are not afraid to “blow the whistle” and report wrongdoing and other potential violations of business conduct they are aware of.

A common mistake that a compliance program can make is to focus too much on the “easy” things and too little on the “hard” ones. It might be easy to do the training, prepare and roll out a code of conduct, institute an external hotline, talk up the culture and tone from the top; however, it is much harder to beat areas such as discipline, audits, monitoring, incentives and the fact that the organization needs so called corporate cops.

- **Performance incentives and disciplinary actions**

The organization’s compliance program shall be promoted and enforced **consistently** within the organization. This can be done through appropriate incentives to perform in accordance with the program, and also through disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect such a conduct.

- **Response to criminal conduct and remedial action plan**

After a criminal conduct has been revealed, the organization shall take reasonable steps to **respond appropriately** to the criminal conduct and to prevent further similar conduct, including making any necessary modifications to the organization’s compliance program. The organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement or modify each compliance requirement to reduce the risk of criminal conduct identified through the above mentioned risk assessment.

12.3.2.7 International compliance

It should be highlighted that in today’s corporate world compliance **goes beyond the geographical borders**. This must be understood as a side effect of globalization of business. International compliance is therefore a necessity. The global nature of organizations with subsidiaries, affiliates and vendors all over the world provide great opportunity but also great risk. Both U.S. and UK laws reach all around the world and cover the actions of “their” corporations and employees no matter where they are. Illegal actions relating to the FCPA or the UK Bribery Act can have major implications. There are severe penalties for those who violate the anti-bribery provisions of those acts. Third party liability is another major concern as organizations are liable for the actions of people they hire, by their direct employees or agents. The solution is a strong global compliance program that ensures everyone knows what the rules are, what is going on and to keep track of who is doing what (particularly on the local level).

4. Criminal liability of Czech legal entities

1. Introduction

Criminal liability of legal entities became a reality here in the Czech Republic already on **1 January 2012**. Generally, a criminal act can be committed only by an individual (natural person). Legal entity, a sort of theoretical legal structure, never acts by itself, *i.e.* it can always act only through individuals predicted by the law. However, over time it has been demonstrated in the corporate (business) practice that it is not always fair and adequate to “punish” only natural persons for committed criminal acts and therefore in 2012 a concept of criminal liability of legal entities was newly introduced into the Czech legal order.

Thus the basic principle of the criminal liability of legal entities is the possibility to hold liable the legal entity concerned, under certain circumstances, for the conduct committed by a

particular individual. However, this is generally possible only if the individual acted on behalf, for or in the interest the legal entity concerned or in the framework of its activities. In this context, the **updated Act on Criminal Liability of Legal Entities** (hereinafter also “ACLLE”) contains two key changes. They fundamentally complete the original concept of the criminal liability of legal entities in the Czech Republic. Firstly, the list of criminal acts for which a legal entity may be held liable is substantially extended; secondly, the entire possibility of a legal entity to exculpate itself from the criminal liability has been included in the ACLLE. Section 7 of the ACLLE previously included the so called positive list of criminal acts for which a legal entity may hold criminal liability. However, the discussed Amendment has changed the positive list to a negative one. Thus from **1 December 2016** a legal entity may commit any criminal act except for those explicitly listed in the amended wording of section 7 of the ACLLE. From the point of view of effects of the Amendment of the ACLLE on the activity of individual entrepreneurs, however, the introduction of a mechanism allowing legal entities to entirely exculpate themselves from the criminal liability is more significant. The Amendment of the ACLLE introduces new section 8 subsection 5 of the ACLLE stipulating that: *“The legal entity will be relieved of criminal liability (...) if it made every effort that could be reasonably required to protect committing a wrongful act (...).”* The used wording may be seemed a bit vague at first sight. Its content will become fully clear only after practice of next few years. Nevertheless, in terms of the possibility of interpreting the ACLLE, this statement is quite clear – namely the investigative, prosecuting and adjudicating bodies must consider what is the standpoint of the particular entrepreneur concerning possible criminal activity, *i.e.* what specific mechanisms have been introduced by them in their internal environment. **A properly functioning internal compliance program of the particular entrepreneur may constitute such mechanism.**

Following the above analysed changes it can thus be **recommended to Czech entrepreneurs to take every appropriate preventive measures – as a reaction to the effectiveness of the ACLLE**, especially to introduce or review their internal compliance programs corresponding to the applicable market standards. It may include, for example, the following measures:

- **Necessity to identify and assess appropriate risk areas of the entrepreneur concerned**

Firstly, all risk areas and relationships which the entrepreneur usually enters into should be thoroughly assessed, and in this context all criminal acts that could even potentially concern the entrepreneur in this regard in theory, taking into account the specific business or other activities, should be analysed and appropriately evaluated.

- **Updating the existing internal compliance program of the entrepreneur concerned**

In the light of individual specifics of the entrepreneur concerned, the system of internal regulations should be revised and customized to the presented legislative changes; subsequently, a system of other internal compliance mechanisms should be set up so as to ensure not only the effective running of the business establishments but also adequate protection against the risks of potential criminal liability (it usually involves a combination of preventive, detective and sanctioning compliance mechanisms); and last but not least, to introduce regular, professional and above all practical compliance training courses for all persons acting in the interest and/or for the entrepreneur concerned (not only its internal employees, but also selected third parties).

It can therefore be expected that **greater emphasis will be placed on internal regulations, control procedures and other compliance mechanisms of Czech entrepreneurs** (business corporations or legal entities in general). This is also confirmed by the Explanatory Memorandum which states at the point of “Impact on Businesses Entities” that: *“Higher costs*

can be expected with the extension of compliance programs.” Since the amended wording of the ACLLE places great emphasis on prevention, it can be recommended in this regard to the Czech business practice that entrepreneurs concerned conduct thorough audit of their internal regulations and related compliance and control mechanisms, *i.e.* **an audit of their internal compliance programs in general**. They should meet the recommended wording of the ACLLE, especially in the sense that individual legal entities will be able to demonstrate that in the framework of the discussed criminal prevention or repression they have implemented everything what can be “fairly required”. Specific contents, or individual elements and areas of interest, of the particular internal compliance program will be assessed in accordance with the above specified, primarily depending on the particular entrepreneur, its market position, area of business, and many other factors.

12.4.2 A more detailed analysis of the ACLLE from the compliance perspective

A Czech legal entity may exculpate itself from the criminal liability if it proves that it acted with **due care and diligence**. The minimum for the foregoing is the implementation of the relevant statutory provisions and the measures that may be reasonably required, *i.e.* especially **preventive measures** and **reactive measures**.

In the context of presented (amended) institute of the criminal liability of legal entities individual entrepreneurs may be asking the following questions: **“How to prevent the situation when an excess of an individual may have criminal impact on an innocent legal entity?”** **“Is implementation and administration of internal compliance programs sufficient to prevent it?”** **“What areas of interest and specific elements the internal compliance programs should consist of?”** Here it is appropriate to emphasize again that preventing or eliminating the risks associated with the criminal liability of legal entities cannot be interpreted as a “mere” acceptance of the recommended tools, regulations and rules. So as to effectively protect the legal entity it is necessary to build a comprehensive and interlinked (robust) system of compliance with the rules, regulations and specific procedures or processes of a legal entity concerned. Such compliance program must be fully adapted to specific needs and requirements of the particular legal entity, including the procedure for its initial implementation. It is therefore impossible to present the only one generally binding internal compliance program that would reflect very specific needs of a wide range of Czech entrepreneurs. However, during its implementation and subsequent (interim) administration the following recommendations and expected features can serve as guidance:

a) Full support from the legal entity’s management (so called “tone at the top”)

An important element of any internal compliance program is the full support of mid, senior or statutory management of the respective entrepreneur, *i.e.* consistent honouring of the “leading by example principle”. It applies that such support should be fully transparent and, above all, permanent. The above described objective can be achieved by several practical methods, *e.g.* a personal letter of the chairman or another member of the statutory body of the entrepreneur addressed to all its employees and emphasizing the importance and sense of observance of rules, regulations and specific procedures or processes of the internal compliance program as a whole and its individual components and areas of interest, and incorporation of fundamental principles and rules of the internal compliance program directly into the foundational legal actions, whereby public declaration is made about interest of the legal entity to observe, when performing the relevant business or other activities, all applicable legal, ethical and other rules or specific requirements. In addition, the top management of legal entities should actively promote not only the principles and rules or specific elements and areas of interest of the

compliance program, but also support the employee or employees (departments) who are in charge of the implementation and ongoing management thereof. It should also be added that the established compliance rules, regulations, procedures and specific processes are always observed by all interested employees and third parties, without exception and without regards to their specific position within the hierarchy of the legal entity concerned. Observance of legal, internal and other regulations of the particular entrepreneur should be a common and regular issue at all levels of management of the activities of the entity concerned. Internal compliance program of the entrepreneur should therefore not tolerate other than anticipated and approved exceptions specified in internal rules and procedures; this applies to all its areas of interest or specific elements.

b) Analysis and rigorous evaluation of the applicable compliance and other business risks, and adoption of appropriate rules and measures for their elimination or reduction (treatment)

This element of the internal compliance programs of various entrepreneurs can be determined as a key element. Only on the basis of a properly performed analysis of applicable compliance and other business risks and their subsequent evaluation, the top management of a legal entity concerned is able to decide on individual (specific) areas of interest and other elements of the management and controlling (compliance) program in such form that this program will be fully adapted to corresponding internal and external legal and other influences. In relation to their subject of business (activity) entrepreneurs should regularly analyse relevant legal and other regulations and ethical standards and thereby identify their key areas of risk, relationships and acting. On this basis they adopt specific measures, and the given measures would always be „tailor-made” in maximum possible form. The primary objective of these measures is to clearly identify and organize the structure and competence of selected employees, and the associated responsibilities of teams or individuals. Minimum response of the respective entrepreneur to most applicable compliance and other business risks should consist in creation of a comprehensive system of internal procedures, processes, regulations and other rules, settings of related roles and responsibilities, and especially regular trainings of and communications to all employees and selected third parties of the legal entity concerned, including its top executives (statutory management).

c) A clear, transparent, internally coherent and periodically reviewed system of internal rules, procedures and processes of the legal entity concerned

In the light of the obligations resulting from the ACLLE and related measures, every entrepreneur should not only devote appropriate efforts to the creation and subsequent (ongoing) updating and maintaining of a comprehensive and coherent system of its internal regulations, procedures and specific processes. The primary objective of such a system is to inform employees, selected third parties and the top management of the legal entity about all (internal) rules and thus to ensure legal and ethical business or other activity, *i.e.* such activity that is in full compliance with applicable legal and other regulations and ethical standards. The heart of the said system of internal regulations, procedures and processes is often the ethical code (code of conduct). From the point of view of not only corporate (business) practice, the ethical code is seen as a central element of internal compliance programs of entrepreneurs as it should fully reflect the central rules, values and principles. Therefore it can be recommended that the legal entities adopt and regularly review their own system of internal regulations containing primarily the ethical code, working rules and organizational rules, rules for dealing with clients (including the gift and hospitality rules), anti-bribery rules, rules preventing the

legalization of proceeds from crimes, rules for handling of documents, including archiving, filing and retention rules, rules for electronic data treatment, rules for disposal of assets (including intellectual property rights), public procurement rules *etc.*

d) Training of the legal entity's management, employees and selected third parties about risks and related responsibilities

Every entrepreneur should acquaint its employees and selected third parties with the above specified (proposed) rules of the internal compliance program and remind them thereabout on a regular basis. One of the tools that constitute a prerequisite for the functioning of the overall system of internal rules, regulations and specific procedures or processes can be systematic training and communication plans and other related activities of the legal entity. They should be sufficiently effective, *i.e.* they should have an adequate form, scope, content, style, length and evaluation, and they should aim only at those employees whom the area concerned relates to. Communication and training of some areas of the specific compliance program will thus cover all employees (or third parties) of the entrepreneur concerned, other, usually more specific areas, will cover narrower audience, such as managers or other narrowly focused experts and specialists. Regular internal trainings and communications should also cover the top (statutory) management of the legal entity in question. The top management should be an example that there are no doubts that it is the top management that must know in details and observe the applicable internal rules, procedures and processes. Some training or communication activities should obviously aim at selected suppliers or business partners, or rather representatives of the entrepreneur concerned (*e.g.* anti-bribery rules).

e) Providing internal legal support

Providing internal legal support and consultation to all stakeholders substantially reduces all applicable criminal risks. The legal entity should therefore identify and consistently communicate when and whom you can turn to with your legal enquires.

f) Implementation of controlling (whistleblowing) mechanism that is able to receive information on potential infringement in time

Effective compliance and enforcement of the rules, regulations and specific procedures or processes of internal compliance program of the entrepreneur concerned also includes the development of a mechanism for the timely receipt of the information by means of which the entrepreneur is notified about violation of relevant legal, internal and other regulations. For this purpose an anonymous whistleblowing line (a kind of internal hotline) may be established, or the notification of actual or potential violation of legal, internal or other relevant regulations of the compliance program is addressed directly to top managers or specially designated persons, departments or teams, usually in a particular regime. The aim of such notifying (controlling) mechanism is to establish a functional process for dealing with complaints and suggestions from employees and selected third parties of the legal entity leading to more effective performance of the business or other activity, and the timely detection of all kinds of compliance failures or breaches and other negative phenomena. In accordance with the above described it also applies that all notifications should be thoroughly investigated, *i.e.* in this respect a fully functional process of initiating and conducting internal investigations of the legal entity is required. It is followed by the consequence management, or results of the internal investigation are evaluated in other appropriate manner and communicated.

g) Thorough due diligence (audit) of third parties

In order to properly identify applicable criminal risks of the legal entity concerned, it is suitable to conduct regular internal audits of third parties, for example, suppliers or sales representatives of the entrepreneur concerned.

12.5 Summary

The corporate compliance and ethics functions have grown rapidly in the last few years in response to several high profile governance failures and subsequent regulatory reforms. Companies throughout the whole world are making huge investments in compliance and ethics, launching their compliance programs, building risk management systems, rolling out comprehensive mandatory trainings and communication plans, designing and distributing compliance standards and procedures and engaging their employees through so called tone from the top. This phenomenon has struck companies across a diverse set of industries, even those that have traditionally received less regulatory attention. Nowadays, when most of the companies have already established some basic level of compliance and ethics infrastructure, many of them begin to evaluate whether these are effective enough.

Ethics, integrity, accountability and strong leadership are key elements of a culture of compliance. They can even be seen as constant for any successful organization. When a business talks about increasing shareholder value, return on investment and driving revenue, one of the best investments is to establish and maintain an effective compliance program. Best in class compliance program is a real competitive advantage. Compliance then is a solution.

A culture of ethics and compliance takes time to develop. It can be a long journey to reach the highest level of ethical standards as well as compliance requirements. All the positive changes in legislation, regulation, initiatives, policies and procedures have taken years to clarify the purpose of improving corporate governance. The legal and compliance requirements have significantly changed the way businesses operate. Today's senior (statutory) executives and leaders, employees and other stakeholders must be aware of these requirements and their impact on a culture of compliance.

In terms of building and maintaining an effective compliance program, the organizations meet a wide variety of different laws, regulations and standards. Some of them provide the organizations with guidance on how to best construct a truly working program or establish the minimum requirements demanded by the law; others include industry standards or organizational certification requirements. As the topic of compliance is so broad, this chapter cannot possibly cover every aspect of every law. For example, the areas of health & safety, environmental impact and privacy regulations have specific compliance requirements. This chapter has tried to cover most of the key points but the world of compliance is so vast that even a book could not hope to be fully comprehensive in anything less than several volumes. However, understanding compliance from the concepts introduced in this chapter provides the readers with the basics for effective implementation and maintenance of compliance programs no matter what particular law or regulation applies.

To underline the compliance principles presented in this chapter, more impressive words than the ones said by W. C. Stone could hardly be found: *“Have the courage to say no. Have the courage to face the truth. Do the right things because they are right. These are the magic keys to living your life with integrity.”*

Considering the biggest (recent) Czech legal development in the compliance area, please do not forget that on 1 January 2012, the Act No. 418/2011 Coll., on Criminal Liability of Legal Entities came into force. This Act has introduced the institute of criminal liability of legal entities into the Czech legal order. Adoption of such legislation was in conformity with national and foreign development trends in recent years. In the middle of the year 2016, the ACLLE was significantly amended. Section 7 of the ACLLE is of cardinal importance from the point of view of the criminal liability of legal entities. It specifies in details the range of crimes for which legal entities can hold criminal liability. In this context it should be pointed out that the range of criminal acts represented by the list contained in the aforementioned section 7 is very wide especially after the adoption of the ACLLE amendment. Conditions of occurrence of the criminal liability of Czech legal entities are specified primarily in section 8 of the ACLLE. In connection with the wording of this section it applies that under certain circumstances a legal entity may exculpate itself from the criminal liability. However, to do so it must be proved in the criminal proceedings that the criminal conduct of the particular employee (or the above and below specified persons in equivalent positions, or a third person) occurred despite the fact that the legal entity concerned, or its elected bodies (members of these bodies), implemented the measures that are required by applicable laws or that can be reasonably required. So as to limit the criminal liability, it can be strongly recommended to legal entities that they create and continuously manage internal compliance programs within the scope of their internal environment.

12.6 Self-assessment questions and tasks

Please make sure that you are able to fully answer the self-assessment questions below. If not, please go back to the chapters above and re-read all related texts.

1. How has the recodification of the Czech private law touched the corporate governance rules in NCC and BCA?
2. What are the standard types of managerial liability under Czech laws? How do these differ?
3. Define the duty to act with due managerial care. What are its key elements?
4. Define the business judgement rule. What is the purpose of this rule?
5. What is the link between the two legal institutes above?
6. Is the duty to act with due managerial care being assessed subjectively or objectively?
7. What are the three elements of business judgement rule (the ones that should always be tested by Czech justice)?
8. Name and describe two consequences of a breach of the duty to act with due managerial care.
9. What are the mandatory parts of an agreement on the office performance? Where is this agreement regulated?
10. Explain the legal term “interference”.
11. What does the term compliance mean?
12. What are the most critical aspects of an effective compliance program?
13. Think about the history of compliance. How, why, when and where was this concept created?
14. What does it mean if we say that an effective compliance program must always be “industry-specific and unique”?
15. What are the benefits of having an effective (internal) compliance program?
16. What is the difference between compliance and ethics?
17. How is compliance linked to the Czech concept of criminal liability of legal entities?

18. What are the major indicators of a corporate ethical collapse?
19. How would you explain “integrity”?

12.7 Further reading/listening

Legislation:

- Selected provisions of Act No. 418/2011 Coll., *on Criminal Liability of Legal Entities*, as amended.
- Selected provisions of Act No. 89/2012 Coll., *Civil Code*, as amended.
- Selected provisions of Act No. 90/2012 Coll., *on Business Companies and Cooperatives (Business Corporations Act)*, as amended.
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- The Financial Reporting Council Limited. *The UK Corporate Governance Code*. London, 2016. Available online: <<https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>>.

Documentaries:

- ICA webinar on integrating Governance, Risk Management and Compliance: <https://www.youtube.com/watch?v=rwJk9cNnGvU>
- The Great Dictator speech by Charlie Chaplin (with English subtitles): https://www.youtube.com/watch?v=GU_rn1xzItk

Annex 1: Selected provisions of the Czech Constitution in English

Constitution of the Czech Republic

of December 16, 1992, amended by Act No. 347/1997 Coll., amended by Act No. 300/2000 Coll., amended by Act No. 448/2001 Coll., amended by Act No. 395/2001 Coll., amended by Act No. 515/2002 Coll.

CHAPTER ONE - Fundamental Provisions

Art. 1

(2) The Czech Republic shall observe its obligations under international law.

Art. 2

(4) Every citizen may do what is not prohibited by law and nobody may be forced to do what the law does not instruct them to do.

Art. 3

An integral component of the constitutional system of the Czech Republic is the Charter of Fundamental Rights and Freedoms.

Art. 4

The fundamental rights and freedoms shall be protected by the judiciary power.

Art. 8

Self-government of territorial self-governing units is guaranteed.

Art. 9

(1) Constitution may be supplemented or amended only by Constitutional Acts.

Art. 10

Promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order; should an international agreement make provision contrary to a law, the international agreement shall be applied.

Art. 10a

(1) An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution.

(2) An approval of the Parliament is required to ratify an international agreement stipulated in Subsection 1 unless a constitutional law requires an approval from a referendum.

Art. 10b

(1) The Government shall inform the Parliament regularly and in advance on issues related to obligations arising for the Czech Republic from its membership in an international organization or institution stipulated in Section 10a.

(2) The Chambers of Parliament express their opinions on the decisions of such an international organization or institution in a form provided for by their rules of procedure.

Art. 12

- (1) Acquisition and loss of citizenship of the Czech Republic shall be governed by law.
- (2) Nobody may be deprived of his or her citizenship against his or her will.

CHAPTER TWO - Legislative Power

Art. 15

- (1) Legislative power in the Czech Republic shall be vested in the Parliament.
- (2) The Parliament shall have two chambers which shall be the Chamber of Deputies and the Senate.

Art. 16

- (1) The Chamber of Deputies shall have 200 Deputies who shall be elected for a term of four years.
- (2) The Senate shall have 81 Senators who shall be elected for a term of six years. One third of the Senators shall be elected every two years.

Art. 18

- (3) Every citizen of the Czech Republic who has attained the age of eighteen years shall have the right to vote.

Art. 19

- (1) Every citizen of the Czech Republic who has the right to vote and who has attained the age of twenty-one years may be elected to the Chamber of Deputies.
- (2) Every citizen of the Czech Republic who has the right to vote and who has attained the age of forty years may be elected to the Senate.

Art. 27

- (4) No Deputy or Senator may be criminally prosecuted without the consent of the chamber of which he or she is member. If the respective chamber denies its consent, criminal prosecution shall be excluded forever.
- (5) A Deputy or a Senator may be detained only if he or she has been apprehended when committing a criminal offence or immediately thereafter. The competent agency shall immediately report the detention to the chairman of the chamber of which the detainee is member; if the chairman of the respective chamber does not consent within twenty-four hours of the detention to the surrender of the detainee to a court, the competent agency shall release him or her. At its first subsequent meeting the respective chamber shall decide with final validity on the admissibility of the prosecution.

Art. 33

- (1) If the Chamber of Deputies is dissolved, the Senate shall adopt legal measures regarding matters which cannot be delayed and which would otherwise require the enactment of a law.
- (2) However, the Senate may not adopt legal measures regarding the Constitution, the State Budget, the final state budgetary account, the electoral law and international treaties under Article 10.
- (3) A legal measure may be proposed to the Senate for adoption only by the Government.
- (4) A legal measure adopted by the Senate shall be signed by the Chairman of the Senate, the President of the Republic and the Prime Minister; it shall be promulgated in the same manner as laws.
- (5) A legal measure of the Senate shall have to be approved by the Chamber of Deputies at its first meeting. If the Chamber of Deputies does not approve it, its continued validity shall cease.

Art. 39

- (1) Both chambers shall have a quorum if at least one third of their members are present.
- (2) The decision of a chamber shall be adopted if approved by absolute majority of the Deputies or Senators present, unless the Constitution stipulates otherwise.

Art. 41

- (1) Bills shall be introduced in the Chamber of Deputies.
- (2) Bills may be introduced by a Deputy, a group of Deputies, the Senate, the Government, or the representative body of a superior self-governing territorial unit.

Art. 50

- (1) The President of the Republic may return an enacted law, with the exception of Constitutional Acts, together with the grounds for the return, within fifteen days of the day the law was referred to him.
- (2) The Chamber of Deputies shall take a new vote on the returned law. No amendments may be introduced. If the Chamber of Deputies upholds the returned law by absolute majority of vote of all Deputies, the law shall be promulgated. If not, the law shall be considered defeated.

Art. 51

Laws which have been enacted shall be signed by the Chairman of the Chamber of Deputies, the President of the Republic and the Prime Minister.

Art. 52

- (1) For a law to be valid, it must be promulgated.
- (2) The law shall stipulate the way a law or an international agreement is promulgated.

CHAPTER THREE - Executive Power **President of the Republic**

Art. 54

- (1) President of the Republic is the Head of State.

Art. 57

- (1) Any citizen eligible for election to the Senate may be elected President of the Republic.
- (2) Nobody may be elected President of the Republic more than twice in succession.

Art. 62

President of the Republic shall

- a) appoint and recall the Prime Minister and other members of the Government and accept their resignation, recall the Government and accept its resignation;
- b) convene sessions of the Chamber of Deputies;
- c) dissolve the Chamber of Deputies;
- d) authorize the Government the resignation of which the President has accepted or which he has recalled to execute their office temporarily until a new Government is appointed;
- e) appoint Justices of the Constitutional Court, its Chief Justice and Assistant Chief Justices;
- f) appoint from among the Justices of the Supreme Court the Chief Justice and Assistant Chief Justices of the Supreme Court;
- g) pardon and mitigate penalties imposed by the court, order not to initiate criminal proceedings and suspend them if they are already initiated, and expunge sentences;
- h) have the right to return to the Parliament an enacted law with the exception of Constitutional Acts;

- i) sign enacted laws;
- j) appoint the President and the Vice-President of the Supreme Control Office;
- k) appoint members of the Bank Board of the Czech National Bank;
- l) announces a referendum concerning the accession of the Czech Republic to the European Union and its result.

Art. 63

- (1) President of the Republic shall furthermore
- a) represent the State with respect to other countries;
 - b) negotiate and ratify international treaties; he may delegate the negotiation of international treaties to the Government or, subject to the Government consent, to its individual members;
 - c) be the Commander in Chief of the Armed Forces;
 - d) receive heads of diplomatic missions;
 - e) appoint and recalls heads of diplomatic missions;
 - f) call elections to the Chamber of Deputies and the Senate;
 - g) appoint and promote generals;
 - h) confer and award state decorations, unless he authorizes other body to do so;
 - i) appoint judges; and
 - j) have the right to grant amnesty.

Art. 65

- (1) President of the Republic may not be detained, subjected to criminal prosecution or prosecuted for offence or other administrative torts.
- (2) President of the Republic may be prosecuted for high treason at the Constitutional Court based on the Senate's suit. The punishment may be the loss of his presidential office and of his eligibility to regain it.
- (3) Criminal prosecution for criminal offences committed by the President of the Republic while executing his office shall be ruled out forever.

The Government

Art. 67

- (1) The Government is the supreme body of executive power.
- (2) The Government shall consist of the Prime Minister, Deputy Prime Ministers and Ministers.

Art. 68

- (1) The Government shall be accountable to the Chamber of Deputies.

Art. 71

The Government may ask the Chamber of Deputies for a vote of confidence.

Art. 74

The President of the Republic shall recall a Member of Government if the Prime Minister proposes so.

Art. 78

The Government may issue decrees for the implementation and within the scope of laws. Decrees shall be signed by the Prime Minister and the pertinent Member of Government.

CHAPTER FOUR - Judicial Power

Art. 81

Judicial power shall be exercised in the name of the Republic by independent courts.

Art. 82

(1) Judges shall be independent in the performance of their office. Nobody may jeopardize their impartiality.

(2) A judge may not be recalled or transferred to another court against his will; exceptions, ensuing in particular from disciplinary liability, shall be specified by law.

The Constitutional Court

Art. 83

The Constitutional Court is a judicial body charged with protection of constitutional rule.

Art. 84

(1) The Constitutional Court shall consist of fifteen Justices appointed for a term of ten years.

(2) Justices of the Constitutional Court shall be appointed by the President of the Republic and shall be confirmed by the Senate.

(3) Any citizen of full integrity who is eligible for election to the Senate is the graduate of a university law school and has been active in the legal profession for at least ten years may be appointed Justice of the Constitutional Court.

Art. 87

(1) The Constitutional Court shall rule on

a) repeal of laws or individual provisions thereof should they contravene the constitutional order,

b) repeal of other legal regulations or individual provisions thereof should they contravene the constitutional order or the law,

g) impeachment by the Senate of the President of the Republic under Article 65, par. 2,

h) the Presidential proposal to repeal a decision of the Chamber of Deputies and the Senate according to Article 66 [...]

Art. 89

(1) A ruling issued by the Constitutional Court shall be enforceable upon its promulgation in a manner set by law, unless the Constitutional Court rules differently on its enforcement.

(2) Enforceable rulings of the Constitutional Court shall be binding for all agencies and individuals.

(3) A decision of the Constitutional Court, whereby, in accordance with Section 87, Subsection 2, unconformity of an international agreement with the constitutional order is pronounced, prevents ratification of the agreement until such unconformity is eliminated.

The Courts

Art. 90

The courts shall first and foremost provide in a manner defined by law protection of rights. A court alone shall decide about guilt and penalty for criminal offences.

Art. 91

(1) The system of courts shall be made up of the Supreme Court, the Supreme Administrative Court, and superior, regional and district courts. Their designation may be changed by law.

(2) Jurisdiction and the organization of courts shall be defined by law.

Art. 93

(1) Judge shall be appointed for life by the President of the Republic. A judge shall assume his office by taking the oath of office.

(2) Any citizen with full integrity, who is the graduate of a university law school, may be appointed judge. Additional requisites and the appointment procedure shall be defined by law.

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The EU Charter on Fundamental Rights

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For electronic resources on MEDIATION please refer to: <https://mediation.turiba.lv>

The Financial Reporting Council Limited. *Corporate Culture and the Role of Boards. Report of Observations*. London, 2016. Available online at: <https://www.frc.org.uk/getattachment/3851b9c5-92d3-4695-aeb2-87c9052dc8c1/Corporate-Culture-and-the-Role-of-Boards-Report-of-Observations.pdf>.

The Financial Reporting Council Limited. *The UK Corporate Governance Code*. London, 2016. Available online at: <https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>.

Documentary videos:

A brief video on the **concept of law** recorded by an American professor of law:

<https://www.youtube.com/watch?v=2ds-NIFhU9s>

A link to a video on how the office of the **European Ombudsman** works:

https://www.youtube.com/watch?v=tY_4YeyFxyM

A link to a video on how the **SOLVIT** network may assist EU citizens:

<https://www.youtube.com/watch?v=Mc8D8KDq6iA>

A link to a video on how the **SOLVIT** network may assist EU businesses

<https://www.youtube.com/watch?v=7BeEqT6oy-g>

A link to an institutional video on the functioning of the **European Court of Human Rights**:

<https://www.youtube.com/watch?v=EPWGDhgQlgk>

Basics of **competition law**, the Czech Office for the Protection of Competition; available at:

<https://www.youtube.com/watch?v=uZO2So-wrXQ>

I Am Fishead: <https://www.youtube.com/watch?v=bcRRZsag0Io>

ICA webinar on integrating Governance, Risk Management and **Compliance**:

<https://www.youtube.com/watch?v=rwJk9cNnGvU>

“ICC Institutional Video, 2018” available at:

<https://www.youtube.com/watch?v=gwhufH4vNzY>

Institutional video explaining the **Council configurations**:

<http://www.consilium.europa.eu/en/council-eu/configurations/>

“Lecture 2B: **Enforcement** and Interpretation in **International Law**” by prof. Givens

<https://www.youtube.com/watch?v=2pr9ziZjpeI>

OFT **competition law** film from June 2011; available at:

<https://www.youtube.com/watch?v=ACA9vdINqek&t=35s>

Study resources on **mediation** as well as short theoretical videos and longer videos with mock mediation are available on the Online Study Mediation Platform at <https://mediation.turiba.lv>

The Great Dictator speech by Charlie Chaplin (with English subtitles):

https://www.youtube.com/watch?v=GU_rn1xzltk

The very basics of **mediation and arbitration** can be listened to in the video called Alternative Dispute Resolution – What is ADR? by David P. Hersh, available at:

<https://www.youtube.com/watch?v=5IfPqPIPSmI>

Video on the activities of **lobbyists within the EU institutions**, called “The Brussels Business“:

<https://www.youtube.com/watch?v=h4C5SgeVK-Q>

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Nicole Grmelová graduated from Charles University Law School and University of Sevilla Law School. She obtained her Ph.D. degree at the University of Economics, Prague, where she started teaching at the Business and EU Law Department in 2002. Between 2004 and 2008 she worked as a Lawyer-Linguist for the European Parliament in Brussels. Between 2009 and 2012 she cooperated with the Court of Justice of the European Union in Luxembourg as a freelance Lawyer-Linguist. In 2018 she was appointed Associate Professor at the University of Economics, Prague. She publishes widely on topics related to EU Institutions, EU Law and International Public Law. Nicole Grmelová is the Czech Republic's Country Correspondent to the European Food and Feed Law Review.

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