TOPIC: FREE ACCESS TO INFORMATION

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1. From freedom of opinion to freedom of information.

The right of the individual, traditionally called „freedom of thought" has evolved importantly. Primarily, it was supposed to protect the freedom of thinking of an individual. Even if it seems obvious from today's point of view, historical facts speak for themselves. Namely, in the times of religious wars in Europe nobody questioned the fact that the subjects were to be of the same creed as their sovereign. Soon, the center of gravity was moved from the freedom of thought to "the freedom of expression", in other words the right to communicate one's opinions to others was recognized as the area that was to be protected.

The next stage of the evolution of thinking about the protection of freedom of expression is the recognition of the need for legal protection of „the right to information" itself. Thus, the point is not about what we want to communicate to others but about lack of interference with obtaining information, such as, for example, different forms of artistic or social expression or through any other media demonstrating one's views. In this case the political and social censorship, which restricts circulation of some ideas, can be the threat to the said right.

The next stage of the evolution is introduction of „the right to information" as the right to demand from authorities obtaining information about oneself, collected by the state agencies.

When we speak about the „freedom of thinking" or the "freedom of expression" we emphasize the fact that authorities are supposed not to interfere.

When we speak about „rights", we stress the obligation to act in positive terms, assuming not the obligation to abstain but, on the contrary, to do something for the person entitled. When we speak about „the right to information", then the change in terminology (from „freedom" to „right") means the actual introduction of the obligation of the state to create conditions for the entitled person to exercise his or her right. The question is not only to prevent from invading the internal sphere of an individual (which is characteristic for freedom) but to ensure that individuals, as members of the society, have an access to information. The authorities are not only to abstain from censorship but to provide existence and functioning of „free trade in ideas" by means of proper technical devices. This trade can not exist nowadays due to technical circumstances (mass media) without a positive support from the state which, thereby, has to create the conditions and framework for the existence of media.

A tendency is observed in judicial review exercised under the European Convention for the Protection of Human Rights and Fundamental Freedoms, in relation to the right to information: in particular the issue of the freedom of the press as well as radio and television broadcasting. A trend has been recently observed to gradually narrow the scope of admissible restrictions and intervention on the part of the state. Thereby, we will probably witness the consequent evolution: **individual freedom of speech begins to transform into the right of belonging to a community, to society. This is no longer a question of an individual having an ability to communicate something to others, but the main question here is that all potential listeners - recipients of information should have the chance of accessing this information.**

The right to information can be restricted, however, in the situation when other interests such as privacy, public safety are endangered. However, protection of these other interests must comply with the international and regional law as well as the country tradition.

Article 10(2) of the CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS explicitly defines when freedom of expression can be restricted. *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

Each restriction of the rights defined under the European Convention for the Protection of Human Rights and Fundamental Freedoms is subject to the appraisal of the local court as well as to the European Court of Human Rights.

2. What does the „right to information" mean?

The right in question encompasses the possibility to obtain information, which includes not only the right of individuals to pose questions but also the institution's duty to provide answers to these questions. This concerns both general information relating to the knowledge and phenomena of public interest as well as information collected by authorities. As this question overlaps with the right to privacy, the commentary to that chapter contains information about relevant case-law (the cases Klass, 1978 – access to information obtained as a result of the police operation; Leander, 1987 - access to information collected illegally and concerning job applicant's suitability; Gaskin, 1989 – files concerning the interested party's stay in the care . It is worth noting that, in this area, the margin of discretion given to the domestic legislation and administrative practitioners by the Court of Human Rights is broader than in respect of the right to inform about the social dimension relating to the freedom of expression of the media.

The protection appropriate for the freedom of expression, for the manifestation of one's opinions relates also to the **right to silence**. As a consequence, the state is not authorized to compel individuals to disclose their opinions. Nevertheless, the protection of silence (in the context of voicing or disclosure of opinions, and consequently basically covered by the freedom of expression) appeared in the background of cases concerning free practice of religion.

Nowadays, one of the traditional personal freedoms, i.e. freedom of speech understood as freedom of expression is undergoing specific changes. In place of freedom, we start to speak about the right. This means that we don't emphasize an active element (freedom of the speaker) but the passive element – the right of the recipient to expression. "Freedom" requires protection of the user of his or her freedom from interference of the third persons and state agencies on the part of the state. The "right" requires something more and imposes on the state the obligation of active behavior aimed at guaranteeing obtaining information – organizing processes of obtaining and flow of information. The subject of protection is also being transformed. The question is not only about the sole possibility (production) of expressions, which is defined as "freedom of speech". If this is the question of protection of the right that the recipient of the message is entitled to, the subject of protection is the information contained in the message. "Freedom of speech" is being replaced by "right to information" as the subject of protection of individual rights.

3. Prospects for „free trade in ideas” in the countries of Central and Eastern Europe

In the countries of Central and Eastern Europe, there is no universal conviction that "free trade in ideas" is advantageous, which in contrast is popular in liberal democracies. On the contrary, one may venture an opinion that it is typical of politicians in that part of Europe to regard media as a threat which should be restrained.

Negative attitudes, of the establishment to the media, have taken more delicate forms and are being implemented by means of:

- limitations on access to information ("We are going to eliminate unreliable journalists. Let them look for their own sources of information");
- the lack of response to press criticism;
- expressly voiced expectations that public prosecutors' offices will take steps aimed at punishing those journalists who tarnish reputation of politicians;
- efforts to impose both on the press and opponents more stringent financial sanctions for violations of personal interests.

Various forms of resentment towards the media manifested in activities of the authorities are considered by most people as signs of an "improper" situation. In fact, they generally evince the already existing, real "trade in ideas". **It is not the lack of efforts to manipulate the media, but rather the identification and rejection of such efforts by that market, that means the ideal and normality.** Similarly, the sign of free trade in ideas was manifested in certain regions of Poland in the summer of 1996 when Catholic groups organized actions against distribution of newsstand materials considered as pornography. If such actions they do not cross the limits of a punishable threat, do not resort to physical force, do not restrain trade activity in general, but include persuasion, ideological pressure and application of legal measures, e.g. information of an offense committed, they should be treated as indication of normal functioning of the trade in ideas.

Courts and judges are just now breaking their own abstinence in interpreting the constitution and human rights as sources of consideration in disputes. Occasionally, courts do not observe a need of change in interpretation and necessity of taking into consideration European legislation, constitution and the axiology of human rights when they decide about cases on media, where the basis for judgment are regulations from the “old époque”, for example on obligation of revealing the source of information by press, responsibility of the press for revealing the source of information, responsibility for the publication of news originating from investigation materials or news constituting state or trade secret. Thus, the court delivers judgments where compatibility of the Polish law with the European Convention for the Protection of Human Rights and Fundamental Freedoms is not being analyzed at all.

The Attitude of public life actors shows their growing understanding that the freedom of speech and freedom to information ceased to be the privilege of the speaker and is becoming the right of the society “to be informed” and that the changes are necessary. The changes are taking place. One can only question the speed of these changes.

4. Limitations on the right to information

Almost all disputes about the freedom in question are concentrated around the key issue of admissible limitation on interference by the state with the liberty of the individual expressing his or her opinions and willing to learn something. It is a difficult question, since freedom of speech, freedom to information, expression of opinions and ideas, due to its scope and substance, intrude drastically on the matters considered as a domain of state activity.

At the same time, freedom of expression, particularly in its broader sense, also as the right to information, is often in conflict with other rights of other individuals. Religious freedom – is also the right to express ideas considered to insult religious beliefs (e.g. heresy); freedom of conscience – insulting such beliefs by expressing opponents' beliefs, privacy – the disclosure of information about those people who want to avoid entering „trade in ideas". All this makes drawing such a borderline of freedom of expression and right to information especially difficult.

Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of defines the limitations on admissible interference with the freedom of expression: **"this right due to the fact that it involves duties and responsibility may be subject to formal requirements, conditions, restrictions and sanctions, provided by the law and necessary in the democratic society in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation and the rights of others, as well as for the prevention of disclosure of confident information or for maintaining the authority and impartiality of the judiciary".**

The restricting formulation in the Article 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms is the most detailed one compared to its corresponding clauses in Articles 8, 9 and 11 (the right to privacy, the freedom of religion, the freedom of association) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The scope of the protected freedom is very broad in this document. This is due to the fact that the right to information is the prerequisite for existence of other liberties (freedom of religion, assembly), whereas the right to information due to its function (free trade in ideas) is the condition of social discourse in a democratic society which simply cannot exist without such a discourse. The whole case-law under the very expanded limiting clause is concentrated around one issue: it mostly concerns the question of proportionality of intervention by authorities. This means that the main issue of the case law of the European Court of Human Rights is reaching a compromise between limitation of rights to information and the reason for it.

The issue of proportionality is always a matter of assessment of circumstances of a concrete case. Thus, the case law under Art. 10 of the Convention has a casuistic character. The Court tends to avoid being bound by a precedent formulated too generally. It has repeatedly stressed the need for taking into account local context (Otto Preminger Institute v. Austria, 1994 in the assessment whether the authorities of a particular country have acted according to the rule of proportionality between the purpose and the applied measure while introducing a limitation). It is striking anyway that general comments which are very favorable for the right to information can be found in justifications of judgments. They stress the meaning of the freedom of information circulation for democracy, the state of law or exercising of other human rights. Paradoxically, it goes along with quite liberal assessment of specific restricting practices of authorities that are considered justified or compliant with the principle of proportionality.

In such circumstances, another problem, typical especially of Central and Eastern Europe, should also be noted. A liberal, and favorable for freedom of speech and the right to information concept of self-regulatory mechanism of „free trade in ideas", where confrontation of ideas and discussion deprives radical opinions of their destructive power, takes for granted the existence of active society in which political discussion is a citizen's duty. In such circumstances, it is logical to free the state of its role as a censor. An inert society, which does not want and does not know how to lead such a discussion, does not guarantee functioning of such a self-regulatory mechanism in this area. And, then, there appears a temptation to apply the state coercion. Punishment, censorship, removal of persons with certain political convictions from public services in order to compel silence where understandable absence of a comprehensive discussion does not allow for a natural competition between ideas leading to their mutual social sustainable equality. This temptation exists in the countries of Central and Eastern Europe experiencing their way towards "active democracy". Societies of these countries have no sufficient experience in carrying out free trade in ideas and their activity and patience for waiting for the results of the emerging competition are not impressive.

This, on the one hand, results in a shock caused by facing the ideas which now "can be expressed" although are not acceptable for some members of the society. Some call for a form of return to a "healthy censorship" (an authentic term used by a Polish newspaper which called for the introduction of such censorship after the change in the political system). Some ideas or views are recognized as "not deserving" to be revealed. Such a reaction - caused by fear of the consequences of "free trade in ideas" is by no means rare. Moreover, the societies where the state has promoted and safeguarded one official, orthodox doctrine demand gaining state support for the idea or axiology held by them. However, they fail to notice that such a postulate is short-sighted and dictated by the existing state of affairs.

Therefore, the argument about necessity of a "coerced silence", restriction of freedom of speech by state interference due to the fact that "time has not come and the society is not mature yet" is relatively often used in the circumstances of Central and Eastern Europe. At the same time, it is a false argument insofar as it closes the way to shaping the prerequisites for open society in these countries.

Also (and for the same reasons) it would be wrong to expect that the standard of legal protection of the right to information or freedom of expression in the countries of Central and Eastern Europe should be, in principle, lower, because of local conditions and the lack of tradition of active, discussing and pluralistic society. If such "double standard" were to be established, e.g. on the basis of future judgments of the Commission and the Court of Human Rights, this would be very distressing, especially if we remember about the new wave of countries waiting to be admitted and for which, logically, "transitional standards" should be applied. This would mean the lowering in comparison to the level which has already been developed in practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This, in turn, would lead to negative consequences for rapid achievement of the standards by the "new" members of the Council of Europe, and also constitute a threat of regress in the protection of freedom of speech in general.

5. Freedom of informing on unwelcome and irritating ideas

In the case Handyside v. United Kingdom, 1976, the Court of Human Rights formulated one of the most important thesis which enabled functioning of the „free trade of ideas" and a key prerequisite for the application of the Article 10 of the European Convention for the Protection of

Human Rights and Fundamental Freedoms. Emphasizing the meaning of the freedom of expression the Court concluded that: “this freedom may not be limited only to information and opinions, which are perceived favorably, or considered to be harmless or indifferent, but the concept should equally relate to opinions that hurt, frustrate or introduce instability. These are the requirements of pluralism and tolerance, ultimate conditions of democracy". The idea of the necessity for the democratic state to tolerate free circulation of information, including controversial and unwelcome information, can be found in the case Open Door and Dublin Well Woman v. Ireland, 1992. Here the decision of the Supreme Court of Ireland which prohibited organizations-plaintiffs to disseminate information about operations of interruption of pregnancy abroad was considered illegal.

In all cases the role of a free flow of information was believed to be useful for the development of democracy and open societies. In the case Sunday Times v. United Kingdom, 1979 (the case concerned a publication about the cause effects of the medicine thalidomide, which caused irreversible defects of children if mothers took this medicine during pregnancy) the Court in its sentence favorable for the free press emphasized the right of the society (including the victims of thalidomide) to obtain comprehensive information on topics of interest to public. The same spirit of the right to information and free trade in ideas, in spite of revealing information inconvenient for authoress, is observed in the cases Sunday Times v. United Kingdom, 1991 (publication of materials concerning illegal activities of the British official of counterespionage). In the case Vereinigung Demokratischer Soldaten Osterreichs and Gubi v. Austria, 1994 the prohibition of distribution of a magazine containing critics against the army was considered a violation of Article 10. The magazine contained proposals for reforms and motivated soldiers to use existing legal instruments and suits. If you compare this resolution with the case of Engel and others against Holland, 1976 (where the possibility of distribution in the army of a criticizing magazine was also evaluated and the limitations imposed by the state were accepted) one can observe an increasingly more favorable attitude towards the freedom of information, even destined for distribution in the army.

Even when concerning publications of information on confidential data, considered internally excluded from the „information market” by authorities, the attitude of the Court is favorable for the freedom of press on the condition that the publication concerned a secret but widely revealed information, if the publication was supposed to serve a public debate. According to the Court, these issues are subject to the evaluation if the limitations were “necessary” from the point of view of a democratic society. In the case Goodwin v. United Kingdom, 1996 the Court emphasized the importance of protecting journalists’ sources of information and exclusion of arbitrary invading this area by forcing journalists to reveal the sources in question.

The use of the most drastic method of interference by authorities into the freedom of expression, which is the censorship (removal, confiscation) is also not tolerated in the light of the case law of the Court of Human Rights if there is a discussion about the participation of the press in political discourse. Cases where such a possibility was believed to be justified on the part of internal authorities related either to the prohibition of publication due to protection of the interest of the third party (the case Tolstoj-Miloslavski v. United Kingdom, 1995, within limits where no breach of the Article 10 was observed as a result of the court prohibition of publication which defamed the third party) or offence of morality or religious feelings (the case of Otto-Preminger-Instytut v. Austria, 1994). Separate opinions of judges during the latter case demonstrated an overall aversion to measures based on the use of prior restraint.

Authorities and a civil servants must tolerate revealing information which is unpleasant for them, even if the information concerns their privacy. In the light of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms one should consider the conclusion of the Court in the case of Lingens v. Austria, 1986, which opens a

whole series of sentences, based on the idea that within the framework of political debate, conducted for public interest, revealing of private life of public figures and also sharp criticism of public figures must be tolerated by them. What is not allowed in case of people not serving any public functions must be tolerated by the criticized if they hold public functions. The eventual application of the penal code constitutes the breach of the freedom of expression and the right to information (the case Janowski v. Poland, 1999, where the punishment imposed on a journalist for using words insulting municipal guards was considered a breach of Article 10 but at the same time it was assumed that the circumstances of the case justify the decision about non-violation of proportionality rule in interference by authorities. The judgment was delivered by 12 votes to 5.

6. Preferences for the freedom of media to exercise the right to information

The observation of the case law related to the freedom of expression and the right to information may suggest a conclusion on the distinct preference for the freedom of media (from the point of view of their function within a democratic society). Authorities (and their representatives) should tolerate even more from media because in the case of the conflict between the right to information and the right to privacy of persons holding public functions, it is the right to information which has priority. Within the limits of this conflict, the case law in the light of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is apt to attain a privileged position only to the authority of a court (due to the limited opportunities for judges to participate in a public discourse) (Barfod v. Denmark, 1989; the case Prager and Oberschlick v. Austria, 1995; Dalban v. Romania, 1999 – where the punishment of a journalist for ill-faming of a judge via a criticizing publication was considered an infringement of Article 10, Fuentes Bobo v. Spain, 2000 – laying off a journalist for insulting remarks addressed at the TV management, Bergens Tidende and others v. Norway, 2000 – adjudging high damage for ill-faming in press articles, Trammer v. Estonia, 2001 – convicting a journalist for using insulting words in a press interview).

The thesis that the European case law attains special meaning to the right to information may be proved also by other types of cases. We can quote here the life-long prohibition of publication activities for a journalist (war collaborator) for breaking the principle of proportionality (De Bekker v. Belgium, 1962). The decision emphasized the utter hurtfulness of the an applied measure, based on an untimely possibility to execute one's profession, without the possibility to verify the assessment with a cause of time and the change in circumstances. This very fact was evaluated as a non-corresponding necessity within a democratic society.

The next example is a gradual extension of favourability towards the freedom of exchange of information in the light of interpretation of the prescription which allows the state to control the development of the television via admission of a concession (por. Groppera Radio AG v. Switzerland, 1990, Autronic AG v. Switzerland, 1991, Informationsverein Lentia and others v. Austrii, 1993).

The case of Jesild v. Denmark, 1994 is a very interesting example. The journalist was sentenced for the preparation and broadcasting of a TV interview with representatives of radical right coalition, who expressed racism and xenophobic opinions. Dutch authorities made references to international obligations not to spread racist opinions. In this case, then, the freedom for information was found in conflict with other fundamental human rights. However, the Court again (although not unanimously) reached a favorable conclusion for the freedom of press, with respect to the fact that informational and educational intentions of a journalist were

beyond doubts, and also the fact that the broadcast itself did not serve to praise xenophobia and racism.

As there is no doubt that criticism of authorities (even in forms that cause conflict with the right to privacy which belongs to the authority representative) concerning political issues is the essence of the right to information in its social dimension so the situation when journalist information enters into conflict with other human rights and, though touches upon important social issues, intrudes into the sphere of protected interests belonging to someone else than authorities – making the described case of Jersild to be a boundary situation. The justification of a sentence emphasized that the protection, assumed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also covers the form of a journalist expression (information journalism); punishing the journalist for words of his interviewee or a character in his report would complicate the participation of press in the discussion of socially important issues.

7. Limited protection of civil servants

In the case Glasenapp v. Germans, 1986, German authorities refused to appoint an applicant as a teacher with the status of a civil servant due to the fact that as a young woman she was engaged in the communist and Maoist movement. The judgment deprived the applicant of protection under Article 10 of the Convention referring to the argument that protection of freedom of expression of civil servants can be limited due to the civil servant's duty of political loyalty. A bit different attitude was revealed in the case Vogt v. Germans, 1995 where in a similar situation dismissing a teacher and a member of the communist party was considered a violation of Article 10 as a measure, used by authorities, disproportionate and strongly infringing the freedom of expression. In the case Rekvenyi v. Hungary, 1999, the introduction of the constitutional law that prohibited the policemen from joining any political party was not considered a violation of Article 10 of the Convention.

8. A consumer is also a human being and has the right to information

Commercial information is always **an emanation of freedom of expression understood as one of fundamental human rights (Art.10 of the European Convention of Human Rights and Fundamental Rights). The right to broadcast and receive information includes also, beyond any doubts, commercial speech.** The practice of human rights protection bodies – The Human Rights Commission, the Court of Human Rights – includes examples of protection of this area. In the cases Swedish Church of Scientology v. Sweden of 5 May 1979, Barthold v. Germany of 5 March 1985, Jacubowski v. Germany 1994, Casado Coca v. Spain of 24 February 1994 it was stated: "Restrictions on advertising are admissible, in particular in order to prevent unfair competition and false or misleading advertising. In some circumstances restrictions on even objectively truthful advertisements might be admissible in order to ensure respect for the rights of other persons (…). Such restrictions are subject to the strict control of the Court which assesses the real importance of arguments being allegedly in favor of introducing such restrictions".

The fact that commercial speech is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms means that any restrictions imposed on trade and commercial activity concerning information, including advertising, are subject to protection appropriate for human rights. Thus, restrictions introduced by the state on commercial speech,

also for the purpose of protection of a consumer, in the form of legislation e.g. legislation on advertising, administrative measures (various prohibitions or restrictions) or, finally, court's decisions on competition or advertising, protection of personal interest etc., resulting in prohibitions or restrictions, will be assessed and controlled in the same way as any other restrictions on human rights.

The control is carried out by means of a test consisting of three steps. The test is always applied in assessing if there was a violation of human rights in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The following subsequent issues are checked and assessed: **if the restriction is justified by the law in form of the act; if it is necessary in a democratic state** (the statement about "benefits", "usefulness" or "purposefulness" of restriction is insufficient; "necessity" is a much stricter requirement); **if the restriction was placed in order to protect one of the interests explicitly listed in the Convention**: national security, territorial integrity, public safety, necessity of the prevention of disorder or crime, the protection of health and morals, the protection of the reputation and rights of others, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (Art. 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Consumer's right to information, to obtain knowledge about the subject and conditions of transaction, and even more extensively about the conditions for participation in the market, and a possible free decision making is one of principal consumer rights. It plays a special role, although the European Court of Justice does not distinguish it as absolute or superior among other consumer rights. However, the same Court regards the specific consumer information as a constructive ground for consumer protection in EU Law. This constructive ground is protection by information and not by prohibitions. The conclusion of the European Court of Justice on Inno Company is characteristic for the issue: the right to be informed on EU market does not provide grounds for justifying domestic regulations closing the access to information, even if these internal restrictions could be justified by protection of the consumer. As a consequence, the European Court of Justice recognizes the importance of full and transparent information, which in this case means "prohibition of prohibition" formulated in internal law so in favour of freedom of exchange of goods in the common market.

The meaning of "right to information" and transparency that can be observed in the EU Law results from the conviction that a "well informed consumer" is a "well protected consumer". One can see an analogical position of freedom and right to information among human rights as a basis for other freedoms indispensable for the correct functioning of democratic relations. In the EU and community law it is perceived as the main strategic motif and constructive ground for consumer protection. Even if entrepreneurs possess a full knowledge of the sector in which they conduct an economic activity, consumers, whose interests are dispersed and concern varied sectors of goods and services that are indispensable to be supplied, possess a dispersed and shallow knowledge. The deficiency of this knowledge deprives of freedom in assessment and choice, which limits freedom in consumers' market decisions.

Such an approach frees consumer protection in the EU from the charge of arbitrary paternalism: we protect a consumer not because he/she "should" be protected, because we "want" to do it or he/she "deserves" the protection, but because it is necessary for the proper functioning of the market, when all participants contracting transactions should be guaranteed minimum influence on the creation and content of the transaction, which is not possible without possessing knowledge i.e. information. The market used by the participants in a spontaneous instead of conscious way is not a healthy market.

The approach which stresses this role of information as deciding in the EU countries about the need for consumer protection makes information contribute to "market compensation", i.e. regaining balance of power, when disturbed by actual domination of hominess economic activity over consumers and, thus, treated as incorrect. This function is important for defining **what information a consumer can demand and expect and what information the consumer mustn't be provided with or demanded from** as well as what legal channels should be used for informing the consumer and **how high the requirements and expectations should be**.

We are consumers and it this is beginning to be a more and more important element of our life. That is why in the law of consumer agreements appears an issue about what entrepreneurs can, should and should not do in the scope of informing consumers. On the other hand, looking at the issue from the point of view of information not broadcast but demanded – what information mustn't be demanded from consumers.

Thus, the issue of consumer protection from information appears irrespective whether the information is issued or demanded. The consumer's interests that need to be protected include 2 types: **protection of consumer privacy** and **protection of market transparency (for the consumer)** in order to enable conscious market decisions. The latter can be indispensable in some situations due to the protection of another fundamental consumer right, namely protection of life and health (the same in case of warnings about dangerous features).

Commercial information and privacy – this is the first big area of conflict. Here is the issue of information which is not necessary or even useless for a consumer or unnecessarily demanded from the consumer, disturbing him/her and infringing his/her peace and quiet, ineffective information ("information noise"). Commercial information tends to be a factor invading consumer privacy. The conflict of freedom of expression and privacy is at first glance a conflict of two principal human rights.

For entrepreneurs the possibility of applying commercial information means making use of their individual freedom of expression. For consumers, however, information in this form constitutes a threat of their privacy because it is unwanted and unexpected and invades the area protected by one of the fundamental human rights.

Whereas for manufacturers, buyers and providers of services freedom of information in this form is protected as a part of protection of fundamental human rights, the threat of consumer's privacy being invaded commercial information apparently is not of equal importance. Namely, human rights act only in a vertical way, protecting from interference of the state and its bodies. However, they do not protect from interference with privacy from other entities acting horizontally. The protection must be provided here by regular legislation.

At the same time freedom of communication of commercial information by a professional can be threatened by authorities by means of restrictions or prohibitions i.e. by phenomena that one can be protected from if human rights are referred to. On the other hand, information threats for consumer privacy do not come from "authorities" but contractors – professionals. It concerns both communication of information invading privacy as well as information demanded from a consumer.

From the point of view of human rights freedom professionals in using commercial speech enjoy more legitimate protection on the grounds of human rights than consumer privacy, which is invaded by his/her contractors – professionals, but not by authorities. This does not exhaust all complexity of the relation between privacy and information.

9. Right to information on natural environment

The progress of globalization and awareness that we all live on one planet lead to, among others, approval of separate regulations on access to information on the natural environment. During the 4th Pan-European Conference of Ministers of Environment "An Environment for Europe" held in Aarhus, Denmark, in 1998, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was ratified. This Convention grants the right to information on the natural environment to everyone, irrespective of nationality and place of residence. It also makes the state's parties liable for accumulation, providing access and dissemination of information on environment. In particular it concerns information which constitutes a direct threat to environment or human health and life. Such information must be immediately transferred to the concerned. Thus, each state is obliged to inform us about ecological disasters and threats that they entail. If the incident in Chernobyl took place today, Ukraine, which ratified this convention on 18 November 1999 should immediately notify the international public of this incident.

Unfortunately, the case law of the European Court of Human Rights is not so unequivocal. In the case Guerra and others v. Italy (judgment 19 February 1998, report of the European Commission on Human Rights of 29 June 1996, application no 14967/89) concerning refusal to inform the local population about the risk and proceedings in the event of natural disaster in the nearby chemical plant, it is stated that authorities have no duty of passing information but are not entitled to restrict information that others want to pass.

10. Public information

The issue of public information – information on functioning of public authorities and their decisions are treated very seriously. On 21 February 2002 the Committee of Ministers of the Council of Europe adopted Recommendation (2002)2 for member states on access to official documents. The preamble to the Recommendation states that public authorities should conduct active policy of communication with the society and provide access to any useful information. It is recommended to adopt that no information should be a priori concealed from public opinion. Article XI recommends public authorities to take necessary steps to make information public if it is in the public's interest and promotes transparency and effectiveness of public administration. For this purpose access to official documents should be ensured. Member states can restrict the right to access official documents but these restrictions should be defined under law, necessary in a democratic society and proportionate to the aim to be protected by these restrictions. The aims to be protected are inter alia: national and public security, defense, international relations, prevention of crime, investigation and charges in criminal cases, privacy and private interest protected under law, private and public economic interests.

The right to access information subject to EU bodies is quite extensive. In Declaration 17 annexed to the Treaty on European Union the importance of the access to information possessed by community bodies is stressed. EU is very particular about diminishing the distance between Europe and its citizens and the strategy of increasingly free access, openness and transparency in decision making and legislative processes is to serve that purpose.

The Amsterdam Treaty of 2 October 1997 introduced in Art. 255 guarantees of the right to access to EU documents. The Treaty also indicates the obligation of including in Parliament, Council and Commission statutes internal laws regulating access to documents of these institutions. Likewise, the European Union Charter of Fundamental Rights proclaimed in Nice on

7 December 2000 under Art. 42 grants everybody the right to access the documents of the European Parliament, Council and Commission.

11. The right to information in the Polish Constitution and not only there

The Polish Constitution of 1997 regulates the issues related to information under two articles – Art. 51 and 61.

The former of the regulations states as follows:

> *"1. No one may be obliged, except on the basis of statute, to disclose information concerning his person. 2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law. 3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute. 4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute. 5. Principles and procedures for collection of and access to information shall be specified by statute."*

This Article is the source of the so-called individual information autonomy: only the statute can make a person obliged to disclose information concerning a person (Art.51(1)). Moreover, the statute must be restricted by the boundaries indicated in paragraph 2 of this Article. Namely, according to the statute defining the scope of invading privacy, the authorities are not allowed to collect nor make accessible information at one's discretion. This information must be "necessary in a democratic state ruled by law".

Article 51 of the Constitution creates among others, apart from obligations vested on state authorities, two constitutional human rights of persons:

- Access to documents and data collections (at the same time an ordinary legislator can specify restrictions – Art.51(3) and
- Everyone's right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute Art.51(4).

The fact that, under Art. 51(5) of the Constitution, principles and procedures for collection of and access to information shall be specified by statute does not mean that such a statute can shape these principles and procedures in an unrestricted way. Firstly, the legislator is limited by the Constitution itself (see Art.51(2) above). Secondly, material restrictions are imposed by international standards, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this respect the case law shaped as a result of the control concerning admissibility of collecting information on persons subject to the police surveillance.

Each intervention of the legislator has to have:

- Sufficiently precise and concrete legal basis for intervention in the form of statute. Restrictions (here: on privacy) by acts of different level are not admissible. Even if carried

out in the statute but of too general, blank and not concrete enough character, then the prerequisite of the specific statutory basis will not be fulfilled. It is confirmed by the case law under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Art.8 relating to the issues of operation and examination activities, e.g. in the cases against France (Kruslin v. France, 11801/85 and Huvig v. France, 11105/84 of 24 April 1990). In this case it was pointed out that the Convention requires the domestic legislation to define in the statute the category of persons that can be subject to operational control, on the basis of court order; types of crimes that such a court order can be issued for; maximum time of control; procedure of reports on the content of registered conversations (the case concerned telephone-tapping); measures that guarantee transfer of intact records that can be fully controlled by the judge and defiance; specifying cases when records can or must be destroyed, especially when proceedings in a case are remitted or the court acquits the convicted offender. The French legislation as well as the domestic legislation in the case Malone v. Great Britain (8691/79), judgment of 2 August 1984 (cases concerned collection of information and tapping) were regarded as incompatible with the above mentioned criteria. It was considered that the local statutes are too general and not concrete enough. That is why, in spite of statutory grounds for carrying out these activities, the level of defining in the statutes themselves does not allow for a positive result of the test under Art.8(2) of the Convention;

- Proof of necessity of such an intervention, considered from the point of view of a democratic state ruled by law. Reference to the factor of purposefulness is not sufficient. It is indispensable to prove necessity of a concrete (defined in the scope and procedure) restriction established by statute. Moreover, the standard of what is appropriate for a democratic state is not discretional. It must take into account the standard of an enlightened, open, tolerant state possessing appropriate professional police apparatus, capable of acting in a reliable, professional and not petty or malicious way, treating intervention in the area of protected personal rights as a necessary evil and not only as the factor making the police work more effectively;

- The proper purpose of statutory intervention (importance of the protected public interest) specified in Art.8 of the Convention: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and freedoms of others. Obviously, only the verbal reference to such a purpose is insufficient for a legitimate restriction. The existence (and proving) the real need for adopting restrictive measures is necessary, in the name of protection of the very rules of democratic order. The incident in which “on the occasion” of collecting operationally useful information the operational control will also collect data concerning private and social issues beyond the aim of carrying out the control , means the activity of authorities exceeded the admissible interference with privacy.

It should be noted that German antiterrorist legislation of 1968 (Act of 13 August 1968 on restricting the confidentiality of correspondence and telephone conversations, the so-called G-10 Act) has successfully passed the test of concreteness and compatibility with “the aim necessary in a democratic society” (the issue was about tapping in connection with suspicions about terrorism, which were supposed to remain a secret to the interested persons) as well as proportionality of the restriction applied and providing appropriate means of appeal and control (although it was not a court measure but a control on the part of a specially established, representative body). Proportions of values in conflict were considered to be correctly balanced by the German legislator. In this case the European Court of Human Rights regarded controlling persons in a confidential way as “necessary in present reality in a democratic society for national security and for disorder and crime prevention” assuming at the same time that “lack

of notice of observation" does not violate the European Convention of Human Rights (see: justification of the judgment of 6 September 1978 in the case Klaus and others v. Germany (5029/71)).

In the judgment of 4 May 2000 (Rotaru v. Romania, 28341/95) the European Court of

Human Rights stated that systems of secret surveillance must contain legal guarantees (for procedures) applied for controlling the activities of relevant services. According to the European Court of Human Rights, control procedures must comply with the values of a democratic society as close as possible, in particular comply with the principle of the state ruled by law. It assumes that the intervention of executive power bodies in the rights of a person should be subject of effective control. This control should be carried out at least by external bodies for services carrying out operational activities. It is recommended to be carried out in normal conditions by judicial bodies. The judicial control provides the best guarantee of independence, impartiality and application of the proper procedure. The control carried out outside the court by other external bodies for the controlled, with the proper representative composition, does not offend the standard of the Convention.

From the point of view of standards complying with the state ruled by law, collection of information in the form of taking photographs of persons during the demonstration, as a part of operational activities does not arise any doubts – the case Friedl v. Austria (15225/89), judgment of 31 January 1995. The same applies to the use of tapping for prevention of crime, on the only condition that - in both cases – the prerequisites required under internal law to apply such operational measures were fulfilled. That is the reason why in the case A. v. France (14838/89), judgment of 23 November 1993, when a policeman tapped a telephone conversation not fulfilling formal prerequisites required under internal law, a violation of the right to privacy was recognized. In the judgment of 27 April 2004 in the case Doerga v. Holland (50210/99) the European Court of Human Rights consistently stated that intervention in human rights protected under the Convention must comply with the principles of legal state. Consequently, it mainly assumes compliance of operational activities with the requirements of domestic law, which, however, are subject to assessment from the point of view of the above mentioned 3 – level test.

The second constitutional regulation concerning access to information is Article 61 of the Constitution. It states:

> *"A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury. 2. The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings. 3. Limitations upon the rights referred to in paras. 1 and 2 above, may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State. 4. The procedure for the provision of information, referred to in paras. 1 and 2 above shall be specified by statute, and regarding the Sejm and the Senate by their rules of procedure."*

12. A child is also a human being and should know

The group in particular distinguished in access to information are children. The Convention on the Rights of the Child grants children the right to freedom of expression which includes also *"… freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."* (Article 13(1)). Article 17 of this Convention additionally imposes an obligation on the state of ensuring *"that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."*

Nevertheless, the legal status of the child does not provide him or her with claims, i.e. the possibility of demanding exercise of the entitlements provided under the Convention on the Rights of the Child.

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