

Civil Servants' Right to Information and Consultation

Prof. dr. Tomas Davulis

Abstract: The article aims to analyze the status and applicability of a new generation rights – right to consultation and right to consultation – for civil servants. The author refers to a right of consultation of employees and assesses, whether such a right is extended to civil servants in the same or similar manner under the current legal framework in Lithuania. The research is carried out from a national, EU and international perspectives, where the international and EU documents serve as the basis and national practices of other jurisdictions serve as examples. Historical, teleological, systematic analysis and comparative methods are used to examine the scope of the right to information and consultation, the grounds for the (non-)application of these rights in the civil service in Lithuania as well as the prospects for the consolidation of these rights. The relevance of the research is linked to the national debates on the mandatory nature of labor councils in the civil service and relevant caselaw of the European Court of Justice. The author comes to a conclusion that the right to information currently is not guaranteed under the Lithuanian law but argues that the similarity of individual and collective situation of civil servants and employees makes a strong argument that it would be appropriate to develop a softer version of the information and consultation mechanism for civil servants.

Keywords: *right to information, right to consultation, new generation rights, civil servants, labor councils.*

Analysing the right of civil servants to information and consultation is not a simple task. On the one hand, we deal with a new generation of (human) rights that are not equally guaranteed (or not recognised at all) in different jurisdictions. If in Germany they appeared as far back as in the 19th century and today they can be found in the constitutions of Norway, Belgium, Slovenia, Portugal, and a few other States,¹ the Constitution of the Republic of Lithuania does not know them (so far) and they became effective only after transposition of relevant European Union

1 See, for example, at <https://fra.europa.eu/en/eu-charter/article/27-workers-right-information-and-consultation-within-undertaking?page=1#national-constitutional-law>, visited on 30 January 2022.

directives into the domestic legal system. On the other hand, the complexity of the concept of a civil servant from the national research standpoint may also require an additional effort. On the one hand, the definition of a “civil servant” must be sufficiently strict to dissociate persons working for the State in public administration from freely hired employees and to ensure that specialized legal rules and guarantees, reflecting their status and role, are applied. Nevertheless, the scope of the concept of a civil servant may be dynamic, not to say ambiguous. We do not mean cases here when, to reduce the number of civil servants, employees are hired to take over functions that previously were performed by civil servants (re-qualification of civil servants into “contracted employees”), or cases when after political decisions statutory staff is no longer deemed statutory. Rather, it is necessary to talk about corrections to the concept of a civil servant from the outside. Though not highly likely but still possible, the first interference may come from the national constitutional jurisprudence. The Constitution of the Republic of Lithuania was adopted in 1992 and it already contained concepts of an ‘employee’, ‘work’, and ‘trade union’, but the concepts of the ‘civil servant’, ‘civil service’ or ‘works council’ were non-existent. In other words, at the moment of its adoption the Constitution of 1992 classified functions of today’s civil servants performing persons as employees and attributed to them certain employee-like rights. The later legislator’s decision involving the change of the status of those persons (i.e. deprivation or limitation of these constitutional rights (for example, the right to go for a strike or the right to the limit of maximum working hours²) can be challenged in terms of its conformity to the Constitution. Another external correction is linked to the interventions of European Union law in the domain of the national civil service system. Again, here we may speak not only about the permitted public-service related exceptions from the concept of ‘workers’ in the context of free movement of workers in the internal market³ but about the extensive interpretation of the

- 2 The right to strike guaranteed by Article 50 of the Constitution is not granted to the heads of divisions of an institution (subparagraph 4 of paragraph 1 of Article 17 of the Law on the Civil Service), public prosecutors (paragraph 2 of Article 21 of the Law on the Prosecution Service), etc. Another example is working time limits (Article 49 of the Constitution), which do not apply to officers in professional military service (Article 50 of the Statute of Military Service), reconnaissance officers (paragraph 4 of Article 45 of the Reconnaissance Law).
- 3 According to Article 45 of the Treaty on the Functioning of the European Union, freedom of movement for workers shall be secured within the Union, the provisions of this Article shall not apply to “employment in the public service” (in French *emplois dans l'administration publique*). See the CJEU judgement of 12 February 1974 in case No. 152/73 (Sotgiu), ECLI:EU:C:1974:13, the judgment of 26 April 2007 in case No. C-393/05 (Alevizos), ECLI:EU:C:2007:251. It means that the States must prove whether the post of a civil servant, which is subject to the nationality requirement, is characterised both by powers granted by public law and by a common interest. Besides, it is required that such a civil servant is in a special relationship of loyalty to the State and reciprocity of rights and obligations based on nationality.

concept of ‘employee’ used in European Union labour law, which may be forcing its way into the civil service regulated by national public law. In other words, some of the provisions of the European Union directives, which *expressis verbis* are meant to include employees, can be interpreted by the Court of Justice of the European Union (hereinafter referred to as the CJEU) in such a way as to include civil servants who are not considered employees under national law.⁴

In the context of these observations, a question is raised whether civil servants in Lithuania, according to the national and European Union regulation in force today, have the right to information and to consultation, as this is the case already with Lithuanian employees. The article, using historical, teleological, systematic analysis and comparative methods, will examine the scope of the right to information and consultation, the grounds for the (non-)application of these rights in the civil service in Lithuania, and the prospects for the consolidation of these rights. The relevance of the research is linked to the national debates on the mandatory nature of works councils in the civil service and to the CJEU judgment confirming the European Commission’s right *not to present* the agreement of the EU-level social partners on information and consultation in central administrations of the Member States to the European Union institutions for adoption of binding legislation for the Member States.

1. Right to information and consultation in Lithuanian and European Union law

1.1. *Rationale* of the right to information and consultation

The right of the employer to make decisions in respect of subordinate employees is the core of the employment relationship created by an employment contract and regulated by provisions of labour law.⁵ In the employment relationship, it is the employer that carries commercial and industrial risk (paragraph 4 of Article 32 of

4 In case of non-discrimination Directives, see, for example, the CJEU judgment of 6 December 2012 in joined cases No. C-124/11, C-125/11 and C-143/11 (Dittrich), ECLI:EU:C:2012:771, in case of the Working Time Directive 2003/88, see, for example, the CJEU judgment of 20 March 2010 in C-158/09 (Commission v. Spain), ECLI:EU:C:2010:292, in case of Safety at Work Directives – the CJEU judgment of 5 October 2004 in joined cases C-397/01 to C-403/01, ECLI:EU:C:2004:584. See also Rysak M., Dullinger Th. *The concept of ‘worker’ in EU law. Status quo and potential for change*. ETUI Report 140, 2018, p. 40, Menegatti E. Taking EU labour law beyond the employment contract: The role played by the European Court of Justice. *European Labour Law Journal* 2020, Vol. 11(1), p. 22–23.

5 Davulis T. *Lietuvos Respublikos darbo kodekso komentaras*. Vilnius: Registrų centras, 2018, p. 133.

the Labour Code of the Republic of Lithuania⁶ (hereinafter also referred to as the Labour Code)), therefore, it is natural that it is the employer that has the right to unilaterally make economic, financial, work organization decisions (such as what to produce and what not to produce, at what price to sell, what materials to use, how many and what employees to hire, how to distribute tasks among them and under what remuneration conditions, how to organize business relations, when to stop production, when to change the profile of activities and abandon certain activities, how to optimize activities and when to abort them, etc.). Interference with the competence to make such decisions could not only undermine the principles of freedom of economic activity (paragraph 1 of Article 48 of the Constitution⁷) and the inviolability of property (Article 23 of the Constitution)⁸ but would also cause problems in the allocation of liability between decision-makers.

Such a fundamental logic of the employment relationship does not mean that the employer's right to make decisions cannot be restricted by the legislator through labour law provisions aimed at protecting the interests of the employee – the weaker party in the employment relationship. For example, the employer cannot discriminate against persons in hiring, cannot dismiss them without statutory grounds, cannot make deductions from their salaries that are not provided for in law, cannot ignore working time restrictions, etc. In addition to such requirements restricting the employer's decisions, there is also another possibility to influence the employer's decisions – without questioning the right (discretion) of the decision-maker to make a decision, to provide for a mandatory preliminary decision-making procedure – for example, a duty to present information to public authorities or employees representatives at a certain period in time, to provide them with a possibility to ask questions (to consult) and to make proposals, especially when the employer's decisions can lead to essential restrictions of employees' rights and interests.⁹

Procedural rules on information and consultation are aimed at achieving significant objectives of the social policy and the origins of this legal construct go back to the middle of the 19th century. It was in the German legal system,¹⁰

6 Register of Legal Acts, 2016, No. 23709.

7 Hereinafter we refer to the Constitution of the Republic of Lithuania.

8 See also Dorsemont F. Article 27 - Workers' Right to Information. In: *The EU Charter of Fundamental Rights. A Commentary* (ed. Peers S et al). Hart Publishing, 2014, p. 750.

9 For example, obtaining a consent of an officer of the State Labour Inspectorate to dismissal of the employees' representative (paragraph 3 of Article 168 of the Labour Code), presentation of information about dismissal of a group of employees to the Employment Service (paragraph 4 of Article 63 of the Labour Code), etc.

10 From attempts made already in the 1848 Frankfurt National Assembly, later in the Workers Protection Law of 1898, according to which the employer could adopt the rules of working procedure only after listening to the workers' committee, and even in Article 165 of the Weimar Constitution, and in most detail in the German Law on Labour Councils of 1920. Löwisch M. *Arbeitsrecht*, Werner, 2004, S. 121.

where the development of the dialogue between employees' representatives (employees' committees, later renamed as works councils) and employers was first started, seeking dual aims. First, on the undertaking level, involvement, through the information and consultation system, of the employees' representatives (such as elected employees' committees, works councils, elected sole-person shop stewards, local representatives of a trade union or similar) in making of the most important decisions on work organization in the undertaking, makes such management decisions more socially responsible and of better quality, they are discussed in more detail and are more economically sound. It is so because employees or their representatives, at least at the theoretical level, can point out errors in management, draw attention to the social or human dimension of a specific decision, advise, offer alternatives or more efficient and convenient ways to implement production, innovation, saving measures, agree on means to mitigate negative consequences and so on. On the other hand, when employees themselves or via their representatives take part in decision-making procedures, they become directly aware of future changes and measures to implement them and mitigate negative effects. This helps to increase the effectiveness of the implementation of these decisions as employees can prepare for changes, understand their purpose and necessity, and effectively participate in the changes. In this case, we speak not about a simple right to make individual proposals (it is probably not challenged in any organisation) but rather about the institutionalised definite mechanism of cooperation between the two parties. Its essence is to provide in advance complete information about a future decision and its goals, reasons and consequences, to allow access to and analysis of information, to answer questions from employees' representatives, to give time for giving their opinions and only then to make a decision which is within the competence of the employer. Depending on the significance of an issue or decision, in one case, the legislator requires the employer to perform its duty only to inform (information), whereas in another case – it is not only to inform but also to answer questions and listen to the opinions of employees or their representatives (consultation).¹¹

The above-discussed information and consultation rights need to be distinguished from another form of modern social partnership – the right to collective bargaining. The latter right is traditionally granted to employers' and employees' associations, which use the collective mechanism to establish the level of wages as

11 Today the right to information and consultation is regarded as a form of social partnership (Article 164 of the Labour Code) and is assigned to the so-call institution of "co-determination" or "involvement" (in German *Mitbestimmung* or *Beteiligung*, in French *codétermination* or *implication*). The latter includes not only information and consultation rights but also the most intense right of influence on employer's decisions – the employees' representatives' rights to appoint members of management and supervisory bodies of the legal entity together with interest holders in the legal entity ("participation"). For statutory definitions of concepts, in European Union law, see e.g. Article 2 of Directive 2001/86.

labour costs and other key working conditions. The right to collective bargaining as the right to take collective action is also classified as a fundamental right – they arise out of the universally recognised freedom of association and are also guaranteed by national constitutions and international human rights instruments.¹²

Finally, the right to information and consultation must be differentiated from the plain right to make proposals and suggestions, to apply or receive information, which in different intensity can be ensured for any person by rules of administrative law or other rules.

1.2. International, European Union and national dimensions of the right to information and consultation

Right to information and consultation is to be treated as the right of the new generation, which receives different treatment in various jurisdictions. The International Labour Organisation (hereinafter also referred to as the ILO) from its establishment in 1919 traditionally is focused on ensuring and developing the freedom of association and collective bargaining, therefore, its documents barely mention information and consultation.¹³ We will not find such a right in the text of the European Social Charter of 1961, but, in its Additional Protocol of 1988 and Article 21 of the revised Charter of 1996, we could see the Parties' commitment to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:

- a) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and
- b) to be consulted in good time on proposed decisions that could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.

12 See, for example, *Darbo teisės principai ir jų taikymas Lietuvos teismų praktikoje*. Vilnius: MRU, 2016, p. 74–90. It should be noted that the right to collective bargaining is vested in “associations”, but the rights to information and consultation are vested in both employees and their “representatives”, without defining the latter.

13 They are very fragmentarily mentioned in ILO Recommendations No. 94 (1952), No. 143 (1971), No. 129 (1967) and Convention No. 168 dealing with collective redundancies. For more, see Papadakis K. The Concept of Information-consultation in Times of Crisis: Overview of Normative Guidelines and Recent Practices. Available at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_172331.pdf, visited on 10 January 2022.

It is noteworthy that for the implementation of this right, the Appendix to the same Charter presents necessary concepts, among which the concept of ‘undertaking’ is most relevant. It is understood as referring to a set of tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy’. According to A. M. Świątkowski, the inclusion of this criterion of the economic purpose of the activity into the definition clearly explains that Article 21 of the European Social Charter does not apply to the public sector.¹⁴

Although the European Committee of Social Rights of the Council of Europe has taken few decisions in this area,¹⁵ the greatest impulse for the development of the right to information and consultation at the pan-European level came from the European Union. Union’s approach to information and consultation may differ from that of other international organisations, therefore, the legal provisions of different do not necessarily completely coincide. Under the influence of the Member States with the developed information and consultation system (mainly Germany, Austria, France), the European Union showed intense legislative efforts namely in this area, in the attempt to compensate for the significant lack of its competence in collective labour law – the major legislative actions in the area of collective bargaining is directly prohibited for European Union.¹⁶ As evident from the development of the European Union labour law, as the European Union lacked the competence to regulate collective bargaining agreements in the Member States, the so-called European social model¹⁷ was being created by strengthening mandatory information and consultation procedures. The said rights were first implemented in directives, which regulated employers’ decisions of the most severe consequences for employees¹⁸.

14 With reference to the practices of the European Committee of Social Rights, A.M. Świątkowski. *Labour Law: Council of Europe*, Wolters Kluwer, 2014, p. 224. Meanwhile, B. Veneziani seems to “forget” these features and pronounces against the differentiation of the so-called collective solidarity rights and the obvious imbalance in the public and private sectors. See Veneziani B. The Right to Information and Consultation. In: *The European Social Charter and the Employment Relationship* (ed. N.Bruun et al). Hart Publishing, 2017, p. 397–399.

15 For more, see Świątkowski A.M. *Labour Law: Council of Europe*. Wolters Kluwer, 2014, p. 221–222.

16 See Article 153 of the Treaty on the Functioning of the European Union, paragraph 3 of which *expressis verbis* allows permitting a minimal standard in the area of information and consultation rights by a qualified majority of votes, but paragraph 5 does not allow regulating the right to association, pay (in many countries, it is collective bargaining agreements where the main remuneration terms are set), strikes and lockouts.

17 The White Paper of the European Commission of 1994 on Social Policy (COM (94) 333) described the “European social model” as values encompassing democracy and individual rights, free collective bargaining, the market economy, equal opportunities for all, social welfare and solidarity. The model is based on the conviction that economic and social progress must go hand in hand: “Competitiveness and solidarity have both to be taken into account in building a successful Europe for the future.”

18 In Directive 98/59 on collective redundancies and Directive 2001/23 on transfers of undertakings.

Subsequently, these rights were expanded¹⁹ and even institutionalised,²⁰ and some-time later they were even given the status of a fundamental right (Articles 17 and 18 of the Community Charter of the Fundamental Social Rights of Workers of 1989, Article 27 of the Charter of Fundamental Rights of the European Union of 2000). As evident from the development of the European Union labour law, as the European Union lacked the competence to regulate collective bargaining agreements in the Member States, the so-called European social model was being created by strengthening mandatory information and consultation procedures.

Today we can list more than 35 EU directives,²¹ which, in one way or another, mention the obligation of the employer to inform and consult its employees or their representatives – from the general duty of information and consultation in undertakings or establishments at the national level to regulatory provisions on safety at work or information and consultation procedures in economic entities operating internationally (European company, Union scale undertakings and groups of undertakings). In certain cases, information and consultation can perform an additional supporting function in defense of employees' interests (for example, in the case of dismissal of a group of employees or transfer of a business or its part, employees' representatives present their opinions and proposals in information and consultation procedures aimed at mitigating the consequences for employees). In other cases, the European Union directives provide for an obligation for employers to establish permanent information and consultation instruments, by use of which information on the situation of the undertaking and on the employer's decisions most important for employees would be provided regularly and in individual particularly important cases. Today the duty to create the information and consultation system is linked either to the size of an undertaking or establishment (Directive 2002/14 requires to set up of such a system in establishments employing at least 20 employees or undertakings employing at least 50 employees) or to the form of a legal entity or peculiarities of its activities (Directive 2009/38 requires to set up such a system in European Union scale undertakings or groups of undertakings, Directive 2001/86 – in European companies, Directive 2003/72 – in European Cooperative Societies) or to the necessity to involve employees into activities intended to protect from health impairment

19 Directive on European Works Councils (Directive 94/45, later Directive 2009/38) and Directive on employees' information and consultation in a European company (Directive 2001/86) and a European Cooperative Society Directive (Directive 2003/72).

20 Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community.

21 ETUI. Information, consultation and participation. Online access: <https://www.etuc.org/en/democracy-thematic/information-consultation-participation>, visited on 20 January 2022.

and injury at work.²² In this way, a unique information and consultation mechanism has been established, which is harmonized in all the Member States.

Before its membership in the European Union, Lithuania has not provided the information and consultation rights of such scope and expediency. When it became necessary to transpose the European Union directives into national Lithuanian law, the legislator introduced all the mandatory rules into the national legal system, though gradually, not all at once. Currently, almost all these rules are enshrined in the Labour Code of 2016, which:

- 1) establishes the information and consultation rights as one of the forms of social partnership;
- 2) presents the concept of information and the principles for its implementation;
- 3) defines how confidential information is to be shared;
- 4) indicates cases and procedures when the employer must regularly inform the employees' representatives about the situation in the undertaking;
- 5) presents the concept of consultation and the principles for its implementation;
- 6) specifies the procedure when the employer must carry out employees' representatives' the information and consultation when it is about to dismiss a group of employees or when a transfer of business or other decisions affecting employees' rights and interests are projected;²³
- 7) indicates cases when the employer must inform employees directly.²⁴

The Law on Safety and Health at Work provides for special duties of the employer in the area of safety at work.²⁵

22 CJEU judgment of 22 May 2003 in case *Commission v. Netherlands*, No. C-441/01, ECLI:EU:C:2003:308.

23 Works councils also have rights other than those provided for in the directives, such as the right to information and consultation procedures when adopting corporate legal acts in undertakings (Article 206 of the Labour Code, the right to information on average wages of men and women (paragraph 2 of Article 23 of the Labour Code).

24 As provided for in the European Union directives, the right to information and the right to consultation are separate and their implementation depends on the presence of employees' representatives in the undertaking. In those cases when there are no employees' representatives in the undertaking, the right to consultation cannot be exercised and employees are entitled only to the right to information. See paragraph 3 of Article 207, paragraph 3 of Article 208 of the Labour Code. Also, Ales E. 2002/14/EC: Framework Information and Consultation In: *EU labour law: a commentary* (Ed. M. Schlachter). Alphen aan den Rijn: Kluwer Law International, 2015, p. 457–489.

25 Article 13 of the Law on Safety and Health at Work: The employer's representative, persons authorised by the employer must inform workers and consult with them on all issues concerning the state of occupational safety and health, the planning of its improvement, organisation, implementation and control of the measures. Workers' representatives for safety

According to the Labour Code of the Republic of Lithuania of 2016, in order to implement the employee information and consultation mechanism, a permanent body representing employees is used. It is a collegial body – a works council – elected in each undertaking with at least 20 employees²⁶ by the universal equal right. The major part of the works council's competence is namely information and consultation rights. It is a purposeful decision of the legislator, by which the works councils, representing all employees, are vested with the powers to take part in the employer's decision-making, whereas trade unions, representing only their members, have the competence of collective bargaining and conclusion of collective bargaining agreements.²⁷

Thus, although the information and consultation rights of employees and their representatives were discovered quite late at the international level, they were established in the most intensive manner in the European Union. They landed in the Lithuanian legal system only after the transposition of the European Union's information and consultation directives.

1.3. The scope *ratione personae* of the right to information and consultation

Though it is declared that the right to collective bargaining is linked to employees at first sight, however, it is generally accepted that it also applies to civil servants (with certain narrow exceptions). Such a conclusion is determined not only by the historical experience of the fight for the recognition of freedom of association²⁸, but also that the right of civil servants to collective bargaining is *expressis verbis* provided for in relevant international documents, for example, ILO Convention No. 98 on the right to organise and collective bargaining, Convention No. 151 on the right to organise and procedures for determining conditions of

and health shall be elected and occupational health and safety committees shall be set up for this purpose. The employer's representative, heads of subdivisions shall provide conditions for workers, workers' representatives for safety and health to take part in discussions concerning employees' safety and health matters.

26 In smaller undertakings of Lithuania, a sole-person representative of employees may be elected – a trustee, having the same rights as a works council (Article 177–178 of the Labour Code).

27 See Davulis T. Main features of Lithuanian Labour Law Reform 2016. In: *Labour law reforms in Eastern and Western Europe* (ed. Tomas Davulis). Brussels: Peter Lang, 2017, p. 72–74; Davulis T. *Darbo teisės rekodifikavimas Lietuvoje 2016-2017 m.* Teisė: VU mokslo darbai. Vilnius: Vilnius University Publishing House. 2017, No. 104, p. 21–22.

28 It should be recalled that World War I ended with the Treaty of Versailles, which established the International Labour Organization in 1919, one of the main objectives of which is the recognition and development of the freedom of association, the right to collective bargaining (one of the four fundamental areas of the conventions).

employment in the public service”.²⁹ Besides, under the influence of the wording of Article 20 of the Universal Declaration of Human Rights, Article 11 of the European Convention on Human Rights guarantees the freedom of association (accordingly, also the right to collective bargaining and measures of collective impact) to ‘everyone’ (every person),³⁰ therefore, a broad interpretation of the scope of this provision by the European Court of Human Rights penetrates other documents on human rights, which specifically mention ‘only’ employees and employers.³¹ Accordingly, this has implications for the case-law of institutions interpreting national constitutions³² and is ultimately reflected in statutory texts.³³

We cannot state the same about the right to information and consultation. Both Article 27 of the EU Charter of Fundamental Rights and Directive 2002/14 establish a general framework for informing and consulting employees in the European Community using the concepts ‘employer’ and ‘employee’, ‘undertaking’, ‘establishment’. The concept of ‘employee’ in Directive 2002/14 is significant, according to which employees are defined as any persons, who, in the Member State concerned, are protected *as an employee* under national employment law and in accordance with a national practice. Thus, the Directive itself does not create an autonomous Union law concept of an ‘employee’. In addition, it does not create a lacuna, requiring for borrow the concept from the already established case law of the Court of Justice of the European Union. Therefore, the information and consultation mechanism provided for in this directive ap-

29 As for the fact that it is namely by way of collective bargaining that terms of payment are set in civil service in many European countries, see *Collective Bargaining in the Public Service in the European Union*. ILO Working Paper No. 309. Available at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_429795.pdf, visited on 12 January 2022.

30 Judgment of the European Court of Human Rights of 12 November 2008 in *Demir and Baykara v. Turkey*, application No. 34503/97; judgment of 21 April 2009 in *Enerji Yapi-Yol Sen v. Turkey*, application No. 68959/01.

31 See Article 6 of the European Social Charter (revised), Article 28 of the EU Charter of Fundamental Rights.

32 Ruling of the Constitutional Court of the Republic of Lithuania, dated 13 December 2004, says that “(...) certain social and economic rights of civil servants at respective services may be restricted by law due to particularities of these services or duties of respective civil servants, for example, the right of employees to strike while defending their economic and social interests which is entrenched in paragraph 1 of Article 51 of the Constitution may be restricted on the basis of paragraph 2 of this article, wherein it is prescribed that the restrictions of this right, the conditions and procedure for the implementation thereof are established by law.”

33 For example, paragraphs 2–4 of Article 6 of the Law on the Civil Service, Article 1 of the Law on Trade Unions, Articles 186, 234 of the Labour Code.

plies only to the persons who are deemed employees according to the law of the respective Member State.³⁴ The same applies to the concept of the employer.³⁵ Analogous or similar definitions can be found in Directive 2001/23 on transfers of undertakings and Directive 98/59 on collective redundancies, Directive 2008/104 on temporary agency work, Directive 2009/38 on a European Works Council, Directive 2001/86 on a European company and Directive 2003/72 on a European Cooperative Society.

Particular significance also lies in the concept of 'undertaking', which means a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States, and the concept of 'establishment', which means a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where economic activity is carried out on an ongoing basis with human and material resources. These features make it clear that the scope of the directive covers units engaged in economic activities and that public administration entities are excluded from its scope.

The European Union legislator defines the scope of the directives on safety at work slightly differently. Article 3 of Framework Directive 89/391 uses the concept of a working person, but the text of the directive already refers not to 'employee' as the above-mentioned directive but to 'worker'³⁶, also already without any reference to the national law of the Member States, stating that it is any person employed by an employer. As the Court of Justice of the European Union has explained while interpreting the directives on equal treatment and safety at work, the scope of the directives may be defined not by the concepts of 'employee' or 'worker' determined by the Member States but by the autonomous concepts of the European Union law.³⁷ Here we are faced with a broader and autonomous defini-

34 As these directives are intended for social policy (most of them were adopted on the basis of Article 153 TFEU), they are therefore subject to the principle of minimum labour standards, i.e. the Member States are free to make employees' legal situation better than required by the directives. This means that they can expand the application of provisions transposing the directives also to cover other persons, such as civil servants.

35 According to Article 2 of Directive 2002/14/EC, the 'employer is the natural or legal person party to employment contracts or employment relationships with employees, in accordance with national law and practice.

36 It is difficult to say whether these linguistic differences are legally significant as in French and German the same concepts of 'travailleur' and 'Arbeitnehmer' are used. Moreover, Article 27 of the EU Charter of Fundamental Rights also mentions 'worker', not an 'employee'. Meanwhile, Alan Bogg states that more meaningful difference is between 'worker' and 'every worker'. See Bogg, Article 31. In: *The EU Charter of Fundamental Rights. A Commentary* (ed. Peers S et al). Hart Publishing, 2014, p. 851

37 See footnote No. 5.

tion under EU law, which follows from the definition of a ‘worker’ approved by the Court in the area of free movement of workers.³⁸

Such a slightly different scope of information and consultation rights shows a differentiated approach towards their implementation. If safe, healthy and non-hazardous working conditions are a common aim both for employees and civil servants, it does not necessarily mean that also information and consultation rights can be applied to them equally. In the meantime, if the implementation of such rights has an effect on the exercise of sovereign authority or management decisions, procedures restricting the rights of the management are less tolerable. The Court of Justice of the European Union, examining a case whether, in case of closure of an American military base, redundancies in the United Kingdom fall into the scope of Directive 98/59 on collective redundancies (calling for mandatory application of information and consultation procedures), noted that the latter directive obviously does not apply to the public sector (Article 1(2)(b)) and is designed to ensure the functioning of the internal market. Meanwhile, activities that, like national defense, fall within the exercise of public powers are in principle excluded from classification as economic activity.³⁹ It would mean that if redundancies are carried out not in economic activity but in the exercise of public authority, information and consultation rights are not to be recognised.⁴⁰ Of course, the said decision is only about the exception provided for in Directive 98/59, which is not explicitly mentioned in Directive 2002/14, but the economic context may explain the content of “undertaking” or “establishment” used in the latter directive.⁴¹

Both the provisions transposing the directives and national rules on information and consultation are provided by the Labour Code. As the Labour Code provides that it applies to employees, therefore, both the Code’s provisions on information and consultation mechanism cover only employees, as they are defined by Labour Code of the Republic of Lithuania. It means civil servants are not subject to these provisions *a priori*, unless we reach a different conclusion upon analysis of the status of a civil servant according to the Constitution and other legal acts.

38 Decision of the European Court of Justice of 3 July 1986 in case *Lawrie-Blum*, C-66/85, ECLI:EU:C:1986:284.

39 CJEU judgment of 18 October 2012 in case C-583/10 (Nolan), ECLI:EU:C:2012:638.

40 Similarly, Directive 2001/23/EC on transfers of undertakings, businesses provides that an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

41 In the process of adopting Directive 2002/14, the European Parliament sought to make the directive applicable also to the “public sector” (thus, to cover “civil service and public services”), but the Council did not find it acceptable.

2. Possibility (or the absence of) to apply the provisions of information and consultation in the civil service

As we see, information and consultation rights are considered important part of an employee legal status, having the status of a fundamental right in the European Union and, to a slightly smaller extent, in the European Social Charter. We see that they are granted to employees (their representatives), but the question arises whether this legal construct can be applied to civil servants. A strong supporting argument in favor of this statement lies in the similarity of the civil service and employment relationship⁴² and in the same legal nature of their representation via trade unions⁴³. The interception may be provided *expressis verbis* by laws or it may emerge from:

- a) the broader interpretation of provisions of the Constitution dealing with employees' labour rights, or
- a) the broader interpretation of human rights documents, or
- b) the necessity to fill in the gap in the legal regulation of civil service, or
- c) the broader interpretation of the employee's concept by expanding its limits.

To provide answers, the issue of the legal situation of the civil service and a civil servant must be discussed briefly.

2.1. Peculiarities of the legal status of the civil service and a civil servant

The legal basis for the civil service in the State of Lithuania initially appeared in the Constitution of the Republic of Lithuania of 1992, Article 33 of which provided for

42 There is no need to look for such similarities far. According to Article 4 of the Law of the Republic of Lithuania on Employment (Register of Legal Acts, 2016, No. 18825), a person is deemed to be employed if he or she works under an employment contract on the grounds of legal relations deemed to be equal to employment relations. According to paragraph 2 (3) of the same article, legal relations deemed to be equal to employment relations are, *inter alia*, public service relations the characteristics of which are established by the Law of the Republic of Lithuania on the Civil Service and the relevant service statutes.

43 The right of civil servants to establish and join trade unions *on the same grounds* as employees is provided for in the Law of the Republic of Lithuania on Trade Unions (*Valstybės žinios*, 1991, No. 34–933). Though the preamble of the law repeats the principled provision of Article 50 of the Constitution that trade unions are voluntary, independent and autonomous organisations representing and advocating *employees'* labour, economic, social rights and interests relating to their professions, paragraph 1 of Article 2 of the law says that members of trade unions, legally working under employment contracts *or on other grounds established by law* in the territory of the Republic of Lithuania, have all rights and obligations of members of a trade union set in the Articles of Association of the trade unions. The relationship between the constitutional concept of 'employee' and the concept of a civil servant created by the legislator is discussed below.

the right of the citizen to enter the civil service on equal terms. Over the next decades, Lithuania was changing the concept of legal regulation a number of times⁴⁴ and chose the narrow model of the civil service, which, as stated by N. Glebovė,⁴⁵ is probably the most suitable for a relatively small country – it is activities of persons, by which objectives and functions of the State, its apparatus or the relevant institutions in the field of state governance are implemented *directly*.

In the course of the creation of the civil service⁴⁶, constitutional⁴⁷ principles governing civil service were formulated: the unity of the civil service, the loyalty of civil servants to the State of Lithuania and its constitutional order, impartiality, openness, publicity, obeying only the Constitution and law, the principles of separation of powers and limiting the powers of the authorities, high qualification and professional requirements for civil servants, the primacy of statutory regulation, differences from the contractual employment relationship, stability of remuneration.⁴⁸ This also allowed to formulate the doctrinal concept of a civil servant,⁴⁹ according to which a civil servant is a natural person, holding a post in a state or municipal institution and agency, performing public administration activities, having a particular legal status that is regulated by special legal acts, serving the nation and the State and ensuring public interest.⁵⁰

44 See, for example, Vaičaitis V. A. *Konstitucinė valstybės tarnybos samprata ir valstybės tarnybos tobulinimo koncepcija*. Teisė, 2011, No. 78, p. 122–130; Glebovė N. *Valstybės tarnybos samprata ir valstybės tarnautojo teisinio statuso ypatumai*. Teisė, 2010, No. 76, p. 131–140.

45 Glebovė N. *Valstybės tarnybos samprata ir valstybės tarnautojo teisinio statuso ypatumai*. Teisė, 2010, No. 76, p. 131. According to the broad concept of the civil service, it would cover activities of all civil servants in the exercise of the functions assigned to them, and the concept of a civil servant would cover all the working persons (person in service), who work (serve) in state and municipal institutions or agencies and are paid from state or municipal budgets.

46 The currently effective legal definition of ‘civil service’ is given in paragraph 11 of Article 2 of the Law on the Civil Service (Register of Legal Acts, 2018, No. 12037). According to it, ‘civil service’ means the professional activities of the persons holding posts in state and municipal institutions and agencies when discharging public administration functions or assisting the persons exercising state or local authority in discharging the functions assigned to them, with the exception of the functions of economic and/or technical nature.

47 The doctrine of the Constitutional Court helped to reveal the concept of the civil service: see rulings of the Constitutional Court of the Republic of Lithuania of 18 December 2001, 13 December 2004, 20 March 2007.

48 Glebovė N. *Valstybės tarnybos samprata ir valstybės tarnautojo teisinio statuso ypatumai*. Teisė, 2010, No. 76, p. 141.

49 The legislator itself tends to define a civil servant in a very laconic manner. ‘Civil servant’ means a natural person holding a post in the civil service (paragraph 10 of Article 2 of the Law on the Civil Service).

50 Former paragraph 4 of Article 5-1 of the Law on the Civil Service (version of 7 October 2003 that was in force until 1 January 2019) provided that the collective bargaining agreement of an agency may not lay down additional conditions relating to additional funds from state and municipal budgets and public money funds.

Here we would like to note one important aspect – the efficiency⁵¹ of the civil service as a condition for always efficiently performing tasks of public administration and providing public services in pursuance of public interest. The efficiency of the civil service, mentioned by V. Vaičaitis and indirectly mentioned by N. Glebovė, is discussed in the jurisprudence of the Constitutional Court, but most often it is related either to the principle of unity of the civil service or requirements for qualification, professionalism or selection of civil servants or the necessity to ensure the material-financial side of the service.⁵² We believe that the content of the principle of efficiency of the civil service must not be limited only to this – it must cover not only the aspects of lawfulness of public administration and adoption and implementation of decisions on public services or capabilities of the staff but also other dimensions – urgency, effect, expediency, cost-effectiveness, transparency, institutional links, and provide for relevant liability. These aspects of the functioning of the civil service *sine qua non* should be further discussed both in the doctrine and in the jurisprudence of the Constitutional Court.

The differences in the legal status of civil servants and employees arising out of the main purpose of the civil service. One of the necessary characteristics of the constitutional concept of the civil service is ‘the fact that the purpose of the state service is to guarantee, when [...] exercise public administration and provide public service, the public interest rather than private interests of the employees engaged in this activity, presupposes a special procedure of forming the state servants as a corps, the specifics of their legal status, and their special responsibility to the society for the implementation of functions commissioned to them as well.’⁵³ These peculiarities of the civil service also formulate relevant differences between persons having the civil servant status and employees. As N. Glebovė states, though in qualitative terms the service relationship is very similar to the legal relationship of employment, their status is different – they are determined by different legal acts, there are different sources and structures for determination of wages for payment, no contract is concluded with the civil servant as there is no individual agreement on terms of work, the civil servant carries out public administration activities only, the state imposes more obligations (restrictions) on civil servants than on employees and, for this reason, civil servants are entitled to

51 It was this word that the Constitutional Court chose to use. Meanwhile, the civil service effectiveness econometric measurements and calculations can also co-exist (see KPMG study *Valstybės tarnybos efektyvumo indeksas – kas tai?*). Available online at https://vtd.lrv.lt/uploads/vtd/documents/files/VEIKLA/Vykdomi_projektai/Valstybės_tarnybos_efektyvumo_indeksas.pdf, visited on 10 January 2022), but their links to legal imperatives are remote.

52 Rulings of the Constitutional Court of the Republic of Lithuania of 18 December 2001, 13 December 2004, 20 March 2007, 22 January 2008, 3 July 2012, 18 April 2019, 14 April 2021.

53 Ruling of the Constitutional Court of the Republic of Lithuania of 13 December 2004.

different social guarantees compared to employees.⁵⁴ However, a natural question arises: what restrictions apply to civil servants and what rights they are deprived, if compared to employees?

The Constitutional Court itself has stated on a number of occasions⁵⁵ that, no matter the similarity, the legal relationship of the civil service is not identical to the employment relationship between the employee and the employer.⁵⁶ The court itself creates a solid basis for this, arriving at the conclusion that the provision of paragraph 1 of Article 33 of the Constitution ‘citizens shall have the right <...> to enter on equal terms in the civil service of the Republic of Lithuania’ is related to the provision of paragraph 1 of Article 48 of the Constitution “each human being may freely choose a job” as *lex specialis* to *lex generalis*. According to the court, the constitutional right of a citizen to enter on equal terms in the civil service is a variety of each person’s constitutional right to choose a job.⁵⁷

Such a principled conclusion allows the Constitutional Court to declare the rights of a civil servant closely related to the constitutional rights of each working person, *inter alia*, the right to receive fair remuneration for work and social security in the event of unemployment. Later on, the Constitutional Court continues to state that ‘*the same* could be said about other social and economic rights entrenched in the Constitution, *inter alia*, social assistance in the event of unemployment, sickness and other cases provided for in laws, entrenched in Article 52 of the Constitution, etc.’⁵⁸

Here, we have to ask ourselves: do civil servants have *all* the rights provided for in the Constitution (Articles 48–52) or given to *employees* by the Labour Code and other rules of labour law and to what extent? The court itself tends to solve such problems casuistically. For example, stating, on the one hand, that each person’s right to fair remuneration provided for in paragraph 1 of Article 48 of the Constitution must be guaranteed to a civil servant *at the extent not less* than to other workers, then it immediately makes this statement relative: ‘due to the character of the civil service, as a specific working activity, certain *peculiarities* in its

54 Glebovė N. *Valstybės tarnybos samprata ir valstybės tarnautojo teisinio statuso ypatumai*. Teisė, 2010, No. 76, p. 144–145.

55 Rulings of the Constitutional Court of the Republic of Lithuania of 13 December 2004, 20 March 2007, 11 December 2009.

56 However, in the doctrine of the Constitutional Court, we can find many examples where the status of employee and civil servant are compared though there is no valid reason for this (for example, removal of a civil servant from work and removal of an employee from work have different purposes. See Ruling of the Constitutional Court of the Republic of Lithuania of 22 December 2021.

57 Rulings of the Constitutional Court of the Republic of Lithuania of 13 December 2004, 25 June 2019, 14 April 2021.

58 Ruling of the Constitutional Court of the Republic of Lithuania of 13 December 2004.

implementation are possible,⁵⁹ in the application of which 'rules and principles of the Constitution must be respected.'⁶⁰ In other words, the truth seekers shall walk in the dark forest, until they encounter the light from the constitutional spirit.

Thus, in accordance with the jurisprudence of the Constitutional Court, a civil servant is not an employee⁶¹ and due to the exceptional public importance of the function he or she performs (defense of public interest), certain greater restrictions may apply compared to employees working under an employment contract (e.g. requirement of no conflict of public and private interests, etc.). The court 'weighted' the necessity, reasonableness and proportionality of all restrictions very carefully in the context of fundamental human rights and, as V. A. Vaičaitis concludes, sought to defend disproportionate restrictions on those involved in the civil service.⁶² However, this does not explain to what extent a civil servant can be subject to the single elements of the legal regime provided for by the Labour Code for an employee.

2.2. Are information and consultation rights provided by the legislation applicable to civil service?

It is natural that the answer as to whether one or another legal institution applies to a specific category of persons must first be searched in legislation defining the legal status of that category of persons or in legislation defining the application of that institution to persons.

2.2.1. Law on the Civil Service

Since its adoption in 1998, the Law on the Civil Service has not even mentioned the civil servants' or their representatives' rights to information and consultation. In contrast, the possibility of negotiating collective bargaining agreements was specifically addressed by this legislation. Paragraphs 2–4 of Article 6 of the Law on the Civil Service establish that collective bargaining and conclusion of collective bargaining agreements in the civil service are subject to provisions of the Labour Code of the Republic of Lithuania (that is also provided for in the Labour Code, see below). They also present concepts of a national collective bargaining agree-

59 Rulings of the Constitutional Court of the Republic of Lithuania of 13 December 2004, 11 December 2009, 29 May 2019.

60 Ruling of the Constitutional Court of the Republic of Lithuania of 11 December 2009.

61 Paragraph 5 of Article 10 of the Law on the Civil Service directly provides that employment contracts shall not be concluded with civil servants.

62 Vaičaitis V. A. *Konstitucinė valstybės tarnybos samprata ir valstybės tarnybos tobulinimo koncepcija*. Teisė, 2011, No. 78, p. 128.

ment and undertaking's collective bargaining agreement (branch and territorial agreements, however, are not mentioned). The peculiarities of the implementation of freedom of association in the public sector in Lithuania are also examined in the legal doctrine, where it is emphasized that they *in concreto* are derived from national statutory law.⁶³

2.2.2. Labour Code

The scope of the information and consultation institution is restricted to the scope of the legal act where it is provided for (i.e. the Labour Code), consequently, it applies only to the relationship which is regarded employment relationship as determined by Article 32 of the Labour Code in conjunction with Article 21.⁶⁴ It should be noted that, in labour law, certain rules of the Labour Code are known to be applied not to employment relationships as it is defined by the Labour Code but to other public relations (the relations indicated by the Law on Employment as equal to employment relations) *expressis verbis*. That is provided for by the provisions of the Labour Code setting forth the rules of the conclusion of collective bargaining agreements (paragraph 1 of Article 186 of the Labour Code) and collective bargaining (paragraph 1 of Article 234 of the Labour Code). Rules of the Labour Code defining information and consultation (as well as activities of the works councils) do not provide for their application (Article 203 of the Labour Code) in the civil service.

2.2.3. Law on Trade Unions

It has been already mentioned that civil servants have the right to establish and participate in trade unions. If information and consultation rights were assigned to

63 Petrylaitė D. *Asociacijų laisvė valstybės tarnyboje: norai ir galimybės*. Justitia, 2007, No. 1, p. 50–58; Kasiliauskas N. *Asociacijų laisvės įgyvendinimo valstybės tarnyboje, policijoje, kariuomenėje ypatumai*. Teisė, 2008, No. 55, p. 18–26; Kasiliauskas N. *Kolektyvinės sutartys valstybės tarnyboje*. Teisė, 2008, No. 55, p. 33–40; *Darbo teisės principai ir jų taikymas Lietuvos teismų praktikoje*. Vilnius: MRU, 2016, p. 96–103.

64 According to Article 32 of the Labour Code, the employment contract is an agreement between the employee and the employer by which the employee undertakes to perform a job function for the benefit and under the subordination of the employer, and the employer undertakes to pay remuneration for it. According to paragraph 1 of Article 21 of the Labour Code, an employee is a natural person who undertakes to perform a job function for remuneration according to an employment contract with an employer. A natural person who has the right to work (the ability to have employment rights and obligations) and employment legal capacity (the ability to acquire employment rights and create employment obligations through one's own actions) can be an employee. A natural person acquires the right to work and employment legal capacity at the age of 16, save for the exceptions established by law.

trade unions, such rights could also be recognized as rights of trade unions of civil servants. However, the Law of the Republic of Lithuania on Trade Unions, although it provides for the right of trade unions to conclude collective bargaining agreements or other agreements (Articles 11, 12), to submit proposals to state and municipal institutions (Article 14), to defend the rights of members (Article 15), it does not provide for information and consultation rights of unions. The law provides for the employer's obligation to provide authorised representatives of a trade union, who perform the control function, with the information they request about employment conditions, economic and social conditions but links this obligation to the abstract right of all trade unions to control compliance with labour and other laws (Article 17). Once again, the law kind of says that employment, economic and social issues must be dealt with by the employer in agreement with the trade union bodies (paragraph 1 of Article 13) but immediately refers to cases provided for by other laws. Thus, the Law on Trade Unions does not give information and consultation rights to trade unions that, *inter alia*, may operate in the civil service. Nor are they given them by any international legal acts in the area of freedom of association.

2.3. Could information and consultation rights of the civil service derive from the Constitution?

Information and consultation rights of civil servants can be originated from the requirements of the Constitution. On the one hand, one may ask whether the concept of employees, which is used in Articles 48–51 of the Constitution, should be interpreted as broadly as to cover civil servants. On the other hand, whether, due to the similarity of the concepts and legal status of an employee and a civil servant, the fundamental rights attached to employees should be “passed onto” civil servants as “working human beings”.⁶⁵

2.3.1. The broad constitutional scope of the ‘employee’ concept

The idea of a broad scope of the concept of ‘employee’ has not yet been examined either in the doctrine of the Constitutional Court or in special literature.⁶⁶ Its basis is the scope of the concept of ‘employee’, fixed at the date of adoption of the legal

65 Paragraph 1 of Article 49 of the Constitution says that each working human being shall have the right to rest and leisure as well as to an annual paid leave.

66 For example, A. Abramavičius mentions that the “employee” concept in Article 48 of the Constitution must also cover those persons who work without employment contracts – civil servants and self-employed. Abramavičius A. Der Schutz des sozialen Grundrechte in der Rechtsordnung Litauens. In: Soziale Grundrechte in den “neuen” Mitgliedstaaten der Europäischen Union, Nomos 2019, p. 317–318.

act (the Constitution). Persons, who are considered civil servants today, could not be considered civil servants in 1992 because they were distinguished and their legal status was in fact created only in 1998 when the Law on the Civil Service was adopted. Consequently, in 1992 they were regarded as employees and had employees' rights. This paradigm was subsequently changed by the adoption of the Law on the Civil Service and its regular amendments, but it does not deny that some rudiment elements of the employee status can not only be recognised by the State as characteristic of civil servants but can also be defended, even if they are not provided for or are prohibited by statutory law. The most striking example of this could be the "right of employees to strike", which is probably derived from the status of the employee rather than from the fact that some fundamental labour rights of a human being apply to civil servants too.

2.3.2. Extending the scope of fundamental human rights as a constitutional imperative

The Constitutional Court of the Republic of Lithuania has recognised the possibility of application of some fundamental human rights that are characteristic of employees or assigned to employees (safety at work, working time, probably also trade unions and the right to strike). These rights have acquired the constitutional status, therefore, in principle, they can be rather easily passed on to other working human beings.⁶⁷ Main labour rights, which are not directly provided for in the Constitution but arise out of international agreements, can hypothetically be passed on to civil servants even if the legislator does not take active steps to establish them.

However, such passing on fundamental human rights is to be regarded as an extreme measure, which becomes necessary only if a number of important conditions are met. Account should be taken not only of the comprehensiveness,⁶⁸ accuracy and clarity of fundamental rights as such or the limits of the legislator's discretion. The most important aspect is probably the similarities of the actual and legal situation of different groups of persons, calling for the necessity of similar protection, and the specifics of the employment relationship and the civil service relationship, calling for the necessity of differentiation (different treatment). It is these significant differences that allow rejecting a possibility of expansion of the scope of the rights not mentioned in the Constitution, which recently emerged in the legal system via the European Union directives.

67 For example, it is sought to do so at the EU level in order to regulate the work of self-employed workers using work platforms. See proposal of the European Commission of 9 December 2021 for a Directive on improving working conditions in platform work, COM(2021) 762 final.

68 See Section 1, where these differences are discussed.

2.4. Subsidiary application of the Labour Code

The fact that civil servants by the legislator's will were grouped to form a category of civil servants (later some of them were returned from it) separate from employees, also that their relationship is similar, allows the legislator and the Constitutional Court to see a possibility to apply rules of labour law to them. Such a principled possibility was also provided for in the first Law on the Civil Service of 1998. Today, this principled provision can be found in paragraph 1 of Article 6 of the Law on the Civil Service and sounds as follows: the laws and other legal acts regulating labour relations and social guarantees shall apply to civil servants in so far as their status and social guarantees are not regulated by this law. It may be argued that the fact that the legislator does not provide how information and consultation are carried out in the civil service should be considered a gap that must be filled by subsidiary application of the provisions of the Labour Code on the basis of paragraph 1 of Article 6 of the Law on the Civil Service. On the other hand, maybe information and consultation rights could be imported through the "back door" – if the institution of works councils, which can be found in the Labour Code but is not discussed in the Law on the Civil Service, would be applied to civil servants after stating a gap in legal regulation. This would create a possibility for civil servants to make use of information and consultation rights that are already given to the works councils by the Labour Code.

2.4.1. *Is there are gap in the Law on the Civil Service?*

The rule of subsidiary application states that laws and other legal acts on employment relationships and social guarantees of employees are applicable to civil servants to the extent their status and social guarantees are not regulated by this law (paragraph 1 of Article 6 of the Law on the Civil Service (version of Law No. XIII-1370 of 29 June 2018)). However, such expansion of the scope of the Labour Code needs a precondition – an existence of a regulatory gap. The legislative gap is a concept that is requiring more elaborated analysis than merely a grammatical or mechanical mismatch between two statutory acts.

The starting point here should be the perception that the status of an employee and a civil servant is significantly different and that the forms of their participation in social partnership do not have to coincide. Presumably, the fact that the information and consultation mechanism is not mentioned in legal acts on the civil service is not to be regarded as a gap but rather a conscious decision of the legislator. In this case, the arguments that where the law does not grant a right or guarantee, it should be automatically regarded as a restriction of rights or guarantees, are not sustainable because (1) they cannot be supported either by a historical or grammatical or teleological or any other methods of interpretation of the law; (2) they seek uniformity in very different areas of legal regulation, which

deal with social partnership relations and restrictions on operational activities of institutions implementing public administration. Finally, this also fully reflects the interpretation of Article 21 of the revised European Social Charter based on the reference in the Charter to the effect that the information and consultation are related to the activities of an 'undertaking' that 'produces goods and provides services for financial benefit'⁶⁹ and not to public administration.

It should be noted that information and consultation rights can be present in collective employment relationships but not in individual employment. If the civil servant's and employee's legal relationship can have many similarities, the number of such similarities is less at the level and in the relationship where these persons are no longer directly involved rather where they are represented by their representatives – trade unions and an agency, organisation or institution representing them, starting relationship marked by conflicts due to different interests, mutual pressure, negotiations, intermediation, search for a compromise, making of agreements. In this relationship of collective character, we find very many differences between the private and public sector (civil service), which prevents the information and consultation mechanism from being transposed into the civil service area as its addition, without relevant changes in legislation. It should be reminded that information and consultation procedures restrict the decision-making discretion of a private employer that can make and finance decisions (an entity that usually seeks commercial benefit and risks assets of its members). A private employer can take work organisation, personnel planning decisions taking into account the opinion and position of its employees' representatives, thus ensuring social dialogue and social peace in the undertaking. Meanwhile, public sector employers (heads of undertakings, agencies, organisations) do not have such powers and financial freedom to deal with matters in their agencies. A private employer can make an agreement on the implementation of information and consultation competence and other mutual rights and obligations (Article 175 of the Labour Code). Meanwhile, in the case of a public administration entity, agreements with representatives of civil servants can hinder the implementation of the public interest, effective public administration. These constitutional imperatives can easily be violated if both the legal acts on the civil service and the competence of the heads of agencies are limited by the powers that are conferred on the works councils in the employment relationship.

Finally, the Labour Code provides for a very wide competence of the employees' representatives, acting through works councils, not only to participate in collective redundancies (Article 207 of the Labour Code), issues of restructuring and business transfers, other decisions which may have a material effect on the employees' situation (Article 208 of the Labour Code), but also when the employer

69 See above.

approves a number of corporate regulations (Article 206 of the Labour Code). Some of those provisions are based on the requirements of the directives, some on the peculiarities of national legal regulation (e.g. approval of rules of procedure, approval of the remuneration system, application of measures that may be in breach of the protection of private life, approval of the personal data storage policy, etc.) (Article 206 of the Labour Code). The employer has the right to adopt such regulations, however, only after the performance of mandatory information and consultation procedures. On the other hand, technical failure to comply with the procedures gives the right to the works councils and the trustee to challenge the decisions of the employer, requesting to deem them invalid from the moment of adoption, solely because the procedure for adopting a decision, which is provided for in the Labour Code, has not been complied with or to claim a fine of up to EUR 3,000 from the employer (Article 217 of the Labour Code). Such disputes fall within the competence of the labour disputes commissions, after that – to courts of general competence.

2.4.2. Subsidiary application if failure to regulate works councils is recognised to be a gap

Gaps in legal regulation should also be considered to cover cases when the Law on the Civil Service does not regulate issues of establishment and competence of works councils. Therefore, this gap should be filled on the basis of paragraph 1 of Article 6 of the Law on the Civil Service by way of application of rules of law on works councils to the civil servants. On the other hand, a question may arise whether, in case of election of a works council in a public administration entity and other entities, which have both employees and civil servants, the right to elect a works council is granted only to persons having the status of an employee or both to employees and civil servants. If the answer to the second part of this question were positive, it would lead to the conclusion that the activities of works councils in those agencies and institutions of public administration cover the legal situation not only of the employees but also of the civil servants.

At first sight, such a statement could be supported by the fact that the Law on the Civil Service (version of 29 June 2018) mentions works councils for the first time.⁷⁰ Article 11 “Competition and selection of acting career civil servants” of the law say that “According to the procedure set by the Government, representatives of a trade union or a works council operating in a state or municipal institution or agency and other representatives of the public may participate as observers in a

70 New version of the law was adopted by Law No. XIII-1370 of 29 June 2018 (Register of Legal Acts, 2018, No. 12037).

competition and selection for a post of an acting career civil servant.” Alignment of a works council, which must be elected by employees working in a state or municipal institution or agency by reason of imperative requirements of the Labour Code, with “other representatives of the public” signifies the symbolic significance of their participation, the aim of which is transparency but not a participation in activities. The provision of paragraph 15 of Article 27, according to which a representative of the works council participates in the activities of the performance evaluation commission as an observer in case a civil servant under evaluation is not a member of the trade union (if he/she is a member of the trade union, a representative of the trade union must take part in the commission as its member), can also be logically explained. The situation that civil servants are not elected as members of the works council also ensues from Article 17 “Rights of civil servants” of the law, which does not mention the right to elect or be elected, and from Article 16 “Duties of civil servants”, which prohibits participation in activities not compatible with duties of a civil servant, except for other work or another activity, *inter alia*, the performance of the duties of a representative of the trade union (a works council is not mentioned).

It should be noted, however, that the institution of works councils, unlike trade unions, is not enshrined in the Constitution. It appeared in the Lithuanian labour law not by way of adoption of the social model, the core of which is the Labour Code of 2016, in 2016–2017, it was much earlier – when the Labour Code of 2002 was adopted in 2002 and upon adoption of the subsequent Law of the Republic of Lithuania on European Works Councils and the Law of the Republic of Lithuania on Works Councils.⁷¹ The institution of works councils, for the first time provided for in the Labour Code of 2002, covered only employment relationships as it was understood according to the then effective Labour Code. Paragraph 2 of Article 2 of the Law on Works Councils provided that a works council means an *employee* representative body protecting the professional, employment, economic and social rights of *employees* and representing their interests. It should be noted that at that time the works councils were in a competitive relationship with another employee representative body – trade unions because they had essentially the same competence as trade unions.

In the course of the re-codification of labour law in 2016–2017, there was no discussion about the expansion of the application of the works council institution to cover the civil service or civil servants. During the re-codification of labour law, issues in connection with the defense of employees’ rights and their representation were addressed by strengthening the dual model of representation of employees widespread in the European countries, the signs of which are:

71 Official Gazette *Valstybės žinios*, 2004, No. 164-5972.

- 1) concentration of collective bargaining within the competence of trade unions (exclusive right of trade unions to conclude collective bargaining agreements and to announce strikes), and
- 2) mandatoriness of elected representatives of employees (works councils and in undertakings with up to 20 employees – employee trustees) and restriction of their competence (denying the right to collective bargaining and the right to strike) but strengthening their participation (in information, consultation and participation⁷² procedures) in the adoption of main decisions of the employer.⁷³

The explanatory note to the new Labour Code does not pronounce on the expansion of the institution of works councils to cover the civil service not because a mistake was made or the explanatory note was not fully elaborated, but because the authors of the Labour Code or other legal acts on the social model had no aim to establish such a social partnership form in the civil service, too. Even no hints can be found in the social model objectives or descriptions of the draft, or in preparatory hearings, presentations, discussions or later in *travaux préparatoires* (see www.socmodelis.lt) that the purposes of the social model also include the expansion of the institution of works councils with their changed competences to cover the civil service, too. Therefore, there is no reason to claim that both the draft Labour Code and other legal acts or their explanatory notes are either incomplete or defective.

Thus, the Labour Code did not provide for works councils in the civil service. The expansion of the application of the institution of works councils in the absence of any statutory grounds for this would create a number of problems for civil servants in terms of further application of these rules in the civil service and in administrative relationships in general, especially when it comes to the decision-making by a state or municipal authority ensuring public administration. The aim, in addition to trade unions, to establish another form of representation of civil servants with information and consultation rights today would mean a lack of uniformity and uncertainty in the application of regulatory legal acts on the

⁷² The concepts correspond to those used in EU directives (see, for example, Article 2 of Directive 2001/86/EC).

⁷³ In this respect, the relationship between the works councils and trade unions has become special – trade unions can take over all the rights of a works council (and a works council cannot be established) if one third of employees are members of one or more trade unions in an undertaking, agency or organisation (paragraph 3 of Article 169 of the Labour Code). However, if there is an operating works council, the rights of a trade union are not legally identical to the rights of a works council, they are derivative, as provided for in paragraph 3 of Article 205, paragraph 3 of Article 207 of the Labour Code – trade unions have the right only to receive information on the processes, but the main representative of employees that makes decisions is the works council.

civil service, effect on the implementation of the civil service that would depend on bodies with collective rights, restriction of the management right of the head of an institution or agency. Though such restrictions may in principle be considered, their introduction cannot be based on a legal gap but must be materialised via relevant legal acts that would define the procedure of formation and competence of works councils. Activities of works councils restrict the freedom of the employer's decision-making in the private employment relationship, therefore, the question is whether such a restriction, if transposed to apply to public authorities, would be in line with the constitutional imperatives of the implementation of the civil service, effective state functions, would remain open.

Thus, according to the new Labour Code of the Republic of Lithuania, the employees' information and consultation rights are expediently given to works councils – employees' representatives. It is a purposeful decision of the legislator, by which the works councils, representing all employees of an agency, are vested with the powers to take part in the employer's decision-making, whereas trade unions, representing only their members, have the competence of collective bargaining and conclusion of collective bargaining agreements. In the light of the above arguments, the approach applied in the case-law⁷⁴ of the court of the last instance until now that works councils are the institution for representation of employees rather than civil servants and the civil servants do not have the information and consultation rights provided for in the Labour Code must be supported. This also means that a works council will have to be set up in a public administration agency if it has 20 or more employees working under employment contracts (paragraph 1 of Article 169 of the Labour Code) and the management of the agency will have to inform and consult the works council but only with regard to the employees working under employment contracts. Civil servants continue to be represented only by a trade union, which means the rights of collective bargaining provided for in the Law on Trade Unions and the Labour Code, but not the information and consultation rights.

74 The Lithuanian administrative courts have consistently held that “works councils are exclusively employees' representatives and do not have any rights in the civil service legal relationship” (e.g. ruling of the SACL passed on 4 November 2020 in administrative case No. eA-1724-438/2020, ruling of 20 February 2019 in administrative case No. A-2045-415/2019). That has also been confirmed by the Supreme Court of Lithuania that admitted that paragraph 3 of Article 57 of the Labour Code, which provides for the employees' selection procedure, criteria for which are to be approved by a works council and, when there is no works council, by a trade union, is applicable only to employees working under employment contracts, therefore posts of civil servants are not subject to this selection procedure (ruling of the Civil Cases Division of the Supreme Court of Lithuania passed on 2 January 2020 in civil case No. e3K-3-152-248/2020).

3. Is the development of information and consultation rights to be expected in the civil service – European dimension

The fact that there are no rules of law either on the European Union law level or on the national level that would provide for civil servants and their representatives' right to information and consultation, as it is understood according to the EU legal acts, does not mean that such rights cannot be provided for by other states in their systems. However, the situation varies widely between different European countries due to the different institutional, legal and cultural traditions of the countries.⁷⁵ Both the definition of social dialogue and its forms, with the exception of traditional collective bargaining, and the comparison between its procedures, actors and results, are too complex.⁷⁶ However, for our study, it is most appropriate to discuss those countries where the civil servants' rights to information and consultation have the deepest traditions and the widest possible recognition.

The situation in the Member States is very different.⁷⁷ The most advanced (and most similar to those of employees) civil servants' information and consultation rights can again be found in Germany. A personnel council (in German *Personalarat*) is elected in governmental administrative institutions and agencies, formed according to public law and federal courts according to the Law on Representation of Federal Personnel (in German *Bundespersonalvertretungsgesetz*⁷⁸) that represents civil servants in relationship with the management. Territorial, general councils are formed according to the institutional hierarchy. The personnel representatives have the rights of co-decision,⁷⁹ participation, hearing, information, consultation, and initiative. Such issues as employment, transfer, promotion, further employment above a certain age limit, evaluation guidelines, workplace planning can only be done by a co-decision (only upon receipt of approval from the personnel council), and any disputes are resolved in a quasi-judicial body (in German *Einigungsstelle*). Weaker participation rights include the right to consultation, the right to give advice, and the right to receive information. Consultation is mandatory in case of essential changes

75 Bordogna L. Social dialogue in the public service in selected countries of the European Union. ILO working paper No. 318, 2018, p. 24–25.

76 *Ibidem*.

77 Commission Staff Working Document 'Fitness check' on EU law in the area of Information and Consultation of Workers. SWD(2013) 293 final, p. 16–17.

78 Available at https://www.gesetze-im-internet.de/bpersvg_2021, visited on 25 January 2022. The federal lands have their own laws on representation of civil servants.

79 Employment, transfer, promotion, further employment above a certain age limit, evaluation guidelines, work place planning can only be done upon receipt of approval from the personnel council, and any disputes are resolved in a quasi-judicial body (*Einigungsstelle*).

in work processes and course of work, requirements for a workplace, construction and reconstruction of buildings, consultative participation in exams, and extraordinary dismissal from service.⁸⁰ The situation in Austria is similar.

Meanwhile, in the Francophonic tradition, there is a principle of establishing the parity-based social partnership bodies – institutions dealing with significant issues of individual and collective interest are formed from the same number of representatives elected by civil servants and representatives appointed by the management. As in Germany, such institutions in France are created on various levels of administration and the variety of their typologies reflects the scope of their competencies. Since 1946, there have been administrative parity commissions (in French *commissions administratives paritaires* (CAP)),⁸¹ which are important because the management of institutions or agencies must consult them before taking certain individual decisions relating to the career and situation of civil servants.⁸² CAP must be involved and present its opinion on actions affecting the relevant civil servants' situation (transfer, reappointment, replacement of a leaving civil servant, imposition of a disciplinary penalty, warning) and their career (assignment to a class, mobility, promotion, evaluation). CAP must be consulted not only on a regular basis (dismissal or extension of a traineeship for civil service trainees; dismissal for professional incompetence or refusal to take one or more of the posts proposed in order to reinstate a person in the civil service; certain solutions relating to the employment of disabled workers, certain decisions on vocational training) but also in case of an individual disagreement between a civil servant and the management (on part-time work or remote working, disagreement on the assessment of the professional interview, on the use of accumulated time off, in case of the refusal to resign). CAP may also participate in the disciplinary commission if a civil servant is suspected of having committed a professional misdemeanor. In addition to CAP, there is also a technical committee (Comité technique) for the improvement of civil service legal acts, a committee of hygiene, safety, and working conditions (Comité d'hygiène, de sécurité et des conditions de travail (CHSCT)) in the civil service. Civil servants in higher-level social dialogue institutions are represented by trade unions, meanwhile, in Germany, the higher-level representation of personnel is entrusted to higher-level personnel councils elected by civil servants.

Based on the outcome of these national experiences, the need for common European regulation started to emerge. As early as 2009, the European Parliament announced that it believed that representatives of public administration sec-

80 Without hearing the personnel council, dismissal from service is deemed invalid.

81 Décret n°82-451 du 28 mai 1982 relatif aux commissions administratives paritaires. Available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000879673/>, visited on 26 January 2022.

82 Officials with employment contracts are represented by the Consultative Parity Commission (commission consultative paritaire (CPP)).

tor workers and representatives of undertakings in the state and financial sectors must be ensured the same information and consultation rights as granted to other workers. When assessing the effectiveness of the existing directives, the European Commission also stated at first that public administration and the civil service were taken out of the scope of information and consultation and treated it as a gap in and inconsistency of legal regulation.⁸³ During the celebration of the 30th anniversary of the European social dialogue (in the so-called Val Duchesse format), the then President of the Commission J. C. Juncker promised the reloading of the social dialogue in the European Union. Understanding it as a signal favorable for expanding the scope of the information and consultation mechanism to cover the civil service, the European level trade unions of civil servants⁸⁴ and the EUPAE, representing the public administration employers, were negotiating for the agreement on civil servants' information and consultation rights throughout 2015 and reached it on 21 December 2015.⁸⁵ It is likely that the conclusion of the agreement has been prompted by the fear of employers to receive a unilateral decision of the European legislator to simply expand the scope of the directives concerned to include the central public administration institutions of the states, and they have chosen to negotiate with trade unions and find a solution that was best suited to the public sector. Meanwhile, trade unions believed that the Commission would use the mechanism provided for in Article 155 of the Treaty on the Functioning of the European Union⁸⁶ that allows transposing the agreements reached by the European social partners into directives and thus would make them binding on the Member States.⁸⁷ These hopes were lost when the European Commission formally refused to do so on the grounds that central government administrations are subordinate to national governments and exercise public authority powers. Their structure, organization, and functioning can be determined only by the national institutions of the Member States concerned. Moreover, the organization of this sector varies considerably between the Member States depending on the degree of decentralization of their public administration, and a directive transposing the agreement into EU law would differ significantly in the level of protection depending on whether a Member State tends to have central-

83 Commission Staff Working Document 'Fitness check' on EU law in the area of Information and Consultation of Workers. SWD(2013) 293 final, p. 33, 37.

84 The most important of them is the EPSU (European Federation of Public Service Unions), representing 8 million civil servants and uniting 260 trade unions in the Member States.

85 Available at <https://www.cesi.org/wp-content/uploads/2014/03/Signed-agreement-information-and-consultation.pdf>, visited on 22 January 2022.

86 See Davulis T. *Socialinių partnerių vaidmuo kuriant Europos Bendrijos teisės normas*. Teisė, 2006. No. 58, p. 24–53.

87 Such a unique mechanism of the relatively delegated legislative process is a rather popular instrument for the legal regulation of employment relationships. See, for example, Directive 97/81 (part-time work), Directive 1997/80 (fixed-term contract), Directive 2010/18 (parental leave) but also sectoral directives.

ized administration and thus a broader scope for central government or rather a decentralized or federal administration.

The content of the agreement itself has not been criticized, despite the fact that it is far from existing similar directives in terms of detail and clarity. When considering the provisions of the agreement, they are quite abstract and lack content. For example, in addition to the briefly formulated objects, definitions, and exceptions (Articles 1–3 of the agreement), provisions on confidentiality, protection of representatives (Articles 6–7 of the agreement), and organisational provisions (Articles 8–9 of the agreement), the agreement has Article 4 “Scope”, which says that information and consultation must include “safety at work, working time and work-life balance, consequences on conditions of employment of decisions changing the organisation of structures and services or when there is a threat to employment”. Another provision provides that information and consultation “according to the national legislation and social dialogue” must deal with remuneration guidelines, employee training, gender equality and non-discrimination measures, and social protection specifically applicable to public employees.

In view of the background to the conclusion of the agreement and the agreement just signed on the European Pillar of Social Rights, trade unions treated this refusal by the European Commission to transpose the agreement as a betrayal⁸⁸ and challenged it in the General Court. However, both the General Court⁸⁹ and the Court of Justice of the European Union⁹⁰ have rightly confirmed the European Commission’s discretion to assess agreements between social partners at the European Union level and the right to make a political decision – not to submit their legal act for a decision to the European Parliament and/or the Council. Although the reasons for the Commission’s refusal can be criticized both in terms of their sustainability and their completeness, it must be, however, acknowledged that the agreement does not grant private parties (and the social partners at the European level are considered to be such) the right to demand in all cases that their agreements be implemented by the European Union legal acts. Accordingly, the General Court did not err in law in holding that the intensity of its judicial review of the contested decision was limited in this instance.⁹¹ As a result, European level social partners are

88 The European Pillar of Broken promises, Time for a Social Europe – One Year on – Slow Progress and disappointment. Available at <https://www.epsu.org/article/european-pillar-broken-promises-time-social-europe-one-year-slow-progress-and>, visited on 20 January 2022.

89 Judgment of the General Court of 24 October 2019 in case T-310/18 (European Federation of Public Service Unions (EPSU) v. Commission). ECLI:EU:T:2019:757.

90 Judgment of the Court of Justice of European Union of 2 September 2021 in case C-928/19 P (European Federation of Public Service Unions (EPSU) v. Commission). ECLI:EU:C:2021:656.

91 Judgment of the Court of Justice of European Union of 2 September 2021 in case C-928/19 P (European Federation of Public Service Unions (EPSU) v. Commission). ECLI:EU:C:2021:656, para 100.

left with a rather vague possibility of achieving a common level of harmonization in the Member States only by another means of implementation of such European Union level agreement⁹² – not through directives but through the initiation of the conclusion of relevant collective bargaining agreement in each country.

Thus, the social dialogue in the civil service, which is actively developed in some Member States of the European Union, can also be realized through granting of intensive information and consultation rights to institutions representing civil servants. Such decisions are taken in the form of national laws and are a matter of political self-determination by the national legislator. Equally, the omission to act by the European Union legislative institutions must also be seen as a political decision, which is manifested by: (a) refusal to implement the agreement of the EU level social partners on informing and consulting civil servants and employees of central government administrations; (b) refusal to amend the scope of the EU directives on employees' information and consultation rights to include civil servants; (c) refusal to adopt a different legal act providing for such rights.

Conclusions

Currently, the right of civil servants to information and consultation (with the exception of the application of safety and health provisions) is not guaranteed in Lithuania. This right is not enshrined in the legal provisions governing civil service and derives neither explicitly nor implicitly from the interpretation of the provisions of the Constitution or Labour code. Given the similarity of the individual and collective situation of civil servants and employees, it seems appropriate to develop a softer version of the information and consultation mechanism, which would aim to include representatives of civil servants in internal decision-making within civil service, without hampering the effectiveness of the governing of the service. Those decisions can be related to the promotion or evaluation of civil servants or consultation on the mitigation of the consequences of decisions that are most detrimental to the interests of individual civil servants. However, a recognition of a structure representing civil servants (e.g., Civil servants council) and its empowerment with the rights to receive information and to be consulted, shall be the decision taken at the level of a legislator and after considering the particularities of the civil service and the constitutional imperative to ensure its efficiency.

92 For information on this, see, for example, Bagdonaitė A. Europos socialinių partnerių susitarimų perkėlimo į nacionalinę teisę teorinės prielaidos ir jų įgyvendinimas. *Teisė*, 2017, No. 104, p. 176–178; Davulis T. *Socialinių partnerių vaidmuo kuriant Europos Bendrijos teisės normas*. *Teisė*, 2006. No. 58, p. 45–49.