

PREVENTIVE PRIVACY PROTECTION FOR VICTIMS OF INFRACTION IN THE CONTEXT OF THE DIRECTIVE 2012/29/EU

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Introduction

On 10 June 2011, the Council of the European Union adopted on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (Budapest plan). Herein the Commission has presented on 18 May 2011 a proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime. In 2012, the EU established the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (hereinafter referred to as the Directive).

The essence of the Directive is that the needs of victims must be addressed in an individual manner, based on an individual assessment, and using a dedicated and participatory approach regarding provision of information, support, protection and procedural rights.⁷⁰ In my opinion, in order to meet the long-term goals and objectives of the Directive, it is necessary to look at the victim of crime in a broader sense, i.e. to grant at least certain rights to victims of infraction. After all, the Budapest Plan itself talks about victims in general. An important argument are cases where the public authorities cannot determine with certainty from the outset whether the conduct fulfils the characteristics of a criminal offence, or even if the conduct itself will be classified as an infraction, it will not be a partial attack of a criminal offence.

This article then addresses the sub-issue of the preventive protection of the privacy of victims of infraction under Article 21(1) of the Directive. The main research question of this article is whether the legal regulation of preventive privacy protection for victims of infractions in the Czech Republic stands up in the light of the Directive.

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⁷⁰ BAIER, B. - MELUM, J. (2017). *FU's 'Victims' Directive' – a legal act for a cultural change?* in *International Journal for Court Administration*, Vol. 9 2107. p. 17. <https://doi.org/10.18352/ijca.246>



As sub questions, it then aims to answer:

How the victim of an infraction is defined

How the privacy of a infraction victim is protected

How the privacy of a crime victim is protected

Are privacy protections for victims of infractions and privacy protections for victims of crime symmetrical?

Does protection comply with EU law?

Definition of victim of an infraction

European Union law does not use the term victim of an infraction. Article 2(1) of the Directive only defines a victim of a crime as a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence.

The Czech legal system does not work with the concept of a victim of an infraction at all, too. We can use the definition contained in Act No. 45/2013 Coll. Victims of Crime Act (hereinafter referred to as the "VCA"), on Victims of Crime, according to which: "A victim is a natural person who has been or should have been harmed, damaged or injured by a criminal offence or at whose expense the offender has been or should have been enriched by the criminal offence". Thus, we substitute the term crime for the term infraction in the sentence construction at issue. As regards the related concepts of personal injury, damage or non-pecuniary damage, these are defined in the Civil Code or the Criminal Code.⁷¹ The definition contained in the VCA therefore corresponds to the definition in the Directive.

Act No. 250/2016 Coll. on Liability for Infractions and Proceedings thereon (hereinafter referred to as the „LIP“) uses different terms and designations for victims of infraction depending on the stage of the offence proceedings and the procedural position of the victim. Before the commencement of the infraction proceedings, the victim may be referred to as the whistleblower, the person affected by the conduct of the suspected offender and the person directly affected by the commission of the infraction.

⁷¹ GRIVNA, T.-ŠÁMAL, P.-VÁLKOVÁ, H.: „A kol: Oběti trestných činů. Komentář. 2. vydání,“ C. H. Beck, 2020, pp. 18-31

A victim of an infraction, in the procedural capacity of a whistleblower, is a natural person who has reported an infraction to the Police or an administrative authority. The whistleblower is not without more a party to the subsequent infraction proceedings. However, the whistleblower has the right to be notified by the police authority pursuant to Section 74(4) of the LIP or by the administrative authority pursuant to § 42 of Act No. 500/2004 Coll., the Administrative Code (hereinafter referred to as the „AC“), within 30 days, but only if the whistleblower so requests.⁷² After the commencement of the infraction proceedings, the whistleblower usually acquires the procedural status of a witness.

A victim of an infraction, in person affected by the conduct of the suspected offender, is a natural person who could have, but necessarily did not have to, report the infraction and who has suffered damage or non-pecuniary harm as a result of the commission of the infraction. A person affected by the commission of an infraction has the potential to become a party to the proceedings - an injured party, or to acquire the status of a witness. According to § 76(3) and (5) of the LIP, the person affected by the infraction has the right to be notified if the case is adjourned.

The injured party is a party to the proceedings in the part of the proceedings that concerns his claim for compensation for damages or for unjust enrichment.

In order to become an injured party, the administrative authority shall without delay inform the person to whom the damage was caused by the commission of the offence or at whose expense the accused was enriched by the commission of the offence, if known to the administrative authority, of the possibility of making a claim for compensation or a claim for unjust enrichment. At the same time, the administrative authority must notify the person of the hearing. The reason for this notification is that the law associates the oral hearing with the deadline by which the claim for compensation for damage caused by the offence or the claim for the release of unjust enrichment obtained by the offence may be asserted. Since the potential victim is not a party to the proceedings before bringing his claim.⁷³

⁷²KUČEROVÁ, H.-HORZINKOVÁ, E.: *Zákon o odpovědnosti za přestupky a řízení o nich a zákon o některých přestupcích s komentářem a judikaturou*. Leges, 2019, p. 425

⁷³JEMELKA, L., VETEŠNÍK P.: *„Zákon o odpovědnosti za přestupky a řízení o nich. Zákon o některých přestupcích. Komentář. 2. vydání“* C. H. Beck, 2020, pp. 542-550

The person directly affected by the commission of the infraction, unlike the injured party, is not a party to the proceedings, but has a hybrid status, where the person directly affected by the commission of the infraction is the subject of the proceedings to which he or she consents to the initiation or continuation thereof.⁷⁴

According to the Explanatory Memorandum to the LIP, a person directly affected by the commission of an infraction is a person whose rights or legitimate interests have been directly affected by an act or omission that fulfils the facts of the infraction.

A person directly affected by the commission of an infraction is in fact a natural person who has been granted special procedural rights on the basis of the fact that an infraction should have been committed against him or her, for which a special law provides that the consent of the person directly affected by the commission of the infraction is required to initiate proceedings. The obligation to give consent is set out for each infraction.

The infractions for which consent is required are primarily enshrined in Act No. 251/2016 Coll., the Act on Certain Infractions (hereinafter referred to as the ACI), where consent is given by a close person or, in the case of the infraction of defamation, by the person who has been defamed. According to Section 22(1) of Act No. 89/2012 Coll. the Civil Code, a close person is a relative in the direct line of descent, a sibling and a spouse or a partner under another law regulating registered partnerships (hereinafter referred to as "partner"); other persons in a family or similar relationship shall be deemed to be close to each other if the harm suffered by one of them would reasonably be perceived by the other as harm to himself or herself. Persons who are married or permanently living together shall also be deemed to be close.

An exception is § 79 (5) LIP, where if a person under 18 years of age has been affected by the commission of an infraction or if the infraction was the reason for the expulsion from the common dwelling, the administrative authority shall initiate proceedings or continue proceedings already initiated without the consent of the person directly affected by the commission of the infraction.

The administrative authority should identify the person or persons directly affected by the infraction as part of its procedure and actions carried out prior to the initiation of proceedings. The

⁷⁴FRUMAROVÁ, K. „Osoba přímo postižená spácháním přestupku – subjekt, nikoliv však účastník přestupkového řízení“ in Právní rozhledy Vol. 8 2018. p. 275

administrative authority must inform the person concerned of his or her right to consent to the initiation of the offence proceedings and, although the law does not expressly provide for it, should also inform him or her of the consequences of refusing to give consent and of the possibility and consequences of withdrawing it. At the same time as the instruction, the administrative authority must also set a time limit for the person to give consent. This period may not be less than 30 days. Its maximum length is no longer stipulated by law, however, it is necessary in this context to respect in particular the principle of speed of proceedings, as well as the impact of an excessively long time limit in relation to the running of limitation periods and thus the possible extinction of liability for the offence.⁷⁵

Pursuant to Section 71 of the LIP, a person directly affected by the commission of an infraction also has the right to be notified of the initiation of the proceedings, the right to propose evidence and make other proposals throughout the proceedings, the right to information about the proceedings, the right to express his or her opinion in the proceedings, the right to inspect the file, the right to participate in the oral hearing and be present at all acts in the proceedings, the right to comment on the decision before the decision is issued, and the right to be served with the decision."

Finally, in the case of victims of infraction, the LIP deals with the notion of persons appearing in offence proceedings, which is contained in Section 72a of the LIP and was introduced by the amendment to the LIP No. 417/2021 Coll (hereinafter referred to as the Amendment). However, this concept will be elaborated on later.

Personally, I believe the most effective strategy in protecting victims is not to distinguish between victims of infractions and victims of crime. In practice, it is not uncommon to find situations in which a file is forwarded by an administrative authority to law enforcement authorities. The referral may occur because the offence is part of a criminal offence. The offence itself may then be assessed as a criminal offence on balance. The offence in question may also be decriminalized. It may also be common in the EU area for conduct to be classified as an infraction in one Member State and as a criminal offence in another. There may therefore be significant differences in the level of protection afforded to victims depending on the country in which the offence occurs.

⁷⁵ FRUMAROVÁ, K. *ibid.*, p. 275

An apt example seems to me to be Case C-484/16: Resolution of the European Court of Justice (hereinafter referred to as the ECJ) (Ninth Chamber) of 13 December 2016. Criminal proceedings against Antonio Semeraro. Although the Court did not have jurisdiction to answer the question posed, the case raises the issue of the distinction between victims of crime and victims of infractions. A reference for a preliminary ruling was made concerning the interpretation of Article 2(1)(a) of the Directive. That provision defines the concept of victim of a crime.

Mr. Antio Semeraro alleged that the football match damaged the honor and dignity of Mr. Laterz. At the time the offence was committed, defamation was a criminal offence, but during the course of the criminal proceedings the provision containing the offence in question was repealed and the offence was still classified as an infraction. In the opinion of the Conciliation Judge, the action taken by the legislature was inappropriate and illogical. The repeal of the provision also disadvantaged the victim of the offence, who could not properly claim compensation. In the opinion of the Conciliation Judge, the Directive and Article 83 Treaty on the Functioning of the European Union have been infringed.

Although the Court ruled the question inadmissible, it identified a fundamental problem in its reasoning. There is no provision in the Directive concerning the definition of criminal offences or the obligation for Member States to define certain acts as criminal offences in their national legislation, except in cases and directives based on Article 83 Treaty on the Functioning of the European Union. Thus, it cannot but be stated that the position of victims is more than precarious, and a minor legislative change may deny the victim his or her rights because the victim will lose the right to them.

Based on the naming of the institute alone, it cannot be said that the victim will cope with experience better or worse. In fact, the victim's perception and experience of harm is individual. Regardless of whether it is a crime or infraction, the victim is traumatized.⁷⁶

In this context, I refer to the interpretation of Article 6 of the European Convention on Human Rights (hereinafter referred to as the Convention), Right to a fair trial and the interpretation of the concept of criminal offence. The case law of the European Court of Human Rights shows that it would be unfair and discriminatory if the application of the guarantees of a fair trial guaranteed by

⁷⁶ DIANIŠKA, G.: „*Kriminológia*. 2.“ Vydání. Aleš Čeněk, 2022, p. 12

Article 6 of Convention depended only on an imprecise definition of this concept established by the laws of the Member States. The European Court of Human Rights in case *Engel et. al. vs. the Netherlands* identified three basic Engel criteria for determining whether a proceeding would fall under Article 6 of Convention.⁷⁷

It is worth reflecting on the question of whether a similar approach should be taken to victims. Thus, if it is confirmed that the case falls under the Engel criteria and the accused has rights under Article 6 of Convention, the victim shall have the rights of a victim of a crime under the Directive. Indeed, the Budapest Plan also states in its preamble (5): „In the light of the considerable progress made pursuant to the Roadmap for strengthening procedural rights of the suspected or accused persons in criminal proceedings, the Council considers that a similar approach should be adopted in the field of the protection of the victims of crime. “

3. Scope of protection of the privacy of persons appearing in proceedings

According to § 72a LIP:

The administrative authority shall exclude from inspection of the file information on the place of permanent residence or domicile, delivery address, place of employment, profession or business of persons appearing in proceedings on an infraction at their request, if the protection of their privacy or security so requires. The administrative authority shall decide on the request referred to in the first sentence by way of a resolution.

The data referred to in paragraph 1 shall be excluded from inspection of the file if access to such data has been restricted in a previous criminal proceeding concerning the same act, if this fact is known to the administrative authority. A record shall be made in the file of the exclusion from consultation of the file.

I personally find the legislation in question problematic. Below I will try to identify the major shortcomings of the provision in question.

⁷⁷ ŠKUREK, M.: „Evropské správní parvo trestní a postihování přestupků v ČR“ Leges, 2015, p. 56

The first sentence of the first paragraph of the provision in question tells us what data, if any, will be excluded from inspection the file. I do not see a fundamental problem here. However, it is also necessary to interpret the newly introduced term 'persons appearing in the proceedings'. According to the explanatory memorandum to amendment, these are the persons directly affected by the infraction, the injured, a witness, a legal representative, a guardian, or an agent. I believe that there is also nothing to prevent the accused from being included in the list in question on the grounds that he may be subject to retaliation by another co-accused if he cooperates with the administrative authority in the proceedings.

However, I see the most significant problem as the fact that the content of the text and the explanatory memorandum imply that protection will be provided to victims only after the proceedings have been initiated. According to the explanatory memorandum to amendment, the provision in question: 'ensures the protection of the privacy and security of persons appearing in the proceedings on the infraction. This will also fulfil Task No. 14 contained in the Update of the Action Plan for the Prevention of Domestic and Gender-Based Violence for 2015-2018, approved by Government Resolution No. 622 of 4 September 2017 ("Legislate on the protection of personal data, privacy and the procedural status of vulnerable victims in infraction proceedings.")). Both in the text of the law and in the explanatory memorandum, the legislator works with the term "proceedings"

On the one hand, of course, the legislator's reasoning in this respect can be understood, since the accused (i.e. the potential aggressor) only acquires the right to inspect the file material without further delay upon delivery of the notice of initiation of the infraction proceedings, i.e. according to Section 38(1) AC, only when he becomes a party to the proceedings. On the other hand, it should be noted that under certain conditions, it is possible to inspect the case file already before the commencement of the infraction proceedings, pursuant to Section 38(2) of the AC, by alleging and proving a compelling legal interest.

For example, a person who could use the information in the file in another proceeding will have a legal interest. As stated by the Supreme Administrative Court in its judgment of 23 January 2014, No 1 Afs 87/2013-73, the legal interest may also arise, depending on the circumstances, from the fact that the applicant is considering filing a civil action for damages and the administrative file

contains information that may be relevant for the filing of the civil action and the formulation of its grounds.

Similarly, in its judgment of 11 August 2015, no. 6 As 43/2015-67, the Supreme Administrative Court stated that if there is a relevant connection between the administrative proceedings and the findings made therein on the one hand and the ongoing litigation on the other, not only the plaintiff but also the defendant usually has a legal interest in accessing the administrative file in order to develop and adapt its own procedural strategy in the court proceedings.

In the judgment of 17 April 2014, No. 62 Af 18/2013-112, 3286/2015 Collection of the Supreme Administrative Court, the Regional Court in Brno stated that "for the assessment of the existence (proof) of a legal interest in access to the file pursuant to Section 38(2)... it is not only the applicant's activity in the administrative proceedings (even if he was not a party to them) but also the 'position' of the applicant in relation to the issues addressed in the administrative proceedings". A person who is yet to become a party to the proceedings must also be regarded as another person with a right to inspect the file, provided that the proceedings are actually initiated. Such a person will typically be the suspected infraction.⁷⁸

It should also be stressed that in practice there are also situations in which the actual initiation of proceedings does not even take place because an offence does not constitute an infraction due to lack of age or insanity, and the victims do not receive protection of their personal data at all.

4. Provision of data of victims of crime

As mentioned above, the rights of victims of crime, including the issue of providing data of victims of crime, are regulated in the Czech Republic by the Act on Victims of Crime.

According to § 16 VCA "If the victim, his/her proxy, legal representative, guardian or trustee so requests, data on the residence and delivery address of the victim, proxy, legal representative, guardian or trustee, data on their place of employment or profession or business, and on their personal, family and property circumstances shall be kept so that only law enforcement authorities, police officers and officials of the Probation and Mediation Service active in the case may become

⁷⁸ POTĚŠIL, L.-HEJČ, D.-RIGEL, F.-MAREK, D.: „*Správní řád. Komentář. 2. vydání*“ C. H. Beck, 2020, p. 236-247

acquainted with them. Where this is necessary to achieve the purpose of the criminal proceedings or for the proper exercise of the right of defense of the person against whom the criminal proceedings are being conducted, the necessary information shall be disclosed by the competent police officer or criminal proceedings authority; a record shall be made in the file of the disclosure and the reasons for it."

The provision in question informs us that only an exhaustively defined circle of authorized persons, namely the victim of a crime, his/her proxy, legal representative, guardian and confidant, may claim statutory protection in connection with the provision of selected personal data.⁷⁹ Similarly, the list of data that can be excluded from inspection of the file is closed by law. Data on residence, delivery address, place of employment, profession or business, personal, family and property circumstances are protected.⁸⁰

According to the provision in question, the protection of the personal data collected can be effectively invoked whenever the law does not expressly provide for a mandatory form of request. Thus, the request may be made in writing or orally (e.g. in a report drawn up on a criminal proceeding in which the beneficiary is involved).⁸¹

It is very important that the victim of a crime is granted privacy protection from the beginning, i.e. from the moment the criminal report of the commission of a crime submitted to the Police. This follows both from the § 16 VCA, which does not provide for a specific moment from which authorized persons could request anonymization of data, and from §2 (2) VCA, where a victim is understood as a natural person who has been or should have been harmed, harmed or harmed by a criminal offence, or at whose expense the perpetrator has enriched or should have enriched himself, i.e. the status of a victim of a criminal offence *de facto* arises from the commission of the criminal offence itself.

According to § 2(1) of the VCA, "An act otherwise punishable shall also be deemed to be a criminal offence for the purposes of this Act" According to the Explanatory Memorandum, the broader concept of a criminal offence where an act which otherwise exhibits the elements of a criminal offence is not a criminal offence because of the lack of age or insanity of the person acting. does

⁷⁹ JELÍNEK, J. „Zákon o obětech trestných činů: komentář s judikaturou“ Leges, 2014, p. 104

⁸⁰ GRÍVNA, T.-ŠÁMAL, P.-VÁLKOVÁ, H. ET AL: „Oběti trestných činů. Komentář. 2. vydání“ C. H. Beck 2020, p. 114

⁸¹ JELÍNEK, J.: „Zákon o obětech trestných činů: komentář s judikaturou“ Leges, 2014, p. 105

not lessen the impact on the victim of the offence. The victim experiences harm on the same level as if it were a criminal offence“.⁸² This approach, then, is straightforward as the entire provision is primarily conceived as a prevention against secondary victimization of the victim, whereby threats or intimidation of the victim by the accused can be prevented in this way.

Secondary victimization is a process or situation, when or where victims may be exposed to unpleasant behaviors, actions, and events during criminal proceedings which may create negative feelings and deepen their harm, the secondary victimization.⁸³

Secondary victimization was defined in the legal context of the Czech Republic in the year 2013, under VCA, which defined secondary harm – secondary victimization – and sets basic principles for the authorities involved in the relationships towards the victims. In relation to victims, all law enforcement authorities have to be more sensitized in the future. The phenomena of secondary victimization includes defamation of the victim, blaming or transferring guilt to the victim, failure to respect the victim's privacy, damaging the victim's reputation, and harm downplay.⁸⁴

It should be noted that this procedure contributes to the fulfilment of the purpose of criminal proceedings or the victim of the crime often plays a key role in the conviction of the perpetrator in criminal proceedings.⁸⁵ After all, the intention to provide victims of crime with the widest possible range of services can already be seen in the Directive itself, according to its preamble (22): „The moment when a complaint is made should, for the purposes of this Directive, be considered as falling within the context of the criminal proceedings. This should also include situations where authorities initiate criminal proceedings ex officio as a result of a criminal offence suffered by a victim.“

⁸² JELÍNEK, *ibid* p. 27

⁸³ MALACKA, M.: *Victims of crime and harmonization of the legal regulation of their rights in the EU and the Czech Republic in International and Comparative Law Review*, Vol. 20, 2020, p 132. <https://doi.org/10.2478/iclr-2020-0021>

⁸⁴ MALACKA, *ibid*, p. 148.

⁸⁵ JELÍNEK: *ibid*, p. 104

5. The apparent disproportion between the protection of the privacy of the victim of an infraction and the victim of a crime, the case of the accused Mr L.

Already in an initial comparison of the protection of a victim of an infraction and a victim of a crime, one can see abysmal differences, as the so-called person involved in the proceedings is granted much narrower protection than the victim of a crime. I will demonstrate this disproportion with a practical example.

The substantive and locally competent administrative authority received the file material of the Police of the Czech Republic, which was forwarded in accordance with the LIP. The content of the case file was the suspicion against Mr L. that he had committed an infraction against civil coexistence - other gross conduct by driving a group of young women as a taxi driver in the morning hours, when he started to show his genitals to the passengers after they got out of the vehicle. One of the women then reported the suspect's actions to the Police Authority, and at her request her information was anonymized in accordance with § 16 VCA. It should be noted that in the case of suspicion of committing an infraction of other gross conduct, the Police Authority is not obliged to make the necessary investigations to identify the person suspected of committing the infraction and to secure the evidence necessary for later evidence before the administrative authority.⁸⁶ On the basis of the above procedure, the administrative authority is then generally obliged to examine the notification and obtain the necessary explanations. The administrative authority subsequently summoned the suspect, the young woman in the capacity of the informant, and ascertained the identity of the other women to provide explanations. The accused was not contactable in the matter. The following will outline how the status of the whistleblower as a victim of the offence was transformed.

- 1) By the mere referral of the file to the administrative authority, the whistleblower has already lost the existing preventive protection of privacy.
- 2) The suspect could have requested access to the file during the explanation before the proceedings were initiated and, if he had fulfilled the condition of an overriding legitimate interest, the

⁸⁶ § 73 and § 74 LIP

administrative authority would have been obliged to allow him access to the file, including the whistleblower's separately held data.

3) After the initiation of the proceedings, the accused could inspect the file without further delay, where this right arises from the moment of service of the notice of initiation of the proceedings. Thus, the whistleblower is not primarily aware of this moment of the emergence of her right to request the anonymization of data and, in the case of an active accused, the anonymization of data becomes irrelevant.

Certainly, we could encounter the opinion that according to § 72a(2) of the LIP, in combination with (22) of the Preamble of Directive, the data were excluded from access to the file because access to the data was restricted in the previous criminal proceedings and only an entry should have been made in the file. I cannot agree with this approach (although I believe it would be more equitable). In the case of the initiation of criminal proceedings within the meaning of the LIP, as a law firmly linked to criminal law and the procedural rules contained in Act No 141/1961 Coll. on Criminal Procedure Criminal Procedure Code, the act of initiating criminal proceedings is deemed to be the drawing up of a record pursuant to Article 158(3) of the Criminal Procedure Code of the initiation of criminal proceedings to clarify and verify the facts reasonably suggesting that a criminal offence has been committed (cf. Supreme Administrative Court No 6 As 56/2004). As the Supreme Administrative Court further stated, "It is the drawing up of the record of the commencement of criminal proceedings that separates the completely informal stage, which is not even a criminal proceeding under the Criminal Procedure Code, from the preparatory proceedings⁸⁷ (Vetešník, 2020, 259-274). The opposite approach, i.e. the application of the extended concept of criminal proceedings under the Directive, would mean exceeding the statutory competences of the administrative authority. There is no legal framework in the Czech legal order which would allow the administrative authority to take such an approach. Unlike criminal law enforcement authorities, which are directly empowered to take this approach under the VCA. In doing so, state (public) authority can only be exercised "in the cases and within the limits set by law and in the manner

⁸⁷JEMELKA, L.-VETEŠNÍK P.: „Zákon o odpovědnosti za přestupky a řízení o nich. Zákon o některých přestupcích. Komentář. 2. vydání“ C. H. Beck, 2020, pp. 259-274

provided by law". The yardstick here is therefore 'the law', whether ordinary or constitutional.⁸⁸ If the authority in question steps outside these limits, it is acting *ultra vires*.⁸⁹

Unfortunately, however, the above list does not end with the shortcomings of the legal regulation of the protection of the privacy of victims of infraction. On further examination, we are bound to notice several curious situations that may arise.

The provisions of § 72a LIP state that "The administrative authority shall decide on the request pursuant to the first sentence by a resolution", while at the same time remaining silent on the possibility of objecting to the resolution, or on the disclosure of certain data to the accused *ex post* after anonymization. Therefore, there is no choice but to follow the general procedural rules of the Administrative Procedure Code, namely § 76 and § 72 of the Administrative Code, according to which the resolution is notified to the party and the party to whom the resolution was notified has the right to appeal.

It also follows from the regulation in question, § 94(3) of the AC, that "only the resolution on the adjournment of the case (§ 43) and the resolution on the discontinuance of proceedings (§ 66) may be reviewed separately in the review proceedings. The other resolutions may be reviewed only together with the decision in the case or with another decision preceding it and only if it may be relevant for the compliance of the decision in the case or another decision with the law or for the compensation of damages'.

This legal reality tells us that an resolution excluding a portion of the information from inspection of the file will always be served on the accused and, if applicable, on the injured party if the participation of the injured party is established before the resolution is issued. The person directly affected by the commission of the infraction and the witness will not be served with the resolution. The victim in the capacity of a witness will not even have immediate access to information on how the administrative authority has decided on the exclusion of data, given his limited rights. It is not a problem, then, if the administration authority decides in favor of the victim, but it certainly comes into play in a situation where the administrative authority refuses to exclude the data by its resolution.

⁸⁸ SLÁDEČEK, V.-MIKULE- V.SUCHÁNEK, R.-SYLLOVÁ, J.: „*Ústava České republiky. Komentář. 2. vydání*“ C. H. Beck, 2016 p. 32

⁸⁹ SLÁDEČEK, V.-MIKULE- V.SUCHÁNEK, R.-SYLLOVÁ, J.: *ibid*, p. 43

As it follows from the above, the victim has no right to appeal and, given the fact that the resolution neither postpones nor suspends the proceedings, an independent review of the resolution on the basis of the victim's initiative is not possible. The victim's only theoretical possibility is that the administrative authority will apply under the Freedom of Information Act, find out the reasons for the refusal, and then apply again, since the resolution did not create an obstacle to the case being adjudicated. However, given the preventive nature of the measures, this construction is completely wrong. Moreover, the accused may, in the meantime, become acquainted with the contents of the file without difficulty, particularly if he is informed of the victim's efforts to exclude the data from inspection by means of a resolution sent by post.

Unfortunately, the shortcomings of the provision in question do not end with the list so far. I believe that a difficulty may arise with regard to the definitive way of excluding data from inspection. Although the accused, unlike some persons involved in the proceedings, has the right to lodge an appeal against the resolution to exclude part of the data from inspection of the file, the situation provided for in § 16 VCA may arise without much difficulty and some of the excluded data may need to be made available to the accused in order to achieve the purpose of the proceedings or to exercise his right to defense. It is common for the accused to hire a lawyer during the proceedings. If the defense counsel subsequently requests disclosure of information already excluded, although for the purpose of proper defense, this information will nevertheless no longer be disclosed. There is no legal cause on which the information could be disclosed.

6. Preventive Privacy Protection for Victims of Infraction in the Context of EU Law, The case of accused M, accused C and Mrs. C.

Given the fact that the Czech Republic is a member of the European Union, it is necessary to assess national legislation in the light of these obligations. It is necessary to ask whether the national legislation on the protection of the privacy of victims of infraction can stand not only on its own, but also in the context of the legislation of this Community and whether together they form a meaningful and functional whole. To my great regret, however, I must rather predict, on the basis of the preceding chapters, that the national legislation will not hold up, which may also have a significant impact on the protection of victims of infraction in the EU area as a whole.

I will again demonstrate my reasoning with a practical case, this time with a cross-border element. Mrs C was the wife of accused C when that marriage was in a long-standing breakdown. Both were citizens of the Slovak Republic. Mrs C subsequently met the accused M, who was a citizen of the Czech Republic, at a poultry show. Mrs C then finally decided, in view of the abusive behavior of her former husband, to apply for a divorce and subsequently moved to the Czech Republic to join the accused M. She reported her husband's abusive behavior to the police authorities in the Slovak Republic before she left. The accused C subsequently sought out Mrs C in the Czech Republic, where he harassed her and there was also a mutual assault between the accused C and the accused M.

The summary of the case:

In the Slovak Republic, there is no preventive protection of victims of infraction, and even the Slovak legal system does not contain preventive protection of the privacy of the victim of a crime.

It is possible to inspect the file material in Slovakia according to Act No. 372/1990 Coll. on infractions, hence according to Act No. 71/1967 Coll. Act on Administrative Proceedings, under de facto the same conditions as in the Czech Republic, including inspection of the file prior to the initiation of proceedings.

In view of the fact that Mrs. C and Accused C were in divorce proceedings, Accused C had the opportunity to inspect the pre-trial file when he argued and proved the reasonableness of his claim. Accused C submitted that the information in the file was necessary for him to attend the divorce proceedings. Based on the information provided in the file in Slovakia, accused C sought out Mrs C in the Czech Republic.

Also in this case, as in the previous example, it is true that preventive privacy protection in the Czech Republic was not granted to the victim from the moment the case was reported, but only when the proceedings were initiated.

Ms C has the procedural status of a person directly affected by the commission of an infraction, specifically pursuant to § 7(1)(c)(4) ACI, where she has consented to the initiation of proceedings.

If Mrs C had requested anonymization of her data, she would not have been notified of the resolution. She could have found out the result by inspecting the file. However, Mrs C would be denied the right to challenge the resolution.

The first problem that the above example highlights is the fact that some countries have not yet properly implemented the Directive. The Commission's report to the European Parliament and the Council on the implementation of the Directive of 11 May 2020 shows that Member States had until 16 November 2015 to transpose the requirements of the Directive into national law. In January 2016, the Commission launched infringement proceedings against 16 Member States that had not notified their implementing measures by that date.⁹⁰ As of the date of publication of this Report, most of the Member States have not completely transposed the Victims' Rights Directive. Infringement proceedings for these countries are on-going.⁹¹ As regards the implementation of Article 21, several Member States have not implemented this provision at all and less than half have only partially implemented it.

It is indeed a problem to ensure the protection of any legal asset in the EU area if some countries do not provide this protection at all or very casually. However, it should be remembered that victim protection already existed before the Directive.

In this vein, the Directorate-General for Justice issued a guideline in 2013 to facilitate the effective and timely implementation of the Directive bound by its provisions. In line with the DG Justice guidance, the general principles of EU law (e.g. equality and non-discrimination) and the provisions of the CPR must be fully respected. Existing case law of the European Court of Human Rights, which contains various references to victims' rights, is also binding, in particular as regards access to justice and respect for due process requirements.⁹²

⁹⁰ Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovenia and Slovakia

⁹¹ The Commission has 21 on-going infringement proceedings for incomplete transposition of the Victims' Rights Directive against Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden.

⁹² BANACH-GUTIERREZ, J.B.: Crime victims' rights in the European area of justice and Polish legislation. *Nowa Kodyfikacja Prawa Karnego*, 2019, 52, p. 14
<https://doi.org/10.19195/2084-5065.52.2>

Looking then at the other circumstances of the example, in my view it can be concluded that Mrs C (the person directly affected by the infraction) may have been deprived of her right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union. Specifically, I am referring to the right to an effective remedy, which corresponds to Article 13 of Convention. Indeed, the right to a fair trial is itself guaranteed by the Directive in paragraph (66).

This problem, in my judgment, lies in the fact that even if Mrs. C had decided to make an application to anonymize her data in the file, she would not have had the right of appeal or application to activate the supervisory remedy in the event of a refusal resolution. It is also more than striking that although the resolution rules on the victim's right to preventive privacy, the victim is not even notified of the resolution. I believe that in the current wording of the legislation under § 72a of the LIP, this protection of the privacy of the victim of an infraction cannot be considered realistic, let alone effective.

I am also of the opinion that such an approach of the legislator is in direct contradiction with the case law of the European Court of Human Rights hereinafter referred to as the ECHR). In a 2011 judgment, the ECHR emphasized that “the object and purpose of the Convention [for the Protection of Human Rights and Fundamental Freedoms, ECHR] as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.”⁹³ In its jurisprudence, the ECHR has also stated that the victim's right to access to justice must not only be theoretical, but also effective.⁹⁴ It is also debatable whether the State in this case has complied with its positive obligation under Article 8 of the Convention to take measures to ensure respect for private life in relations between individuals.⁹⁵

The other problem I see is the potential curtailment of the rights of the accused. It is likely that the excluded information and its disclosure will be necessary for the accused to exercise his right of defense under Article 6(3)(b) of the Convention. If the accused or his attorney were not allowed to see specific information, the rights of the defense might be impaired.⁹⁶

⁹³ ECHR Case of Al-Skeini and other v. The United Kingdom (Application no. 55721/07)

⁹⁴ ECHR Case of El-Masri v. The former Yugoslav Republic of Macedonia (Application no. 39630/09)

⁹⁵ ECHR Case of Đorđević v. Croatia (Application no. 41526/10)

⁹⁶ ECHR Case of Öcalan v. Turkey (Application no. 46221/99)

A significant violation of the accused's procedural rights may also have a direct impact on the victim. Even if the accused were the perpetrator of the offence, the proceedings would suffer from such irreparable defects that a decision of guilt on the merits would not stand.

As a result, the victim's right to a thorough and effective investigation that could lead to the identification and punishment of those responsible could not be fulfilled.⁹⁷

While the main purpose of the Convention system is to provide individual assistance, it is essential to stress that its mission is also to adjudicate public policy issues of common concern, thereby raising general standards of human rights protection and expanding human rights jurisprudence throughout the Convention community.⁹⁸ Given that the Court provides the final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will assess whether the national authorities have taken sufficient account of the principles emerging from its judgments on similar issues, even where they concern other States.⁹⁹ It can therefore be concluded that failure to respect the clear fundamental statements of case-law may be considered a violation of the parties' obligations under Article 1 of the Convention, irrespective of the State against which the relevant judgment was directed.¹⁰⁰

7. Conclusion

More than 10 years have passed since the adoption of the Directive and therefore we can assess, at least in the short term, whether its introduction was successful and whether it has had a positive impact on the legal order of the Czech Republic and the EU as a whole. It can certainly be stated that the legislator in the Czech Republic has primarily focused on victims of crime, as the proclamation in the Directive itself suggests. As far as the rights of victims of infraction are concerned, the legislator has rather failed on this point. In my opinion, this article shows that the legislator started to partially address the rights of victims of infractions only after a long time after the introduction of the Directive, and not yet in a very successful way. The legislator did not define

⁹⁷ ECHR Case of Gäfgen v. Germany (Application no. 22978/05)

⁹⁸ ECHR Case Bayatyan v. Armenia (Application no. 23459/03)

⁹⁹ ECHR Case of Opuz v. Turkey (Application no. 33401/02)

¹⁰⁰ ARNARDÓTTIR, O. M.: *Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights* in *The European Journal of International Law*, Vol. 28 2017. p. 825. <https://doi.org/10.1093/ejil/chx045>

the concept of a victim of an infraction, since in the case of preventive privacy protection it does not grant protection to all victims, but only to those who have a procedural status in the proceedings initiated. Also, in the legal system of the Czech Republic, there is a significant gap between the protection of victims of criminal offences and victims of infraction offences, without any reflection of the possibility that the procedural status of a victim of an infraction offence may be only temporary and, from a substantive point of view, a person may be a victim of a criminal offence. I believe that it is precisely this myopia that leads to a breach of the obligations arising from the Directive for the Czech Republic. On the basis of a more thorough analysis, it must then be concluded that the legal regulation of victims of infraction not only does not stand up to the Directive but also to the recent case law of the ECHR. In my opinion, it would be appropriate for the protection of victims of infraction to adopt at least the position that victims of infraction should be regarded as victims of crime or at least be given adequate protection. However, it would of course be best if this issue were addressed at least marginally in a decision of the ECHR or the ECJ. Given the rather marginal interest in infractions as opposed to crimes, this seems less likely in my view. However, this case law, as a unifying element, would then cover protection throughout the EU area, despite the lax approach of some Member States to transposing and implementing the Directive into their national legislation. However, we shall see what the future practice will bring.