

# Jurisprudence of the ECtHR under Article 2 of the European Convention on Human Rights and Legal Economic Order

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## ABSTRACT

It is proven in the article that the mechanism for ensuring the sustainable economic development is based, among other things, on the need to reasonably limit the economic activity, which simultaneously forms the legal economic order in the state and protect the human right to life. The ECtHR also contributes to this mechanism functioning through the analysis of the states' compliance with the positive obligations under Article 2 of the ECHR in cases when the Court diagnoses the nature and effectiveness of the measures taken (to be taken) by the states to secure and protect the human right to life.

As it was found the adoption of the restrictive regulatory measures in the business sphere is a positive duty of the states to ensure the human right to life. The states must establish these measures, ensure their proper implementation and necessary supervision of the implementation. The importance of the ECtHR legal positions in the mechanism for ensuring sustainable development lies in the fact that they a fairly clear pointer to the regulatory policy of the national governments. The author individually focused on the study of the relevant ECtHR positions concerning specific areas of the construction and medical activities.

*Key words: legal economic order, business restrictions, sustainable development, the case-law of the ECtHR, human right to life, Article 2 of the ECHR, construction activity.*

## 1. Introduction

The economically developed states systematically apply the means of the state regulation of an economic activity defined by laws to ensure the achievement of the socially important goals of the economic regulation and sustainable development. In some cases, this means taking the measures that restrict the freedom of an economic activity declared by the states.

Taking into consideration existing scientific definitions of the restrictions concept on the freedom of an entrepreneurial activity (Kozachuk, PhD thesis abstract, 2011, p. 10; Kolomiets, 2015, p. 44), it is possible to generalize that such restrictions provide for the narrowing subjective rights of the economic entities (the right to the entrepreneurial activity) by the normative consolidation of prohibitions, conditions or obligations regarding the implementation of their activities/ influence on the content and scope of the entrepreneurship freedom.

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In practice of the legislative regulation, there are numerous varieties and forms of the restrictions on an economic activity (Kozachuk, PhD thesis abstract, 2011, p. 10; Kolomiets, 2015, p. 87-99; Petrunenko, 2018, p. 131-132). They are classified according to various criteria: the method of establishing the restrictions, the level of the restriction definition, the circle of subjects, the term of the establishment, judicial force of legal restrictions, the source of occurrence, the scope of the economic activity, the nature and content of the restrictions, etc. The methods of the restrictions establishment on the freedom of the entrepreneurial activity are the prohibitions and obligations (Kozachuk, 2011, p. 141). The restrictions on the economic activity may take the following forms, for example: establishing the additional conditions for certain types of the economic activity (obtaining permits, licenses, etc.); prohibition to carry out the activities beyond the established limits (special use of the natural resources, import or export), or the definition of special rules for use of certain funds in the economic activity (currency restrictions, etc.). Some of these restrictions (licensing, special use of the natural resources, issuance and cancellation of permits) are the means of the state regulation of the economic activity, for example, in the sense of the Economic Code of Ukraine (art. 12), the researchers (Apanasenko, 2020, p. 27 – 31).

The legislative consolidation of these restrictions is due to a number of reasons, among which the basic one is the requirement to ensure a balance between private interests of business entities and public interests, and maintain the legal economic order (Kozachuk, PhD thesis abstract, 2011, p. 6; Zadykhailo, 2011, p. 120-121; Apanasenko, 2020, p. 25-27). The legal economic order through these restrictions protects rights and interests of the creditors, consumers, society, state, as well it ensures the proper fulfillment of the obligations and protection of the economic competition (Kozachuk, PhD thesis abstract, 2011, p. 6). In turn, the legal economic order is an integral mean of ensuring the sustainable economic development (Ustymenko, 2009).

The legal requirements/ restrictions for business at the current development stage of European societies are the result and, at the same time, the legal basis for existence of socially oriented economies, when the states must ensure the protection of rights of all subjects of the property rights and economic entities, performance of the certain social functions by the property and prevent its use to the detriment of people and society, as well as protect the economic competition, environmental safety and balance, proper working conditions and consumer rights.

A number of human rights guaranteed by international documents and the national regulations are realized and protected through the consolidation in the legislation and implementation by business entities of the rules of conducting business activities. The latter, among other things, include the restrictive norms.

According to the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011 (para. 11–13), business enterprises must respect human rights. This means that they should avoid the infringing on the human rights and address the adverse consequences for the human rights, and the influence of these consequences. The enterprises can influence a wide range of labour rights, environmental protection and rights of territorial communities and consumers.

The application practice of business restrictions in European countries is assessed, among other things, in decisions of the European Court of Human Court (hereinafter –

the Court, the ECtHR) on the observance of the rights of citizens and business entities in accordance with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The objective of the research is to examine the Court's positions concerning the impact of economic restrictions on the human right to life within the meaning of Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the ECHR, the Convention), to assess the nature of this activity of the Court and its potential significance for the state policy of the countries participating in this Convention.

The timeliness and need to study this practice is substantiated by the fact that due to the various kinds of environmental, ecological, social reasons, current trends in evolution of social interaction, the states constantly resort to changes in the economic policy. This is manifested, among other things, through the changes in license conditions, conduct of state monopolies, establishment of the environmental restrictions, other restrictions and prohibitions in the implementation of the various types of economic activities, and so on. Our capacity to reach a sustainable future depends on the long terms policies (Bova, 2022, p. 113). A balanced state approach to introducing the new rules or restrictions in the economic sphere requires the European countries, among other things, to take into account the relevant case-law of the Court.

As it is known that “the mission of the Convention system is to determine the issues on public-policy grounds in the common interest, thereby raising the general standards of the protection of human rights” (*Konstantin Markin v. Russia*, para. 89). When examining the proportionality of the general measures adopted by the state, determining the permissible limits of the state discretion, the Court evaluates the legislative decisions that underline it, and attaches particular importance to the quality of the parliamentary and judicial research in the country on the need for the measure (intervention) take. The more convincing the rationale for the general measure applied, the less important the Court will attach to its impact on a particular case – this is directly and indirectly reflected, for example, in case *Animal Defenders International v. the United Kingdom* (paras. 108-109, 114-116).

Research methods. In course of the research, a number of special legal and general scientific methods were applied (the system-structural analysis, comparative and deductive methods, etc.). The analysis of the case-law of the Court was carried out, in first turn, using the legal-dogmatic method. The use of the praxeological approach and the method of the interdisciplinary analysis contributed to reaching the conclusions on the nature of the Court's work to assess the state's compliance with their positive obligations under Article 2 of the ECHR.

It should be recognised that problems of the economic activity and its state regulation are relatively rarely the subject of research in the scientific study devoted to the case-law of the ECtHR under Article 2 of the Convention. When studying the case-law of the ECtHR, which concerns the civil aspect of Article 2 of the Convention, the problems of the beginning and end of life, euthanasia and abortion are most often investigated (Boichuk, Vodolazhenko, & Matsakova, 2020; Ostrovska, 2017; Tryniova, 2015; Shafi, & Liashenko, 2021). The research of N. Ilkiv on the protection in the Court of the right to safe working conditions is distinguished (Ilkiv, 2021). However, the ECtHR positions on

the restriction of economic activities aimed at ensuring the safe and healthy working conditions are considered in the context of Article 2 of the Convention in insufficient detail in this research.

Investigating the Court's case-law under Article 2 of the ECHR, the part of which is subject of this research, A. Volou focuses on the issue on the protection of socio-economic interests through the right to life in the spheres of medicine, ecology (Volou, 2017). Positive obligations of the states, some of which have been investigated in this work, D. Korff analyses as the duties in relation to the life-threatening environmental risks (Korff, 2006, p. 59-65).

The proposed work should contribute to the discussion on the socially responsible business conduct, the economic policy and sustainable development in the context of analysing the case-law of the Court under Article 2 of the ECHR.

## 2. Research

### 2.1 The concept of the legal economic order, sustainable development and the case-law of the ECtHR

The initial thesis of the research is that the balanced state regulation and the implementation in practice of the restrictions in the economic activity is one of the elements of the formulation of the legal economic order in the state. The proper state of the legal economic order, in turn, is an important guarantee of ensuring the human rights and sustainable economic development.

The category of the legal economic order is fixed, in particular, in Article 5 of the Economic Code of Ukraine (hereinafter – EC of Ukraine) and has references to the concept of “economic order” proposed in the German and French scientific literature (Rittner, 1987, p. 15, 18, 25; Savatier, 1972, p. 206-216). For the purposes of this work, first of all, the following legal and scientific positions on this complex economic and legal concept are important:

1) the legal economic order – is a state of order of the relations in an economic sphere, based on a set of the legal and economic means enshrined in the legislation, which ensures the development of the entrepreneurship and fair competition, satisfaction and protection of the rights and interests of business entities and, on this basis, increase the efficiency of the public production, its social orientation (Bobkova et al., 2018, p. 84). It combines private interests of the business entities and public interests, in particular, the interests of the economy as an important sphere of the public life (Milash, 2014, p. 1);

2) in terms of the content, the legal economic order includes the legal regimes of the economy established by the law, which ensures the implementation of the economic activities in the certain markets of goods and services, in the certain sectors of the economy and on the scale of the national economy as a whole (Zadykhailo, 2011, p. 112). The integral elements of these legal regimes are various kinds of restrictive measures (licensing, prohibition on the certain business operations, etc.);

3) the legal economic order is formed due to the state regulation of the macroeconomic processes (Art. 5, part 1, EC of Ukraine); public-legal foundations of the legal economic order are created and maintained using a detailed system of means of the state regulation of the economic activity (Milash, 2014, p. 1), among which a legislator in

Ukraine considers licensing, assignment of quotas, technical regulation, applying of the standards and limits, etc. (Art. 12, part 2, EC of Ukraine);

4) the fundamentals of legal economic order shall consist in: social orientation of the economy, nonadmission of the use of property to the detriment of an individual and society; the right of each individual to entrepreneurial activity, allowed by law; due safe and healthy labour conditions, protection of consumer rights secured by the state, etc. (Art. 5, part 2, EC of Ukraine);

5) the right to the entrepreneurship, its limits and the implementation procedure is one of the basic foundations of the relations of the legal economic order (Zadykhailo, 2011, p. 113).

The restrictions establishment in the economic activities is largely determined by the need to protect the human rights of various groups and generations, including the rights of the first generation (the right to life, the right to property, etc.) (Nesynova, 2015, p. 37). Under the Court terminology, these restrictions are the elements that form a legal and administrative framework that should guarantee and protect the human rights (for example, *Prylutsky v. Ukraine*, para. 31). The Court considers the introduction and application of various restrictions in the economic activities as a positive duty of the states to prevent violations of the right to life under Article 2 of the ECHR.

It should be borne in mind that the right to life under Article 2 of the Convention is interpreted as encompassing the important economic and social elements and includes the right to health, ecological interests (Volou, 2017, p. 167). The requirements of the state to ensure the rights of citizens to the effective, affordable and high-quality medical and pharmaceutical services (as an important guarantee of the right to health) are fixed in the economic legal norms (Pashkov, 2009). Developing this idea, the restrictions in this and other areas of the economic sphere are also a subject of the economic legal regulation that protect the human rights to life and health. Thus, the purpose of the protecting the rights of citizens of various categories to life and health is pursued by such restrictions as the issuance and cancellation of the permits in the business sphere. We mean the permits as follow: veterinary and phytosanitary permits, construction permits, permits in the trafficking of narcotic drugs and psychotropic substances, in the safety of the road users and under the legislation on the labour protection. The achievement of the Sustainable Development Goals is directly related to the issuance and cancellation of the permits for natural resources and other environmental permits. The sustainable development of the human settlements cannot be achieved without using the means of issuing and revoking the construction permits, outdoor advertising permits and permits for the preservation of the cultural and archaeological heritage (Apanasenko, 2020, p. 95, 109-110, 341, 351-352).

Thus, the mechanism for ensuring the sustainable economic development is based, among other things, on the need to reasonably limit the economic activity, which simultaneously forms the legal economic order in the state and protects the human right to life. Let's take a closer look at the Court's legal positions on this issue.

## 2.2 The ECtHR case-law on the right to life in the context of business restrictions

In cases under Article 2 of the ECHR, the Court addresses the issues of the business restrictions most often when analysing the situations caused by the conducting dangerous business activities. Resolving the dilemma of the applicability of Article 2 of the

ECHR in cases concerning a death of persons or a serious threat of causing it as a result of dangerous industrial activities, the Court in *Öneriyıldız v. Turkey* has most fully and clearly formulated the approaches that are consistently applied in resolving the cases of this category in future.

Thus, the Court has come to the decision that a positive obligation on the states to take the appropriate steps to safeguard the lives of those within their jurisdiction in the meaning of Article 2 of the Convention “must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous...”. A basic state’s obligation is to provide a legislative and administrative framework for the appropriate reducing the risks of the right to life. States “...must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens... the relevant regulations must also provide for appropriate procedures,... for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels...” (*Öneriyıldız v. Turkey*, paras. 71-72, 89-90; *Prylutsky v. Ukraine*, para. 31). “...the mere fact that the regulatory framework may be deficient in some respect is not sufficient in itself to raise an issue under Article 2 of the Convention. It must be shown to have operated to the relevant individual’s detriment” (*Vardosanidze v. Georgia*, para. 59).

Consequently, these are the main obligations of the states under Article 2 of the Convention in its material aspect in the sphere of carrying out the economic activities, primarily its hazardous types. Partially similar positive obligations arise for the state in cases of natural threats (*Budaeva and Others v. Russia*, paras. 128-132). The state must have an operational choice in terms of the priorities and resources to ensure the right to life. The Court takes the position that in difficult social and technical spheres the state has a wide margin of the appreciation. The assessment of the completeness of the implementation of the state’s obligations will depend on the specific circumstances of the case, the internal legality of the state’s actions or omissions, and the decision-making process. The scope of the positive obligations depends on the origin of the threat and the extent to which a particular risk is mitigated (*Budaeva and Others v. Russia*, paras. 134-137).

The Court recognized the existence of the positive obligations of the state outlined above to one degree or another, for example, in the cases concerning the violations of the human rights to life as a result of the toxic emissions from a fertilizer plant (*Guerra and Others v. Italy*, 19 February 1998), nuclear tests (*L.C.B. v. the United Kingdom*, 9 June 1998), methane explosion on the waste disposal (*Öneriyıldız v. Turkey*, 30 November 2004), safety violations on the board of a cargo ship (*Leray and Others v. France*, 16 January 2008) and safety at the construction sites (*Pereira Henriques and Others v. Luxembourg*, 26 August 2003), safety at work in dry docks with the asbestos (*Brincat and Others v. Malta*, 24 July 2014), safety of diving operations (*Vilnes and Others v. Norway*, 5 December 2013), rocket fuel production (*Mučibabić v. Serbia*, 12 July 2016), railway operation (*Binişan v. Romania*, 20 May 2014).

Thus in respect of hazardous activities (including the types of the economic activity), the state may also be subject to the positive obligations under Article 8 of the ECHR. In particular, it can include the duty to provide the access to important information for individuals which can help them to assess risks to their health and lives (*Budaeva and*

*Others v. Russia*, para. 132; *Brincat and Others v. Malta*, para. 102). The same duty is covered by the preventive measures, which the state must exercise within the limits of its positive obligations under Article 2 of the ECHR. In the *Brincat* case, for example, the workers of dry docks have not been informed for years about possible health effects of working with the asbestos in their workplaces (paras. 113-114).

An important element of the system of measures to prevent the future violations in the implementation of dangerous activities is the proper and effective investigations into the circumstances of the events/ incidents caused by such activities, which must be conducted by the state within the framework of its procedural obligations under Article 2 of the ECHR (*Öneriyıldız v. Turkey*, paras. 71, 93, 94; *Brincat and Others v. Malta*, para. 121; *Budayeva and Others v. Russia*, para. 142; *Mehrabyan v. Armenia*, para. 81; *Zinatullin v. Russia*, paras. 32-33).

A. Volou and C. O’Cinneide have considered the positive obligations of the state in *Öneriyıldız v. Turkey* through the prism of the state’s obligations to protect the disadvantaged people from the known threats to their lives (Volou, 2017, p. 160-161; O’Cinneide, 2008, p. 590). D. Korff focuses on these obligations as the duties of the state in relation to life-threatening environmental risks (Korff, 2006, p. 59-65). Also it’s important to emphasize these obligations in the context of the state regulation of the economic activity.

A good illustration of the proper implementation of the positive obligations under Article 2 and 8 of the Convention in the context of hazardous activities and, accordingly, a well-thought-out approach to the regulation and practical implementation of relevant restrictions in the economic activities can serve as the measures taken by Norway in the diving operations commissioned by oil producers in the circumstances of the case *Vilnes and Others v. Norway* (para. 224) (except for the informational obligations relating the employees). There were the regulatory framework aimed at improving the safety of divers; proper state supervision of work; liberal approach to the permits issuance for works; active position of the competent authorities on the implementation and change of the rules on the regulation of the measures directed for the provision of the safe diving works. The main concern of the state in this situation was the safety and health of the divers.

In the case-law under research, the Court recognized the violation of the right to life in the material aspect due to such shortcomings of the legislative or administrative system as, for example:

failure to prevent the accidents at a municipal waste dump, defective regulatory framework and lack of the proper supervision system in this area of economy, inefficient overall urban planning policy (*Öneriyıldız v. Turkey*, paras. 109-110);

absence for two decades of the regulation and any practical actions that would protect the employees from the asbestos exposure, and the late adoption of the relevant legislation, its inefficient interpretation, failure to provide the employees with the proper compensation for the dangerous work (*Brincat and Others v. Malta*, paras. 107, 110-112, 114-117). The relevant responsibilities of the states in the organization of labour, recognized by the Court, are essentially the duties to create the conditions for ensuring and complying with the labour protection (Ilkiv, 2021, p. 76);

failure by the state to provide the effective system of inspections on the construction site, resulting from the deficiencies in the legislative and administrative framework (*Cevrioğlu v. Turkey*, paras. 67, 69);

improper functioning of the country's legal system, which faced a continuous case of the negligence in the railway operation and failed to provide the adequate response in the context of the duties to protect the applicant's right to life (*Binişan v Romania*, paras. 90-91);

failure of the state to ensure the effective implementation of the regulatory framework aimed at protecting the rights of the patients (lack of the proper control over the availability of the licenses and certificates provided for by the licensing requirements in a medical institution and some of its doctors) (*Sarishvili-Bolkevadze v. Georgia*, paras. 76-77);

non-compliance with the safety rules in the railway operation (*Kalender v. Turkey*, paras. 49-50).

The methodology used by the Court in the studied category of the cases for analysing positive obligations of the state, in fact, embodies the ideas of the Guiding Principles on Business and Human Rights, which proclaim the following (para. 1): protection against human rights abuse by third parties, including business enterprises requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Like the cited Guiding Principles, the Court recognizes that the protection of the human right to life from violations in the economic sphere requires the states to take not only the certain compensatory measures, ensuring the access of the citizens to justice (i.e., the implementation of the obligations under Article 2 of the ECHR in its procedural aspect), but also the appropriate preventive regulation and practical measures, that will obviously restrict the individual business operations/ activity. In this case, the Court and the Guiding Principles on Business and Human Rights define the obligations of the states in the economic sphere within the framework of such concept of the human rights as a concept of "due diligence" obligations, which requires the state to apply the measures to prevent violations of the human rights, protect against such violations, punish for them and compensate appropriately to the victims (Khrystova, 2014, p. 30). At the same time, both material obligations of the states (to create the legislative and administrative mechanisms to counter the threats to life, etc.), and procedural obligations (to investigate the incident, punish those responsible etc.) are defined.

If we turn to the issue of the type of the positive obligations that the states have violated in the cases analysed, we can talk about the duty of the state to take all responsible measures to protect the individuals from the violations of their rights by other private persons (Khrystova, 2013, p. 12). This is reflected in the Court's position on the need to form a regulatory framework that should properly regulate the business operations/ activities, preventing the violations of the right to life and health of the citizens, as well as the need to organize proper functioning of the legal system and the proper administrative mechanism.

Moreover, what is at stake is the state's duty to carry out the effective investigation into the "credible" (well-founded) complaints concerning serious violations of the rights guaranteed by the Convention (Mowbray, 2004, p. 226). According to the classification by



K. Starmer, the studied positive obligations under the Convention belong to the following groups: 1) the duty to create the “national legal framework”, - first of all, the national legislation that ensures effective protection of the human rights; 2) obligations to prevent the violations of the rights guaranteed by the Convention; 3) the obligation to react to the violation of the human rights (Starmer, 1999, p. 159).

As noted, the restrictions established by the law in economic activities aimed at maintaining the legal economic order are aimed at securing and protecting the interests of a wide range of individuals. The case-law of the ECtHR confirms that the obligations of the states to establish and ensure the implementation of the restrictive measures in the economic activities should protect the right to life of the individuals of the various categories:

consumers of the services: in the *Kalender Case* – the railway passengers (died as a result of the violation by the railway of the operation rules on the railway stations operation), in *Sarishvili-Bolkvadze v. Georgia* – consumers of the medical services;

residents of the communities living in the area of the hazardous industries or located nearby: *Öneryıldız v. Turkey*, *Cevrioglu v. Turkey* (in the circumstances of the latter case, the applicant’s son drowned in a water-filled, non-closed hole at a construction site), *Zinatullin v. Russia* (the applicant fell in an unfinished building, thereby sustaining a serious craniocerebral injury resulting in a disability);

employees of the enterprises: *Brincat and Others v. Malta*, *Vilnes and Others v. Norway*, *Binişan v. Romania*, *Pereira Henriques and Others v. Luxembourg*, *Kosmata v. Ukraine*, *Mehrabyan v. Armenia*. The right of the employee to safe and healthy working conditions in the context of Article 2 of the ECHR is considered by the Court as a component of the right to life (Ilkiv, 2021).

Let’s summarize the cases of the state responsibility for violations of the right to life in the sphere of conducting dangerous activities in the meaning of the Court (Handbook on the application of Article 2, p. 12). First of all, the Court declares the importance of minimizing risks in the organization and management of dangerous activities through regulations and appropriate control (*Mučibabić v. Serbia*, para. 126; *Binişan v. Romania*, paras. 72-74). If such activity still causes harm, it is considered that the state has not complied with positive obligations only in situations of improper regulations or improper control (*Stoyanovi v. Bulgaria*, para. 61).

However, in case of the issue of the state’s responsibility under Article 2 of the Convention also arises in situations of the state’s inability to bring to justice for negligent acts in relation to human life (*Binişan v. Romania*, para. 82). Thus, the conflictive conclusions of the domestic courts about those responsible for the railway accident, the failure of the courts to take into account the fact of the forgery of important evidence in the criminal case was qualified by the Court as a manifestation of such insolvency in *Binişan v. Romania*. With regard to construction sphere, the Court emphasized greater responsibility of the state to the public in view of the level of real hazards on construction sites (*Cevrioglu v. Turkey*, para. 67).

Acting within the framework of the classical doctrine of the positive obligations, the Court emphasizes that it is impossible to impose an excessive burden of the obligations under Article 2 of the ECHR: everyone cannot be guaranteed absolute security in any activity in which the right to life may be violated (*Koseva v. Bulgaria*). A good example in

this regard is the Court's findings in circumstances of *Prylutsky v. Ukraine*. In September 2006, the applicant's son took part in "AutoQuest" in Donetsk, during which he died in a road accident. With regard to the applicant's argument on the need to license such games, the Court pointed to the discretion of the states in this matter and noted the impossibility of "...an unrealistic ... burden on the authorities" (paras. 32-33, 35-37).

There is another example in *Vardosanidze v. Georgia*. In this case the Court did not consider it possible to assign the responsibility under Article 2 of the ECHR to the Georgian state (paras. 60-63). In circumstances of the case the applicant's son died of the carbon monoxide poisoning. Apparently, he, contrary to the warnings of the gas company, reconnected the water heater after it was turned off by the gas company, violating the safety rules. "... the state could not be placed on the excessive burden of the responsibility for the independent risky decisions of a citizen. It doesn't matter that ...deficiencies existed in respect of the regularity of safety check-ups and the manner in which a violation of the safety rules was to be communicated to the individuals concerned" (para. 61).

### **2.3 Legal positions of the Court on the business restrictions in the construction and medical branches of the economy**

Certain specifics of the positive obligations of the states are recognized by the Court in the functioning of the enterprises in the construction industry and in the medical activity sphere.

The construction activity is qualified by the Court as such that may pose risks to human life, and therefore requires serious safety measures (especially in the residential areas), special regulatory rules, taking into account threats not only to the employees, but also to a wide range of the citizens (*Cevrioglu v. Turkey*, paras. 57, 67; *Zinatullin v. Russia*, para. 27). At the same time, the state's duty is also to provide the realization of such regulatory rules. The Court emphasizes the exceptional importance of the supervisory/inspection measures for compliance with the construction regulations. A strict inspection mechanism is not so important for some other activities due to their nature, but in its absence in the construction sector, the legislative and administrative framework is notable to eliminate the risks to lives of the persons associated with the construction. The Court considers it reasonable to expect the state to carry out an inspection within 2-8 months of the ongoing construction work (*Cevrioglu v. Turkey*, paras. 62, 66-69).

The issues of the protection against medical malpractice are considered by D. Korff on the example of more ancient precedents of the Court (Korff, 2006, p. 75-79). Taking into account the current decisions, the limits of the state responsibility for violation of the right to life by public and private medical institutions are determined as follows: "...in the context of alleged medical negligence, the states' substantive positive obligations relating to medical treatment are limited to a duty to regulate, that is to say, a duty to put in place an effective regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of the patients' lives". States must provide the effective regulatory framework in this sphere which includes the implementation, supervision and enforcement (*Lopes de Sousa Fernandes v. Portugal*, paras. 186, 189).

The state will be responsible for negative consequences of the operation of the health services providers if the corresponding defect in their operation that led to such

consequences was such that it can be objectively and specifically defined as structural and systematic, and it indicates the failure of the state to introduce a regulatory framework (*Lopes de Sousa Fernandes v. Portugal*, paras. 190-196). In particular, failure of the Georgian state to ensure the practical implementation of the requirements for licensing a medical institution and doctors was the reason for the Court's recognition of the failure to comply with the state's positive obligations under Article 2 of the Convention in *Sarishvili-Bolkevadze v. Georgia* (paras. 76-77).

Additional information on this issue can be obtained from the Handbook on the application of Article 2 of the European Convention of Human Rights prepared by the Court's specialistst (Handbook, 2018, p. 12-14), so there is no need to dwell on this in more detail.

### 3. Discussion

The study revealed a rather unexpected aspect of the operation of the European Court of Human Rights, which requires the following additional explanation.

When considering the cases under Article 2 of the ECHR, such analytical methodology as the study of the issue of the state's fulfillment of its positive obligations, the Court diagnoses the nature and effectiveness of the regulatory and other measures taken (to be taken) by the states to protect and secure the human right to life. The situation is similar in the case of assessing the state's activities in the formation of the legal economic order: the dominance of the economic order, among other things, is signaled by the state's provision of the proper, safe and healthy working conditions, sufficient protection of the consumer rights (article 5, part 2 of the EC of Ukraine). Therefore, in view of the conducted research of the Court's case-law, it can be argued with some caution that by its operation on analysing the state's compliance with the positive obligations under Article 2 of the Convention, the Court doesn't only protect the rights under the Convention of the individuals, but also in many cases contributes to the diagnosis of the state of legal economic order in various European countries that is important for Sustainable Development Goals. In the decisions studied, the Court does not ignore the issue of the legal basis for conducting the certain types of the economic activities and business operations. Therefore, the Court's conclusions regarding the interference with the applicant's rights are based on the analysis of the legal means that form the legal economic order.

The proposed conclusion does not negate the main purpose of the Court to protect the rights of citizens of the European countries. However, the above-mentioned aspect of the Court's operation is also worthy of attention and seems promising for further scientific research and development from the point of view of the practice.

### 4. Conclusions

Thus, according to the Court's position, the adoption of the restrictive regulatory measures in the business sphere to ensure the human right to life within the meaning of Article 2 of the Convention is a positive duty of the states (in the substantive aspect of Article 2). The choice of the specific measures falls within the discretion of the states, which must not only establish them, but also ensure the proper implementation and

necessary supervision of their implementation. The regulative and administrative measures taken by the state should be systematic in nature; individual shortcomings/ negligence of individual enterprises/ institutions/ employees or servants cannot be the basis for the state responsibility for such actions or omissions, which is emphasized in the Court's decisions on the human rights violations in the medical services provision.

Positions of the Court formed in the analysed group of cases remain stable for many years. Systematically formulated in *Öneriyıldız v. Turkey* in 2004, they were confirmed in other cases that raised the issue of the consequences of carrying out dangerous economic activities.

As it was proved within the study, when considering such cases, the Court participates in monitoring the state of the legal economic order in various European countries, which means that it contributes to maintain the foundations of their sustainable development.

According to the content of the Court's decisions, the Court does not provide the substantive recommendations on the specific regulatory measures, including restrictive ones, that should be taken by the states when forming the mechanisms for ensuring the human rights. It postulates a wide margin of the appreciation for the states in choosing these measures to guarantee the right to life. However, the general position determined by the Court on the need to form an appropriate system of the regulatory measures for businesses in the countries that would participate in ensuring the human rights is already a fairly clear pointer for the national governments in their regulatory policy. Filling this system with the specific content is a responsible and creative work of the national authorities. It is also important that the necessary measures are not only spelled out in the legislation, but also implemented in practice. At the same time, the inspection and control actions of the state bodies will obviously gain the specific weight.

It is important for the officials to remember that the formation and implementation of a proper system of the regulatory measures for business is the way for the state of the legal economic order in the country, and therefore sustainable economic development. Otherwise, as it is written by Thomas L.Friedman: "...if your free market is full of roads and few traffic lights, it is threatened with chaos" (Friedman, 2002, p. 216). The human rights and chaos are incompatible things.

**Acknowledgements:** This article was written as part of the scientific research project No. 0122U201266 "The state regulation of the economy and civil circulation, and the protection of human rights in the circumstances of a post-war rebuilding of Ukraine" realized by scientists of the National University "Chernihiv Polytechnic", Ukraine.

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