



# Control and Sanction of Employees on the Basis of Codes of Conduct – A Question of Basic Labour (Human) Rights?

By Kurt Pärli, Jasmin Vögtli

## I. Introduction

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*“We saleswomen would also like to work under a Max Havelar standard”,* says Eva Grdjic, a poorly paid sales clerk at a supermarket in Switzerland, when she is asked for her opinion on socially responsible products. Eva Grdjic is a famous Swiss cult comic character.<sup>1</sup> Her words are relevant to the core topic of the present contribution. ‘Adding value to the company’, ‘improvement of workplace conditions’, ‘good citizens’, ‘voluntary commitments’ are only some of the attributes that are associated with corporate codes of conduct and/or codes of ethics. Due to public pressure, codes of conduct have become a crucial part in the strategy of enterprises over the last decades in order to address the potentially abusive labour practices by their foreign business partners. Thus, private-sector initiatives such as codes of conduct are providing norms, values and procedures for ethical decisions across the chain regarding social and/or environmental issues. Therefore, working conditions in developing countries have undoubtedly improved in general and goods are produced according to environmentally friendly standards. While codes of conduct demonstrate efforts by enterprises to improve their working conditions, for example in the supply chain, the same effect has not yet been achieved in the relationship between employer and employee.<sup>2</sup> From an employee’s perspective, codes of conduct also have a dark side. What is the problem? Codes of conduct often contain very strict rules regarding morally correct behaviour. The expectations of moral integrity are often very high. Employment relationships are characterised by hierarchical structures. By concluding an employment contract, employees subordinate themselves to the employer’s power of management. The more and, above all, the more vague and ambiguous regulations a code of conduct contains, the more realistic is the possibility that employees may violate a provision – often unintentionally. A violation of the code of conduct regularly leads to sanctions and even dismissals. In the past years’ issues such as dismissal of employees due to breach of corporate codes of conduct were in the headlines more frequently.<sup>3</sup> Employee lawyers and trade unions are also finding more and more problems in connection with sanctions based on codes of conduct.<sup>4</sup> Working

**KURT PÄRLI** is professor for social private Law at the University of Basel, Switzerland, kurt.paerli@unibas.ch.

**JASMIN VÖGTLI**, MAS Law (University of Basel), trainee lawyer.

standard regulation is not only a tool used in corporate companies but also in NGO's. Often NGO's take an active part in keeping the scrutiny on corporations through public exposure. As important as raising the awareness is, it might not always result in better codes of conduct for the employees. NGO's were especially criticized for refusing to negotiate ameliorative codes with companies since compromises have to be made on both sides.<sup>5</sup>

We would like to draw attention to the fact that business-oriented companies nowadays tend to expand the expectations of business conduct. Therefore, codes of conduct often include provisions with the expectation of an overall moral behaviour of their workers, something that is *rather common for ideological and ethically driven organisations* such as churches, political parties and non-governmental organisations. In the same manner, the elimination of the distinction between workplace related conduct and private life is also problematic since it is extremely difficult to limit those expectations to the workplace. As a result, the lines between workplace related conduct and private life become blurred. Furthermore, companies formulate codes of conduct as vaguely as possible. This appears to be problematic regarding their legally binding character. Employees are made redundant because of private activities that are breaking (too extensive) rules in the codes of conduct. Employees' personal views, political opinions, beliefs and other are not always consistent with employers' policies or the way companies present themselves to the public. Increasingly such activities are likely to be used as justification for termination of the employment relationship.

It emerges that codes of conduct entail the risk to create a conflict with fundamental labour rights embodied in the framework of the International Labour Organisation (ILO) and in other human rights instruments and substantiated in national labour law. In view of the various aspects of corporate codes of conduct, the present paper aims solely to *analyse the impact of codes of conduct for duties and rights of employees in the employment relationship* within one company. Other issues such as corporate liability for supply chains and business partners are not part of our contribution.<sup>6</sup>

The codification of (stronger) moral standards for workers in employment in the form of codes of conducts raises many questions. What kind of behavioural requirements do codes of conduct impose on employees? How are requirements controlled? We have taken a close look at a number of codes of conduct available on the Internet from various corporate companies. We then contrast the behavioural requirements for employees with the so called 'freedom' rights of the employees as enshrined in ILO conventions and human rights pacts. We begin our article

with general explanations about the implementation and control including the sanctions of corporate codes of conduct (II). In the next section (III), specific provisions of corporate codes of conduct are examined along with case law from different jurisdictions. In the final part of our study, we place the identified phenomena in the general context of *privatization of labour law*. We also find a *disappearing separation between moral and legal norms*. It is well known that this development is not only evident in labour law. With great humility, we hope to make a modest contribution to those two important questions? (which two?) of this time. Finally, in our conclusion (IV), we identify major research gaps. There is still a considerable amount of work to do for a better understanding of the 'dark side of codes of conducts for employee rights and ways in which to find a balance between the company's interests and the freedom' rights of employees.

## II. Corporate codes of conduct as part of the employment relationship

### 1. Definition

Over the past decades, corporate codes of conduct, respectively codes of ethics, have become common tools to shape the work environment and outline the general direction of the firm. By definition, corporate codes of ethics and codes of conduct are the tool used to address the need for Corporate Social Responsibility (CSR).<sup>7</sup> Corporate codes of conduct are voluntary sets of standards providing norms, values and procedures for ethical decisions regarding social and/or environmental issues.<sup>8</sup> In terms of content, codes are usually statements about ethical conduct such as acting with integrity and respecting the rights of others, but also draft procedural rules such as the operation of dispute resolution mechanisms in the case of violations of the provisions. Even though the content of the codes is covering a variety of topics, the codes nevertheless give direction on how the addressees ought to act.<sup>9</sup> The management literature sees adherence to the company's own codes of conduct as part of a company's compliance policy.<sup>10</sup>

The primary difference between a code of ethics and a code of conduct is that the former is a set of principles that influence an employee's moral judgment while the latter is a set of guidelines addressing employee's actions. Code of ethics will guide the members of the organisation to conduct business honestly and with integrity. The core values are described which are to be followed when making decisions. They are meant to help employees in understanding what is right and what is wrong. The codes are disclosed publicly and hence

addressed to the interested parties in order to know the way the company does business. Codes of ethics are covering a broader level of ethics while corporate codes of conduct are regulating how to act in specific situations.<sup>11</sup> Despite this distinction between the two codes, they are often merged into one document. We are noting that from this point onwards we are in general speaking of codes of conduct (which is the more common description of such codes).

But where is the connection between code of conducts and labour law? Codes of conduct state what specific expectations regarding behaviour the company has of its employees. Often, they lay down ‘do’s’ and ‘don’t’s’. The following examples from codes of conduct indicate that the codes are a vital element in how the employer is able to shape the employment relationship with codes of conduct: ‘All Axa Group directors, officers, and employees, as well as other personnel who have the status of employees (...) have to follow the requirements of this Code’<sup>12</sup>; ‘The Code of Conduct is based on the PwC Purpose and a core set of shared values and sets out a common framework around how we are expected to behave and to do the right thing. Knowing, understanding and living the Codes, is a fundamental part of who we are as PwC professionals, and what we stand for’<sup>13</sup>.

Before we continue with the in-depth analysis about how corporate codes of conduct are becoming legally-binding we first put the focus on the drafting phase. In this stage it is of particular importance whether there is a right to co-determination (of employees).

## 2. Entitlement to the participation of the workers representatives?

Despite the fact that the release and the definition of the content of corporate codes of conduct is in the realm of the company (the employer) it is possible that the addressees are entitled to co-determination and participation.<sup>14</sup> The ILO’s Workers’ Representatives Convention (1971)<sup>15</sup> (ILO convention 135) states in its preamble that the rights of workers’ representatives are to be protected especially. Article 1 of the ILO Convention no. 135 therefore holds:

that workers’ representative shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers’ representatives or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

According to Article 2 of the ILO Convention no. 135 these facilities in the undertaking are to be afforded to

workers’ representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently. However, the granting of such facilities should not impair the efficient operation of the undertaking concerned (Article 2 section 3).

At an operational level the topic concerning the participation of employees is addressed further in two ILO recommendations. The ILO recommendation no. 94 concerning the consultation and co-operation between employers and workers at the level of the undertaking is including a number of measures to be taken by the ILO in order to improve the work between employer and employees within the undertaking.<sup>16</sup> However, these recommendations are not binding under public international law.

Overall, a sobering conclusion has to be drawn since the above-mentioned rights laid down in the ILO Convention are not directly applicable. It remains in the hand of the ratifying state to incorporate the concept of co-operation into the respective national law.<sup>17</sup> At the European level the right to co-determination and participation (information and consultation) have a foundation in law for specific areas.<sup>18</sup> National legislations may grant more extensive rights. For instance, the information or consultation can be mandatory in some countries.<sup>19</sup> The Wal-Mart<sup>20</sup> case in Germany illustrates this issue particularly well. The German court found that the code breached the right of co-determination of the worker’s representative which is governed by the provisions of the Works Constitution Act (*Betriebsverfassungsgesetz*).<sup>21</sup> The right to negotiate specific provisions is governed in the Works Constitution Act. In Switzerland the concept of co-operation and co-determination is anchored in Article 6 of the regulation no. 3 in the Labour Law Act (ArV 3<sup>22</sup>) regarding provisions concerning the health of employees. For the present contribution, the fact that rules laid down in corporate codes can indirectly affect the issues such as health, particularly in relation to surveillance, seems relevant. Furthermore, in connection with ‘the call to more democracy’ in corporations, the participation of employees and labour unions is especially important in the drafting and implementation phase of the corporate codes of conduct.

Finally, the topic of validity of the codes in multinational corporations (compatibility with national law) has to be addressed since national regulations regarding international law are likely to be pertinent. Difficulties in multinational corporations can always arise, for instance in the scenario where the employment contract declares foreign law as applicable and at the same time the applicability of national law is mandatory in nature according to the respective national law. This principle is known as the ‘*loi d’application immediate*’<sup>23</sup>. Where the code of conduct of

multinational groups provides behavioural rules for employees, they shall apply only where they do not conflict with the mandatory provisions of national labour law.

### 3. Implementation

Codes of conduct can be implemented in two ways. Either they form part of the employment contract itself or they are issued unilaterally by the employer in the form of instructions to the employees.<sup>24</sup>

In most cases the release of rules is in the employer's authority to issue binding instructions/directives for employees.<sup>25</sup> With the right to issue directives, employers are able to substantiate employee obligations, which are in an operational connection with the company. Consequently, this right does not comprise conduct in relation to private life. The requirement of the functional link is at the same time a barrier for the issue of directives. Nevertheless, exceptions of such 'extended' expectations of conduct are possible for executive employees of corporate companies as long as the operational relevance is given. The same applies to employees of ideological organisations.<sup>26</sup> More important however is the fact that it is not permissible to introduce new obligations such as the different allocation of the workplace.<sup>27</sup> In most cases employers' directives are not part of negotiations and remain unilateral declarations which the employee is bound to by signing the actual employment contract.<sup>28</sup> Instructions of the employer may be concluded without observing any formal requirements. Once a code is released the company has to communicate externally. The method of publication is not limited to certain direct communications, but it is sufficient to publish it in the annual report, audit letters which is communicated to the outside world<sup>29</sup>

The second option is to implement the codes on a contractual basis. Both employee and employer have to agree to the respective codes of conduct. In order to make the code legally binding it is required to write down all the specific provisions in the contract itself. Usually though, the code of conduct is declared as an integral part of the contract. Before signing the contract, the employee needs to have the chance to read the respective provisions. Codes of conduct which are meant to be part of the employment contract are general conditions which are treated the same as provisions in general terms and conditions. Consequently, rules developed in connection with the interpretation of provisions in general terms and conditions are applied.<sup>30</sup> Consequently, unusual provisions, which have not been explicitly pointed out to the other party (in this case the employee) and which are not to be expected, are invalid.<sup>31</sup>

There is another obstacle prohibiting the implementation into the employment relationship in both scenarios.

The aforementioned obstacle is the mandatory law laid down in the respective labour law- such as the right of personality and protection against dismissal. Such provisions have always had priority over implemented codes of conduct. In Swiss law, for instance, this obstacle has its legal foundation in Article 19 and 20 of the Swiss Code of Obligation<sup>32</sup> in connection with Article 28 of the Civil Code<sup>33</sup> and furthermore in connection with the employment contract Article 328 of the Code of Obligation. This concept is wide-spread among different jurisdictions.<sup>34</sup>

### 4. Implied in fact doctrine

While Civil law jurisdictions typically do not require any general doctrines of implied terms, in English common law, the distinction is made between express and implied terms. It is the general rule that the content of the contract and thus the mutual rights and obligations of the contracting parties are determined by the terms of the contract. While the express terms are explicitly agreed upon, the implied terms are interpreted into the contractual relationship by the court.<sup>35</sup> Employment contracts can also have implied terms which are not necessarily set out in writing or were agreed upon specifically but will nevertheless form part of the contractual relationship between employer and employee. The most commonly relied upon implied term, which is often referred to when employees claim to have been constructively dismissed, is the duty to maintain mutual trust and confidence.<sup>36</sup>

The distinction between express and implied terms is important since a contract can be declared as not legally-binding. When determining whether a code of conduct was a contract or not, the Court of Appeals for the Ninth Circuit expressed the importance of looking at the specific language of the code. In order to be binding, the court ruled in the case *Brinkeley v. Honeywell*<sup>37</sup> that statements in code of conduct have to be '*constituting promises of specific treatment in specific situations, not merely policy statements*'. As a result, the court ruled that the statement contained in the manual, '*Honeywell will make every effort in terms of counseling employees whose work is unsatisfactory*', This language was found too vague, since the term '*make every effort*' might intend in some circumstances, that there is still nothing that can be done to prevent termination.<sup>38</sup>

### 5. Controlling compliance

Contractually agreed upon behaviour requirements or those released in the form of an employer's directive are legally-binding for the parties as long they are not breaking mandatory law. This correlates with the employee's duty of loyalty towards the employer which is a crucial part of the employment law. A breach thereof is a violation of the duties covered by the employment contract. Certain

regulatory provisions allow companies to control compliance with the code. In special areas such as banking, the control of compliance is actually mandatory. It has to be borne in mind that especially banks break their duty of care if they neglect their duty to ensure compliance in these areas. Most corporate codes are therefore addressing the subject of internal investigations.

Corporate standards do not remain simply policy statements. On the contrary, policies are increasingly supported by detailed internal control mechanisms to detect the misconduct of employees and breaches of the codes of conduct. Very often employees are invited to report any kind of actual or suspected violation immediately. While such provisions are necessary in some cases, as just mentioned, anonymous reporting in particular can create a climate of mistrust among workers. False accusations, bias and defamation might be direct results of such policies. There are specific auditing procedures in order to detect breaches of the provisions.<sup>39</sup> For instance, Microsoft is stating: *'Where permitted by the law of your country, your reports may be made anonymously through our external hotline (...)'*<sup>40</sup>. Facebook's code of conduct states *'you must cooperate fully with any investigation, but should not investigate independently (...)'*<sup>41</sup>.

When approaching such internal investigations, the employer's duty of care, protection of personality towards the employer, and the employee's duty of loyalty are the points of reference. Additionally, the principles of the protection of the privacy are relevant. Regarding the actual implementation it is fundamental to define the admissibility of the use of spyware, video cameras as well as the surveillance of e-mail, internet activity, telephones outside of the workplace.<sup>42</sup> In Swiss law for instance, the legal frame is set with Article 328 and Article 238b of the Code of Obligation and the regulations of the Data Protection Act (DSG) as well as Article 26 section 1 of the directive no. 3 of the Labour Act (ArGV 3). The surveillance and investigation of e-mails is data processing and therefore only legal if the relevant provisions are followed. Even though surveillances are to be announced according to Article 4 section 1 to 4 of the Data Protection Act (DSG), the Swiss Federal Court has stated an exception in cases of suspicion of crimes.<sup>43</sup> However, the extensive topic of internal investigations entails a wide range of legal questions whose discussion would go beyond the scope of this contribution.

## 6. Sanctions

As already pointed out, soft law is not as soft as it seems. Breaches of the codes of conduct are a violation of the duty of care and loyalty. Therefore, sanctions with the legal foundation in the general rules of the employment law and within the barriers of employment law are allowed. On top

of that, corporate codes of conduct can imply sanctions on their own. Consequently, most corporate codes of conduct are backed up by disciplinary or even civil sanctions for employees who do not comply with the provisions. The sanctions are further strengthened by the reporting procedure by which employees are required to report violations of the code. Companies often provide hotlines for that purpose.<sup>44</sup> Sanctions include disciplinary sanctions such as fines but also dismissal as well as criminal or civil penalties. While in most codes the enforcement lists the specific types of sanctions, some provide for a formal procedure in case of breaches. For instance, in the code of ethics of FIFA, an entire section is about the definition of the parties, several rights of the parties such as the right to be heard, the types of proof, witnesses, standard of proof, obligations of the parties, the costs and many other related matters. The aforementioned code of ethics even states that the sanctioned party has to bear the procedural costs. In case of non-compliance with the regulations, the adjudicatory chamber will decide.<sup>45</sup>

At this point we would like to emphasize that employees are subject to *'private government'*, which means, they are subordinate to an authority which is able to require certain conduct and impose sanctions for not complying over some domain of their life.<sup>46</sup> The formal and de facto power of such private government goes far beyond what people would normally accept from a state government. As already said many companies steer the performance and behaviour of their employees through guidelines and strict rules, which on top of that contain numerous rules on morally correct conduct. It is true that both employees and employers have the right to terminate an employment relationship. However, for most employees, gainful employment is the only way to earn a living for themselves and their families. Therefore, the loss of a job often has far-reaching consequences. This is particularly true when adequate social insurance protection in the event of unemployment is lacking. The fear of dismissal thus increases employees' dependence on employers, which strengthens employers' private government power.

## III. Corporate codes of conduct in conflict with fundamental labour rights

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### 1. A wide range of (sometimes) vague obligations

Often codes of conduct obtain behavioral rules that are not limited to the workplace. We found in nearly all examined code of conducts restrictions regarding religious

and/or political expressions and other opinions in combination with social media use. As a matter of course, bribery and all forms of corruption are also not acceptable behaviour. Quite often codes of conduct do also ban any form of drug and alcohol consumption at work. Bans of romantic relationship at the workplace are part of codes as well as the expectation to all staff for a strong diversity-commitment and, generally speaking, moral behaviour in all circumstances.

At first sight, the wording of provisions might sound harmless, which impression is enhanced by the ‘*voluntary character*’ commitment of the companies. Companies tend to keep their corporate codes of conduct as informal as possible that is inter alia often achieved by vague formulations. Consequently, it often remains doubtful what companies explicitly expect of their employees. Nevertheless, as we will see, codes of conduct have – from the perspective of the employee- a dark side. Therefore, we will emphasize potential conflicts between provisions in corporate codes of conduct and basic labour rights that are anchored in international (public) labour law. Such rights build barriers against the employer prerogative and are important points of reference for (national and international) labour courts to find a fair balance between the legitimate interests of the employer and those of the employees.

## 2. Relevant labour Human rights

When determining the relevant rights, the already mentioned ILO Workers’ Representative Convention from 1971 (Convention no. 135) is of great importance.<sup>47</sup> Furthermore, a few of the core labour standards promoted by the ILO such as the trade union’s rights are laid down in the right to Organize and Collective Bargaining Convention (no. 98)<sup>48</sup> and the Freedom of Association and Protection of the Right to Organize Convention (no. 87)<sup>49</sup>. Secondly, so called freedom rights, which are carrying validity also in the context of the employment relationship, are of further importance. In that regard the freedom of speech, which is embodied on the European level in Article 10 of the European Convention of Human Rights (ECHR), and the right to freedom of religion embodied in Article 9 of the ECHR are likely to be affected. Furthermore, the entitlement to the protection of privacy and family life is laid down in Article 8 of the ECHR. Finally, fundamental procedural rights that are embodied in Article 6 of the ECHR and to be followed in employment disputes might be relevant in this context. Finally, the freedom of association in Article 11 of the ECHR is likely to be affected.

The rights of employees are not exempted from the European Convention on Human Rights (ECHR) and

the respective interpretation of the European Court of Human Rights (ECtHR). Furthermore, the ECtHR is using other international standards, such as the European Social Charter<sup>50</sup> or the Conventions of the ILO, which are relevant for labour related matters.<sup>51</sup> Even though the right to work and employment are not specifically mentioned in the ECHR and its respective additional protocols, the ECtHR has assessed the breach of the convention in relation to dismissals, access to employment or freedom of association and has developed a significant decision-making practice.<sup>52</sup> Particularly, the ECtHR found that the right to respect private and family life according to Article 8 of the ECHR extends to ‘*professional or business activities*’:

*There appears, furthermore, to be no reason of principle why this understanding of the notion of ‘private life’ should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world<sup>53</sup>.*

Furthermore, the right to privacy at the workplace is crucial for supervisions of phones, e-mails or internet use of employees.<sup>54</sup> Also, the right to freedom of expression, which is guaranteed in Article 10 of the ECHR is limiting the grounds for dismissing employees.<sup>55</sup> As *Althoff* has concluded correctly, the position of employees can be strengthened by considering the human rights argumentation.<sup>56</sup>

## 3. Potential areas of conflicts

### 3.1. No conflict with fundamental rights: Conduct in compliance with the law, but ...

Beginning with the rules concerning the employees’ conduct when it comes **to handling gifts and provisions**. Such provisions, which prohibit any form of bribery, are in no conflict with superordinate law since in most legislation bribery is prohibited by law and there is obviously no potential for any conflict between law and rules in corporate codes of conduct. As mentioned earlier, companies have the duty to report certain misconduct in order to perform adequate due diligence.

Similar standards apply to the **consumption of alcohol and drugs** at the workplace. However, even though the consumption of substances or alcohol in private time might not fall under the ambit of the codes, it might still have negative impacts on the workplace as the following case demonstrates. In the Colorado case of *Coats v Dish Network, LLC*<sup>57</sup>, the employee Coats was dismissed after being tested positive for marijuana during a random drug

test at work. He informed his employer that he was a registered medical marijuana patient in order to relieve his painful muscle spasm caused by his quadriplegia. The medical marijuana was only used at home and not during working hours. Nevertheless, the employer dismissed him on the grounds of breaching the company's drug policy.<sup>58</sup> In the case *McElroy c. Cambridge Community Services NHS Trust*<sup>59</sup> the employer had a policy about substance misuse according to which it was a gross misconduct when an employee is 'incapable of functioning effectively at work'. However, drinking alcohol shortly before coming to work was not banned but the employer recommended that this should be avoided. Co-workers had smelt alcohol and Mr. McElroy had been reported and suspended from work, which eventually led to a dismissal because of breaching the policy. The investigation report found that 'nobody has had any concerns about his behavior or that he has been acting drunk. Patients seem to consistently like him and there have been no other negative reports about him'<sup>60</sup>.

### 3.2. Need for sharing diversity values for all employees – conflicts with freedom rights

Especially global enterprises are emphasizing their **commitment to diversity and inclusion**. It is assumed, that global firms are hereby trying to present the firm as 'good citizen', making it a workplace of acceptance and respect. In that case the code of conduct of US Bank is worth mentioning: 'Be who we say we are, living our core values at all times'; 'Act with integrity and always keep our promises'; 'Be inclusive: respect and reflect the uniqueness of our customers, shareholders, employees etc.'; 'Engage and develop other to help them be their best'<sup>61</sup>. In our points of view such provisions are indeed showing the effort of firms to strive towards forming the most moral and respectful employee. However, as well meaning as such commitments sound, the question remains, who is conclusively defining to what degree employees have to *respect and reflect the uniqueness* of every person. What happens to for example egoistic employees refusing to help in engaging and developing others to be their best?

In order to seek answers for the raised questions we take a look at case law. In the case *Eweida* and others the European Court of Human Rights (ECHR) had to deal with the right to freedom of religion of employees on one hand and, on the other, the right to the entitlement to non-discriminatory service provided by the company.<sup>62</sup> Mrs. Ladele who worked as a register general refused to carry out the partnering of same-sex couples because it was not reconcilable with her understanding of faith. Her employer sanctioned Mrs. Ladele since such conduct is not lawful according to the regulatory code of conduct

and gender equality: '*Dignity for All*'. The British courts as well as the ECHR concluded that the dismissal of Mrs. Ladele was lawful. The employer has rightfully placed a higher importance on the client's right to protection against discrimination on the basis of gender than on the right to freedom of the employee.<sup>63</sup> The decision and consideration are comparable to the judgment in the case of the Christian partner-therapist MC Farlane. (Should this be McFarlane?) He worked for the British undertaking '*Relate*' and refused – due to religious reasons – to counsel homosexual pairs. His employer treated this behaviour as gross misconduct which led to the dismissal of MC Farlane. The ECHR considered that the United Kingdom had not violated the discretionary power by allowing the employer to demand non-discriminatory conduct of its employees.<sup>64</sup>

Between the employer's claim to an employee's commitment to diversity, conflicts can also arise with freedom of expression (Art. 10 ECHR) and freedom of association (Art. 11 ECHR). An employee of the railway police force in Switzerland was dismissed because of his Facebook posts inciting against migrants and glorifying the Nazis. On the photos, he could be clearly identified as an employee of the railway company. In their official statement the railway company explained, that the behaviour of the respective employee is in conflict at least with the moral stance of the employer. It referred to the code of conduct according to which racial and extremist behaviour is not tolerated.<sup>65</sup> It is not possible to predict how this case would be assessed in the light of the ECHR. In this context, the *Redfearn v. UK* case is instructive.<sup>66</sup> The case concerned the dismissal of a bus driver and member of the British National Party because the employer feared negative reactions from customers. Before the Court in Strasbourg, the applicant complained that the dismissal disproportionately interfered with his right to freedom of expression as well as to freedom of assembly and association. The Court held there had been a violation of Article 11 of the convention. It would have been the responsibility of the authorities to take reasonable and appropriate measures to protect employees from dismissal on grounds of political opinion or affiliation.<sup>67</sup>

### 3.3 The duty to be trustworthy and act with moral integrity - a case for the right to privacy and beyond

Trust is another topic that is often addressed in corporate codes. For instance, in the code of conduct of PwC, trust is the central theme throughout the code.<sup>68</sup> While trust is undoubtedly the basis for a prosperous employment relationship the following cases are demonstrating that there is a growing trend of employers relying on a breakdown

of trust and confidence as a reason for dismissal. The case *Governing Body of Tubbenden Primary School v Sylvester*<sup>69</sup> is analyzing the question under what circumstances an employer can rely upon a breakdown in trust and confidence. Ms. Sylvester was dismissed for reasons relating to her friendship with a former colleague who had been arrested for alleged possession of indecent images of children. The friendship was maintained discreetly. In the first place the concern had been raised about their friendship, but nothing further happened. However, nine months later, Ms. Sylvester was dismissed on the grounds of loss of trust and confidence. The Employment Tribunal concluded that the dismissal was unfair because of the way the employer dealt with this issue. The employee was never warned that the friendship with this colleague could threaten her job.

Based on the analysis of the corporate codes we like to draw attention to the companies' aim to proclaim a diverse and inclusive workplace and therefore expect an overall **moral behaviour** of their employees. The already mentioned provision in Google's codes of conduct '*don't be evil*' is getting to the heart of the issue. Who defines what behaviour is evil? Does being an evil person puts the job at risk? Is an employee who is for instance insulting another employee already '*evil enough*' in order to break a provision expecting overall moral conduct? In a similar manner UBS is stating in its code of conduct as follows: '*We do what is right. We don't just ask ourselves whether what we're doing is legal, but whether it fits with our three UBS Behaviors: Integrity, collaboration and challenge*'<sup>70</sup>. In addition, it remains unclear what specific conduct might not fit with all those three behaviours. In the code of conduct of Honeywell, employees are required '*to be a positive influence in the development of others*'<sup>71</sup>. In our opinion, what is understood of a '*positive influence*' is primarily not mentioning any kind of specific conduct where a positive influence should result. Furthermore, it is not limited to the workplace. The mentioned provision is too vague in order to tell which kind of development should be positively influenced. We could exaggerate and say employees are required to help their colleagues living a healthier lifestyle, give advice in relationship problems or help them looking after children. All these examples are likely to improve someone's life. However, vague provisions, such as the mentioned, cannot form a legally binding obligation.

Even though such questions are meant to be provocative, they nevertheless need to be flagged up. We further stress the fact that employees should not impose vague and ambiguous provisions. In our opinion, they cannot serve as the grounds for dismissals and we take the view

that dismissals based because an employee has been 'evil' or not collaborative enough is erroneous and wrong.

The following cases clearly demonstrate that dismissals based on private activities of employees which might be '*not the right thing to do*' or according to the code considered as '*evil*' or simply putting the reputation of the company at risk are reality for employees indeed. In *Pay v. Lancashire Probation Service*<sup>72</sup>, the employer dismissed Mr. Pay after he learnt about his off-duty activities. Mr. Pay was selling '*Bondage Domination and Sado-Masochism*' equipment on the internet and was also dancing half-naked in private clubs. In another case, *Lawrence v Secretary of State for Justice*<sup>73</sup>, Mrs. Lawrence was dismissed because of posting sexually graphic images and videos of herself on the internet.

The the cases of Mr. Pay and Mrs. Lawrence have one thing in common: they were dismissed because of private activities conflicting with workplace policies. We therefore conclude that an employer's decision whether a breach of the code was undoubtedly in relation with the workplace or not, remains extremely difficult. This is foremost due to the more and more extensive codes which are illustrated in the following examples. Nestlé states in the chapter concerning the '*outside directorships and other outside activities*' that '*We take pride in Nestlé's reputation and consider Nestlé's best interests also in our outside engagements and activities. Outside of Nestlé, no activities shall be pursued if such activities will interfere with the employee's responsibilities for Nestlé, or if they create risks for Nestlé's reputation or if they in any other way conflict with the interests of Nestlé*'<sup>74</sup>. However, not only the extended obligations influence the decision but the fear of reputation damage depending on the private activities. Even if codes of conduct explicitly mention (in contrast to vague provisions) that outside engagements and activities have to be in line with a company's moral code, it does not change anything about the fact that behavioural requirements need to be in relation to the workplace.

The above-mentioned cases and examples illustrate the area of conflict between behavioural duties based on code of conducts and fundamental freedoms, and in particular the right to the protection of private life.

### 3.4. The ban on relationships of love at the workplace – an aspect of employees' dignity (and the right to privacy)

The subject of **romantic relationships** is addressed in corporate codes quite often. If, according to Google's code, romantic relationships are '*creating an actual or apparent conflict, it may require changes to work arrangements or even the termination of employment of either or*



both individuals involved<sup>75</sup>. While Google's provisions might lead to the termination of either or even both employees, a romantic relationship for Facebook's employees is (only) to be disclosed: *'However, if a potentially conflicting relationship, romantic or otherwise, involves two employees in a direct reporting relationship, in the same chain of command, or otherwise creates an actual or apparent conflict of interest, the employees must disclose the relationship to Human Resources'*<sup>76</sup>. As these practical examples demonstrate, the subject of romantic relationships can have far-reaching consequences.

In the well-known case of Wal-Mart in Germany, romantic relationships between employees were forbidden according to the newly introduced code of conduct<sup>77</sup>. The German employees of Walmart were given a code of conduct attached to their paycheck. Among other required conducts, the employees had to refrain from intimate relationships with other employees. Furthermore, the guidelines required employees to inform Walmart via telephone hotline if they suspect violations. The Local Labour Court of Wuppertal ruled that the code of conduct violated the German Constitution and German Labour Laws. The clause regulating the love life of the employees was judged to violate the personal rights of the employees, in particular the personal freedom guaranteed in Article 1 paragraph 1 (1) and Article 2 paragraph 1 (2) of the Basic Law (*Grundgesetz*). The judgment was later affirmed by the Labour court of Appeal Düsseldorf. The court found that an employer is not allowed to force its workers to adhere to a strict code of conduct forbidding inter alia love affairs and sexually suggestive conversations.<sup>78</sup> Furthermore, according to the German law, rules regarding employee's personal lives have to be mutually agreed upon between employees and employers.<sup>79</sup> Generally, the principles concerning the right to issue instructions are applicable.<sup>80</sup> It is therefore admissible to release directives in order to deal with tensions evoked by romantic relationship between co-workers, which are eventually affecting the conduct, and the performance at workplace. At the same time, it is allowed to request a collegial interaction among employees in relationships and the restraint of verbal or physical interactions clearly in connection with the romantic relationship.<sup>81</sup> The lawfulness of a duty to disclose a relationship with a co-worker is on the other hand primarily concerning data privacy. Therefore, it is relevant whether an adequate relation to the workplace can be established.<sup>82</sup> Finally, the question remains whether the fact of a relationship between co-workers constitutes admissible grounds for termination or whether such a motive for dismissal is wrongful.

### 3.5 The obligation to report breaches of codes of conduct – another privacy problem

The next section relates to provisions that form the framework for **reporting misconduct** of other employees. While in some companies the employees are (only) encouraged to report behaviour inconsistent with any policies set forth in the codes of conduct<sup>83</sup>, in other companies' persons bound by the codes shall immediately report any potential breach of it.<sup>84</sup> Noteworthy is the wording in the latter case where employees *'shall report any potential breach'*, which creates the impression of a command rather than a voluntary option. Facebook is going even a step further stating: *'(...) In addition, your failure to report a known violation of law or company policy by someone else may result in disciplinary action for employees and/or termination of employment/ your relationship with Facebook'*<sup>85</sup>. While it is important to provide points of contact where employees are able to report actual misconduct, it is at the same time a very sensitive matter to require a report of potential breach without appealing to respect the principle of good faith. Provisions which are basically forcing employees to report actual or suspected breaches of the codes of co-workers are another threat to undermine employees' rights. It is creating an atmosphere of permanent fear, mistrust and has the potential for false accusations.

Where codes are regulating **whistleblowing**, it is crucial to remember that from a legal standpoint the implementation of corporate codes of conduct for global companies is not without some issues. We would like to draw the attention to the incongruence especially between US-American and European perspectives on human rights. In Europe the protection of the privacy of workers is constituted in human dignity law, work law and data protection laws.<sup>86</sup> Especially in France it was found that the US corporations' codes are unenforceable for both the codes' anonymous whistleblowing provisions and procedures concerning the reporting such allegations overseas to the US companies' home offices. In contrast, US firms consider the anonymous whistleblowing as a benign way to encourage employees to report improper activity.<sup>87</sup> In France, the idea of anonymous whistleblower is perceived as an invitation to abuse and slander co-workers or to identify someone maliciously.<sup>88</sup>

### 3.6 Conflict on freedom of Opinion

Under circumstances, the expression of **political, religious or other views** can be problematic for employees. This has become especially true with the rise of social media. The **use of social media** is therefore an often-addressed topic in codes. Considering the various aspects of social media usage, dismissal based on such grounds is quite

challenging for the courts. On top of that, some jobs do require the usage of social media as the employer is encouraging the use of such tools for work purposes. However, the lines between private and professional use are undoubtedly blurred, not least because of devices such as ‘work’-phones provided by the employer. It is therefore extremely sensitive and dismissals for social media activity should only be viewed as lawful on limited occasions. *Mantouvalou* has argued that employers should not have the right to censor the moral or political views and preferences of their employees even if the business is thereby harmed.<sup>89</sup> For example, FIFA’s code of conduct recognizes that team members utilize social media as vehicles for self-expression. However, ‘any content that FIFA team members post on social media, even when speaking in a private capacity, must be consistent with how FIFA expects them to present themselves’<sup>90</sup>. Assessing the above provision FIFA, workers have to adhere to this policy even when they are expressing their opinions on social media outside of work. The lines between workplace and private life are in danger of fading out.

The following cases are demonstrating how the right to express views and opinions (in private life) is endangered due to alleged breaches of social media usage policies. Recently, a cheerleader was dismissed for posting a photo of herself in lingerie on her Instagram page.<sup>91</sup> Another employee working for a care home was dismissed because of a photo and video on Facebook from a music night for the residents. On the specific photo a resident with Down’s syndrome was clearly visible and tagged on the picture.<sup>92</sup> In this regard, the most important question is whether social media posts are covered by the right to private life which is guaranteed by Article 8(1) of the ECHR. As *Mantouvalou* has established employment constructions (i.e. codes of conduct) cannot reduce private social life in the workplace to zero.<sup>93</sup>

That the **expression of personal opinions** is likely to affect the employment relationship, is demonstrated in the following cases. A presenter for Maori Television was instructed by his employer not to participate in protest meetings against the Forsehore and Seabead Bill, as she was the ‘recognizable face of Maori Television’. However, the Employment Relations Authority found that the restriction of the political engagement of the employee was unfair.<sup>94</sup> Even distasteful speech can be protected according to the High Court in England (*Smith v Trafford Housing Trust*<sup>95</sup>). The claimant, a practicing Christian, was housing manager for the defendant trust. He posted on his Facebook page an article ‘Gay Church “Marriages” set to Go Ahead’ and left the comment ‘an equality too far’. According to his employer, the post breached his code of

conduct and Equal Opportunities Policy. The employee had to face disciplinary sanctions. However, he was not dismissed but had to work in a non-managerial position.<sup>96</sup> In the judgement Brigg J concludes that he could not envisage how the claimant’s ‘moderate expression of his particular views about gay marriage in church, on his personal Facebook wall at a weekend out of working hours, could sensibly lead any reasonable reader to think the worst of the Trust for having employed him as a manager’. Judge Brigg J is further noting that the claimant had not been promoting religious views partly because his Facebook page was inherently non-work-related and also because the page was not a medium for the claimant used to ‘thrust his views upon his work colleagues, in the sense in which a promotional e-mail sent to all their addresses might fairly be regarded’. This case from the English High Court is addressing two very important factors. Firstly, the missing relation to work was emphasized strongly. Consequently, the employer cannot claim a loss of reputation as a standard argument. Secondly, the Facebook page was the employee’s personal one without any indication that he is employed by the trust.

Just recently, Australian rugby star Israel Folau was dismissed because of a breach of the code of conduct for what was considered to be a homophobic post on social media.<sup>97</sup> The imaged post states that ‘drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters,’ reading underneath, ‘hell awaits you’<sup>98</sup>. Mr. Folau had been warned about his social media activity. Rugby Australia’s code of conduct states in the section for players: ‘Treat everyone equally, fairly and with dignity regardless of gender or gender identity, sexual orientation, ethnicity, cultural or religious background, age or disability. Any form of bullying, harassment or discrimination has no place in Rugby’<sup>99</sup>. While this provision is specifically linked to the workplace (‘has no place in Rugby’), the relation to the workplace is not emphasized in particular in the following provision: ‘Use Social Media appropriately. By all means share your positive experiences of Rugby but do not use Social Media as a means to breach any of the expectations and requirements of you as a player contained in this Code or in any Union, club or competition rules and regulation.’<sup>100</sup>. Despite the discriminatory content of the post of Mr Folau on Instagram, it is questionable whether the dismissal is unlawful and whether damages have to be awarded. The specific post on the social media platform<sup>101</sup> does not refer to his employer nor is there any other relation to Rugby Sport. The case is emphasizing again how the lines between workplace behavior and private life are blurred and endanger fundamental rights such as in the present case the right to freedom of speech. In the case of Mr. Folau, the provision

in the code of conduct of Rugby Australia addresses the use of social media. Specifically linking the use of Social Media to Australia Rugby, seems quite important to recognize. However, it is stated further: *'Do not otherwise act in a way that may adversely affect or reflect on, or bring you, your team, club, Rugby Body or Rugby into disrepute or discredit'*. Considering the above-mentioned conclusions from Judge Briggs J in *Smith v Trafford Housing Trust* it is also relevant for the case of Mr. Folau that his Instagram post did not mention Rugby Australia. Nevertheless, there are some differences. Of particular importance is the fact that as an athlete, Mr. Folau's working hours might differ significantly. From that it follows that the nature of Mr. Folau's work blurs the lines between work and private life to a greater extent than a nine-to-five-job. It further needs to be considered that an athlete is often a famous person, reaching hundreds if not thousands of people via Social Media. Any company might not want to be associated with the employee's personal views if consequences are expected. However, in our opinion only in cases of serious breaches of the codes, should more weight be attached them.

#### 4. The extension of employee obligations and its limits

Codes of conducts contain rules on proper behavior and sometimes interfere with highly personal beliefs of employees. The spread of rigid rules of behavior in codes of conduct is part of the general trend towards legalization of moral duties. Churches and other companies that primarily pursue idealistic purposes have always had the right that employees fully identify with the ethos of the company and behave accordingly. A lack of compliance with the moral views and beliefs of the church can serve as grounds for redundancy.<sup>102</sup> In a couple of leading cases the European Court of Human Rights (ECtHR) had to deal with the limitations imposed by the European Convention on Human Rights (ECHR) to the dismissal of non-clergy church employees.<sup>103</sup> Recently, the European Court of Justice in Luxembourg (ECJ) had to deal with the question to what extent the 'right' religious attitude constitutes an 'essential occupational requirement' within the meaning of the relevant EU-Directive 2000/78.<sup>104</sup> Both the European Court of Human Rights and the European Court of Justice have shown that even church employers and other companies with primarily ideological purposes have to respect certain freedoms and the privacy of employees.<sup>105</sup> However, the courts may take the special characteristics of the enterprise into account when weighing up the diverging interests. We will not go into these cases any further here. Nevertheless, we doubt that the privileges granted

to employers in non-commercial companies also apply to ordinary companies.

Since the employment contract itself is an agreement between employer and employee, it could be argued that the employees' rights have been waived voluntarily.<sup>106</sup> However, this argument neglects the hierarchical position of employees and even more importantly, that codes of conduct are often not part of a negotiation between equal parties.<sup>107</sup> In fact, for the majority of people turning down a job offer is not a realistic option. Vague and ambiguous wording in codes are unnoticeably covering the private sphere of employees.<sup>108</sup> It is obvious that the desire to extend the employees' obligations is often stronger than the respect of employees' private lives. Private activities often serve as grounds for sanctions such as dismissals, especially if the conduct is not in alignment with the companies' views. Consequently, the question arises whether 'evil'<sup>109</sup> employees are in danger of being made redundant even though their work performance is unobjectionable. An example is the following provision: *'Be who we say we are, living our core values at all times: Be inclusive-respect and reflect the uniqueness of our consumers, shareholders, employees etc.: Engage and develop other to help them be their best'*<sup>110</sup>. Such provisions with no obvious link to the workplace ('at all times') certainly have the potential to serve as ground for dismissals based on private activities of employees. While it is certainly necessary to impose values and duties for the benefit of the company, it cannot remain in the managerial prerogative to dismiss employees based on their private activities, thoughts, interests, political inclinations and so on.<sup>111</sup> Based on such considerations it seems acceptable in this context to speak of overly extended obligations in conflict with fundamental rights of employees. To put it concisely, there is a need for stronger protection against unfair dismissal when it is based on vague provisions in codes of conduct.

#### IV. Conclusion

Based on the abovementioned key legal observations we conclude that despite the positive aspects of corporate codes of conduct in order to, for example, prevent unlawful behaviour, they potentially pose a great threat for fundamental rights. It remains in the managerial prerogative alone to decide what the obligations should be and the extent to which they are imposed on employees. As *Sobczak* stated correctly, companies are increasingly showing their desire to go beyond the sphere of economics.<sup>112</sup> This privatisation of labour standards within companies is posing a risk as it could lead to a weakening of workers' rights.<sup>113</sup> Furthermore, it could lead to a lack

of knowledge or understanding that employment rights have been infringed or other significant factors such as the lack of resources to hire a lawyer and maybe the most important, the fear of retaliation by the employer.<sup>114</sup> The take-it-or-leave-it situation for employees and the hierarchical structure are a weak aspect of the employment relationship. As we have pointed out, corporate codes of conduct are in most cases unilateral declarations and not negotiable. Most employers are naturally interested in imposing extensive loyalty obligations on their employees. It is obvious that even though the employment contract is concluded under private law, the employee remains the weaker party. Therefore, Article 8 of the ECHR is protecting the right to respect the private and family lives which is also including the workplace. Regulations concerning employees' conduct in their private lives are therefore generally not in compliance with Article 8. By stating the company's values and expectations in such codifications, one should expect clear and unambiguous provisions which are limited to conduct at the workplace. However, based on the assessment of the examined corporate codes of conduct, this assumption cannot be confirmed. Often provisions are short, vague and unclear in their wording and furthermore include conduct which cannot be clearly

linked to the workplace. If not impeded, they are intervening and limiting fundamental rights since it remains entirely under the control of the employer. This darker side of the codes is revealed when analyzing their provisions in the light of fundamental rights. As we have seen, it is common practice to dismiss employees for immoral conduct (e.g. *Pay v. Lancashire Probation Service*<sup>115</sup>) or their political activities which employers might not endorse. Because of the existing hierarchy between the parties, the authors are hereby stressing the importance of clear and unambiguous provisions which do not leave room to include other conduct without any relation to the workplace. The importance of a fair and respectful code is necessary in order to ensure the respect of worker's fundamental rights. Lastly, many questions remain unanswered. While in this article the focus was put on the effect of codes of conduct mainly in one direction, it would be of interest to analyze the situation where the employer is breaching the code. How is such a situation handled within the company? — If for instance the employer breaches its own Code by 'doing evil'—say in the area of environmental damage—is there any way to hold the organization and its management accountable? In order to adequately answer these questions, further research is required.

## ENDNOTES

<sup>1</sup> More about Eva Grdjić see <[http://www.sewicky.ch/sewicky/Evas\\_Familie.html](http://www.sewicky.ch/sewicky/Evas_Familie.html)>, (accessed 10 November 2019).

<sup>2</sup> See especially K. Pärli, *Rechtliche und ethische Integrität der Nonprofit-Organisationen am Beispiel der Ausgestaltung der Arbeitsverhältnisse*, 203 – 218, in: *Gutes besser tun – Corporate Governance in Nonprofit-Organisationen* (Voggensperger, Bienek, Schneider, Thaler eds., Bern 2005).

<sup>3</sup> Prominent examples are CNN reporter Octavia Nasr, the SBS presenter Scott McIntyre and most recently the Australian football player Israel Folau: P. Walker, *Octavia Nasr fired by CNN over tweet praising late ayatollah*, <<https://www.theguardian.com/media/2010/jul/08/octavia-nasr-cnn-tweet-fired>>, (published 8 July 2010); M. Whitbourn, *SBS presenter Scott McIntyre sacked over 'inappropriate' Anzac Day tweets*, <<https://www.smh.com.au/national/sbs-presenter-scott-mcintyre-sacked-over-inappropriate-anzac-day-tweets-20150426-1mtbx8.html>> (published 26 April 2015); BBC News, *Israel Folau: Sacked player sues Rugby Australia over anti-gay row*, <<https://www.bbc.com/news/world-australia-49187646>>, (published 1 August 2019).

<sup>4</sup> S. Smith, *Code of conduct vs the Fair Work Act – is firing Folau illegal?*, <<https://www.hrmonline.com.au/employment-law/folau-code-conduct-vs-fair-work-act/>>, (published 13 May 2019, accessed 10 November 2019).

<sup>5</sup> See also L. Compa, *Trade Unions, NGO's, and Corporate Codes of Conduct*, <[http://www.crimt.org/Publications/DEVELOPMENT\\_COM-PA.pdf](http://www.crimt.org/Publications/DEVELOPMENT_COM-PA.pdf)>, (accessed 10 November 2019).

<sup>6</sup> For detailed information we like to refer to the following literature N. Bueno, *Multinational enterprises and labour rights: concepts and implementation*, in: *Research Handbook on Labour, Business and Human Rights Law* (J. Bellace, B. ter Haar eds., Edward Elgar 2019); E. Kocher, *Codes of Conduct and Framework Agreements on Social Minimum Standards - Private Regulation?*, 67 – 86, in: *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (O. Dilling, M. Herberg & G. Winter eds., Hart Publishing Oxford 2008); K. E. Kenny, *Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation between Wal-Mart and the Employees of its Foreign Suppliers*, Vol. 27(2) *Nw. J. Int'l L. & Bus.* 453 (2007); H. Revak, *Corporate Codes of Conduct: Binding Contract or Ideal Publicity?*, Vol. 63 *Hastings L. J.* 1645 (2012).

<sup>7</sup> M.A. García-Muñoz Alhambra, B. ter Haar & A. Kun, *Soft on the Inside, Hard on the Outside- An Analysis of the Legal Nature of New Forms of International Labour Law*, Vol. 27(4), *Int. J. Comp. Law* 337, 346 (2011); S. Licci, *Codes of Conduct im Arbeitsverhältnis mit besonderem Blick auf das Whistleblowing*, *AJP* 1168, 1170 (2015); For more information see especially O.E. Herrstadt,

*Corporate Social Responsibility, International Framework Agreements and Changing Corporate Behavior in the Global Workplace*, 3(2) *Labor & Employment Law Forum* 263 (2013); U. Meyer, *Ethikrichtlinien internationaler Unternehmen und deutsches Arbeitsrecht*, *NJW* 3605 (2006).

<sup>8</sup> G. R. Laczniak, A-M. Kennedy, *Hyper Norms: Searching for a Global Code of Conduct*, 31(3) *Journal of Macromarketing* 245, 246 (2011).

<sup>9</sup> A. S. Carson, M. Baetz & S. McGill, *Codes of Conduct in the Private Sector - A Review of the Academic Literature from 1987 to 2007*, 16, <[http://www.ethicscentre.ca/EN/resources/ethicscentre\\_codes\\_april08.pdf](http://www.ethicscentre.ca/EN/resources/ethicscentre_codes_april08.pdf)>, (published 2008).

<sup>10</sup> J. Adelstein, S. Clegg, *Code of Ethics: A Stratified Vehicle for Compliance*, 138(1) *J Bus Ethics* 53 (2016).

<sup>11</sup> S. Surbhi, *Difference between Code of Ethics and Code of Conduct* <<https://keydifferences.com/difference-between-code-of-ethics-and-code-of-conduct.html>>, (last updated 8 July 2017); K. Leonard, *Difference between Code of Ethics and Conduct*, <<https://smallbusiness.chron.com/difference-between-code-ethics-conduct-2724.html>>, (updated 26 November 2018).

<sup>12</sup> AXA, *Group Compliance and Ethics Code*, edition November 2018, p. 4, <<https://www.axa.com/en/newsroom/publications/compliance-ethics-guide>>, (accessed 10 November 2019).

<sup>13</sup> PwC, *Code of Conduct* (edition November 2018), <<https://www.pwc.ch/de/ueber-pwc/>>

zweck-werte-und-verhalten.html>, (accessed 10 November 2019).

<sup>14</sup> See also J. Diller, *A Social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives*, Vol. 138 (2) Int. Lab. Rev. 99, 103 (1999).

<sup>15</sup> C135 - Workers' Representatives Convention (no.135), *Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking*, (adopted 56<sup>th</sup> session 23 June 1971).

<sup>16</sup> R094 - Co-operation at the Level of the Undertaking Recommendation (no. 94), *Recommendation concerning Consultation and Co-operation between Employers and Workers at the Level of the Undertaking*, adopted 35<sup>th</sup> ILC session 26 Jun 1952.

<sup>17</sup> See especially K. Pärli, *Mitwirkungsrechte der Arbeitnehmenden im schweizerischen Arbeitsrecht-Einfluss des Arbeitsvölkerrechts und des EU-Arbeitsrechts*, Global Europe Basel Papers on Europe in a Global Perspective no. 117, 14 – 15 (2019).

<sup>18</sup> *Ibid*; See further C. Barnard, *EU employment law*, 657 – 699 (4<sup>th</sup> ed., Oxford University Press 2012).

<sup>19</sup> E.g. in France the company's work council has to be informed and consulted by the management. See for more information I. Schömann, A. Sobczak, E. Voss & P. Wilke, *International framework agreements: New Paths to Workers' Participation in Multinationals' Governance?* Transfer, Vol. 14(1) 111 – 126 (2008).

<sup>20</sup> LAG Düsseldorf Beschluss 10 TaBV 46/05 vom 14. November 2005, <<https://openjur.de/u/109272.html>>, (accessed 10 November 2019).

<sup>21</sup> I. Darso, *Implementation of Ethics Codes in Germany: The Wal-Mart Case*, Vol. 3 IUSLabor, 2 (2005).

<sup>22</sup> Verordnung 3 zum Arbeitsgesetz (ArGV 3) vom 18. August 1993 (SR 822.113).

<sup>23</sup> On the European level this principle is embodied in Article 9 of the Regulation (EU) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). In Swiss law this is principle is incorporated in Article 18 of the Swiss international private law (Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987 (IPRG)); See further R. Callsen, *Eingriffsnormen und Ordre public-Vorbehalt im Internationalen Arbeitsrecht, Ein deutsch-französischer Vergleich*, (32) IAAEU (R. Birk, D. Sadowski, M. Schlachter, L. Foerke eds., 1<sup>st</sup> ed., Nomos Verlagsgesellschaft Baden-Baden 2015).

<sup>24</sup> See also B. Borgmann, *Ethikrichtlinien und Arbeitsrecht*, NZA 352 – 357, 353 – 354 (2003).

<sup>25</sup> According to Swiss law directives are legally binding for employees according to Article 321(d) Code of Obligation.

<sup>26</sup> S. Licci, *supra* n. 7, at 1174; See further U. Streiff, A. von Kaenel & R. Rudolph, *Arbeitsvertrag*, Praxiskommentar zu Art. 319 – 362 OR, Article 321d OR N 3 (2010); R. Rudolph, *Amor at Work, Arbeitsrechtliche Fragestellungen rund um Beziehungen am Arbeitsplatz*, Jusletter, 14 (2018).

<sup>27</sup> A. Mengel, *Arbeitsrechtliche Besonderheiten der Implementierung von Compliance-Programmen*

*in internationalen Konzernen*, CCZ, 86 – 91, 86 (2008).

<sup>28</sup> A. Beckers, *Enforcing Corporate Social Responsibility Codes on Global Self-Regulation and National Private Law*, 87 (1<sup>st</sup> ed., Hart Publishing Oxford and Portland, Oregon 2015).

<sup>29</sup> J. Diller, *supra* n. 14, at 103; See further S. Licci, *supra* n. 7, at 1173.

<sup>30</sup> S. Licci, *supra* n. 7, at 1171 – 1172; See for further information U. Streiff, A. von Kaenel & R. Rudolph, *Arbeitsvertrag*, Praxiskommentar zu Art. 319 – 362 OR, Art. 328b N 10 (2010).

<sup>31</sup> S. Licci, *supra* n. 7, at 1172.

<sup>32</sup> Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations of 20 March 1911 (Status as of 1 April 2017).

<sup>33</sup> Swiss Civil Code of 10 December 1907 (Status as of 1 January 2019).

<sup>34</sup> For more information see H.C. Grigoleit, *Mandatory Law: Fundamental Principles*, in: *Max Planck Encyclopedia of European Private Law* (J. Basedow, K. J. Hopt, R. Zimmermann eds., Oxford University Press 2011).

<sup>35</sup> A. Beckers, *supra* n. 28, at 68; In the case *Baltimore & O.R. Co. v. United States*, 261 U.S. 592, 597 (1923) the United States Supreme Court defined implied terms as followed: 'A contract implied in fact is an implied contract in which the intention is ascertained and enforced, while a contract implied in law is a mere fiction, the intention being disregarded, and the quasi-contractual obligation being imposed by law to bring about justice, without regard to the intention of the parties'.

<sup>36</sup> See especially H. Collins, *Implied Terms in the Contract of Employment*, in: *The Contract of Employment* (M. Freeland, A. Bogg, D. Cabrelli, N. Countouris, A.C.L. Davies, S. Deakin, J. Prassl eds., 1<sup>st</sup> ed., Oxford University Press 2016).

<sup>37</sup> *Brinkeley v. Honeywell, Inc.*, No. 93 – 35402, 1994 U.S. App. LEXIS 23834, at 1 – 10 (9<sup>th</sup> Cir. 1994).

<sup>38</sup> For more information see also R.C. Brown, *East Asian Labor and Employment Law: International and Comparative Context*, 168 – 170 (1<sup>st</sup> ed., Cambridge University Press 2012).

<sup>39</sup> A. Beckers, *supra* n. 28, at 25 – 26.

<sup>40</sup> Microsoft, *Standards of Business Conduct* (October 2019), <<https://www.microsoft.com/en-us/legal/compliance/sbc/download>> 15 (accessed 10 November 2019).

<sup>41</sup> Facebook, *Code of conduct* (June 2019), <<https://investor.fb.com/corporate-governance/code-of-conduct/default.aspx>> at section 11 (accessed 10 November 2019).

<sup>42</sup> S. Wantz, S. Licci, *Arbeitsrechtliche Rechte und Pflichten bei internen Untersuchungen*, Jusletter, 8 (2019).

<sup>43</sup> Judgment of the Federal Court of Switzerland, 9C\_758/2010, from 10 June 2011, sec. 6.7.3.

<sup>44</sup> M.A. García-Muñoz Alhambra et al., *supra* n. 7, at 352; I. Schömann, A. Sobczak, E. Voss, P. Wilke, *Codes of Conduct and International Framework Agreements: New Forms of Governance at Company Level*, European Foundation of the Improvement of Living and Working conditions, 105 (2008).

<sup>45</sup> FIFA, *Code of ethics* (2018 edition), <<https://resources.fifa.com/image/upload/fifa-code-of-ethics-2018-version-takes-effect-12-08-18.pdf?cloudid=uemlkcy8wwdtlll6sy3j>>, Part III Chapter Organization and Procedure.

<sup>46</sup> E. Anderson, *Private Government, How Employers Rule our Lives and Why we Don't Talk about It*, 37 (Princeton University Press 2017).

<sup>47</sup> ILO Convention (C135), *supra* no. 15.

<sup>48</sup> ILO Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Convention 98) (adopted 32<sup>nd</sup> ILC session 1 July 1949, entry into force 18 July 1951).

<sup>49</sup> ILO Convention concerning Freedom of Association and Protection of the Right to Organise (Convention 87) (adopted 31<sup>st</sup> ILC session 9 July 1948, entry into force 4 July 1950).

<sup>50</sup> Charter of Fundamental Rights of the European Union (EU Charter) (ratified 7 Dec. 2000).

<sup>51</sup> See for instance the case Eur. Court HR, *Demir and Baykara v. Turkey*, judgment of 12 Nov. 2008, Application no. 34503/97 where those international standards were referred to.

<sup>52</sup> N. Althoff, *Die Bedeutung der EGMR-Rechtsprechung für das deutsche Arbeitsrecht, Stärkung der Arbeitnehmerrechte durch menschenrechtliche Argumentationen*, AnwBl Nr. 8+9 598, 599 (2013).

<sup>53</sup> Eur. Court HR, *Niemitz v. Germany*, judgment of 16 Dec. 1992, Application no. 13710/97.

<sup>54</sup> For more information about this subject see K. Pärli, *Schutz der Privatsphäre am Arbeitsplatz in digitalen Zeiten – eine menschenrechtliche Herausforderung*, EuZA Bd. 8 48 – 64 (2015).

<sup>55</sup> N. Althoff, *Die Bedeutung der EGMR-Rechtsprechung für das deutsche Arbeitsrecht, Stärkung der Arbeitnehmerrechte durch menschenrechtliche Argumentationen*, AnwBl Nr. 8+9 598, 599 (2013).

<sup>56</sup> *Ibid*, at 600.

<sup>57</sup> *Coats v. Dish Network, LLC* 350 P.3d 849 (Colo.2015).

<sup>58</sup> S. A. Campbell, D.M. Combs & A. L. Gambill, *Off Duty Conduct: An Employee's After Hours' Activities Could Get Them Fired*, presented at the ERR Midwinter Meeting on March 22, 2018 in Clearwater, Florida, 7.

<sup>59</sup> *McElroy c. Cambridge Community Services NHS Trust*, Employment Tribunal, Case Number 3400622/2014.

<sup>60</sup> L. Harkin, *Is it unfair to dismiss an employee for coming into work smelling of alcohol?*, <<https://www.roydswithyking.com/is-it-unfair-to-dismiss-an-employee-for-coming-into-work-smelling-of-alcohol/>> (last updated 21 September 2015).

<sup>61</sup> US Bank, *Code of Ethics and Business Conduct* (posted 9 September 2019), 14, <<https://www.usbank.com/dam/documents/pdf/coe/coe-Handbook.pdf>>, (accessed 10 November 2019).

<sup>62</sup> For an in-depth analysis see especially K. Pärli, *Religion im privaten Arbeitsverhältnis*, presentation held at the conference «Religion und Arbeitswelt» on 25 January 2018, <[https://ius.unibas.ch/fileadmin/user\\_upload/ius/11\\_Upload\\_Personenprofile/01\\_Professoren/Paerli\\_Kurt/](https://ius.unibas.ch/fileadmin/user_upload/ius/11_Upload_Personenprofile/01_Professoren/Paerli_Kurt/)

- Dateien/Vortraege\_Folien/Arbeit\_Recht\_Religion\_Vortrag\_Paerli\_Schlussversion.pdf>, (accessed 10 November 2019); R. McCrea, *Religion in the Workplace: Eweida and Others v United Kingdom*, Vol. 77(2) MLR 277 – 307 (2014).
- <sup>63</sup> Eur. Court HR, *Eweida and others v The United Kingdom*, judgment of 15 January 2013, application nos. 48420/10, 59842/10, 51671/10, 36516/1.
- <sup>64</sup> *Eweida a.o. v. United Kingdom*, *supra* n. 63, section 31 – 40 (McFarlane).
- <sup>65</sup> SBB CFF FFS News, <<https://news.sbb.ch/medien/artikel/89128/sbb-hat-untersuchung-wegen-facebook-posts-eingeleitet?printpdf=1>> (accessed 10 November 2019).
- <sup>66</sup> Eur. Court HR, *Redfearn v. The United Kingdom*, judgment of 6 November 2012, Application no. 47335/06.
- <sup>67</sup> See for an analysis H. Collins, V. Mantouvalou, *Redfearn v UK: Political Association and Dismissal*, Vol. 76(5) MLR 909 – 923 (2013).
- <sup>68</sup> PwC, *Code of Conduct* (July 2018), <<https://www.pwc.ch/en/publications/2018/pwc-code-of-conduct-july-2018.pdf>>, (accessed 10 November 2019).
- <sup>69</sup> Governing Body of Tubbenden Primary School v. Sylvester EAT/0527/11, <<https://www.employmentcasesupdate.co.uk/site.aspx?i=ed11932>>, (published 28 May 2012).
- <sup>70</sup> UBS, *Code of Conduct and Ethics* (2019), p. 8, <<https://www.ubs.com/global/de/our-firm/our-culture/code-of-conduct.html>>, (accessed 10 November 2019).
- <sup>71</sup> Honeywell, *Code of Business Conduct* (approved 2011), p. 4, <<https://www.honeywell.com/content/dam/honeywell/files/india-hail/policies/code-of-conduct-new-pdf.pdf>>, (accessed 10 November 2019).
- <sup>72</sup> *Pay v. Lancashire Probation Service* (2004) ICR 187.
- <sup>73</sup> *Lawrence v. Secretary of State for Justice*: 3401016/2016, 23 March 2017 (Employment Tribunal), <[https://assets.publishing.service.gov.uk/media/58d27db1e5274a16e3000076/Mrs\\_L\\_Lawrence\\_v\\_Secretary\\_of\\_State\\_for\\_Justice\\_3401016.2016.pdf](https://assets.publishing.service.gov.uk/media/58d27db1e5274a16e3000076/Mrs_L_Lawrence_v_Secretary_of_State_for_Justice_3401016.2016.pdf)>, (accessed 10 November 2019).
- <sup>74</sup> Nestlé, *Code of Business Conduct*, 15 November 2007, p. 3 <<https://www.nestle.com/investors/corporate-governance/codeofbusinessconduct>> (accessed 10 November 2019).
- <sup>75</sup> Google, *Code of conduct*, <<https://abc.xyz/investor/other/google-code-of-conduct/>> (accessed 10 November 2019).
- <sup>76</sup> Facebook, *Code of conduct*, *supra* no. 41, at sec. 11.
- <sup>77</sup> For more information see especially R.C. Brown, *East Asian Labor and Employment Law: International and Comparative Context*, 169 (1<sup>st</sup> ed., Cambridge University Press 2012).
- <sup>78</sup> Arbeitsgericht Wuppertal, Beschluss vom 15.06.2005 – 5 BV 20/05; Landesarbeitsgericht Düsseldorf, Beschluss vom 14.11.2005 – 10 TaBV 46/05; See for further information I. Darsow, *supra* n. 21.
- <sup>79</sup> See for further explanations H. Revak, *supra* no. 6, at 1657.
- <sup>80</sup> Chapter II, 3.
- <sup>81</sup> R. Rudolph, *supra* n. 26, at 16 – 17.
- <sup>82</sup> *Ibid*, at 12.
- <sup>83</sup> For instance, in AXA, *Group Compliance and Ethics Guide*, *supra* no. 12, at 5.
- <sup>84</sup> See for example FIFA, *Code of ethics*, *supra* no. 45, at Part II Section 5 Article 17.
- <sup>85</sup> Facebook, *Code of conduct*, *supra* n. 41, at section 11.
- <sup>86</sup> For a discussion of German worker privacy law, see for further explanations M. Weiss, B. Geck, *Worker Privacy in Germany*, 17 Compl. Lab. L.J. 75 (1995); There are a few court cases in Germany and France worth mentioning, for instance La Commission Nationale de l'Informatique et des Libertés (the French Data Protection Authority CNIL), Decision 2005 – 110 (26 May 2005), <<https://www.legifrance.gouv.fr/affichCnil.do?id=CNILTEXT000017653326>>, (accessed 10 November 2019); Beschluss des Arbeitsgerichts Wuppertal, *supra* n. 78.
- <sup>87</sup> M.A. Pagnattaro, E.R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28(2) Berkeley J. Emp. & Lab. L. 375 (2007).
- <sup>88</sup> See L. Sotito, C. Kuner & A.P. Simpson, *The Whistleblower Hotline Quandary*, 21 Fin. Executive 47 – 50 (2005).
- <sup>89</sup> V. Mantouvalou, 'I lost my Job over a Facebook Post: Was that Fair?' *Discipline and Dismissal for Social Media Activity*, Vol. 35(1) Int. J. Comp. L. & Indust. Rel. 101 – 126 (2019).
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- <sup>92</sup> See S. McDermott, 'I Lost my Job Over a Facebook Post- Was that Fair?', <<http://www.bbc.com/news/stories-41851771>> (published 6 November 2017, accessed 1 November 2019); See further V. Mantouvalou, *supra* no. 89, at 102.
- <sup>93</sup> V. Mantouvalou, *supra* n. 89, at 113.
- <sup>94</sup> See S. Hornsby-Geluk, *Can Employer stop you expressing your opinion?*, <<https://www.stuff.co.nz/business/opinion-analysis/96267735/susan-hornsbygeluk-can-your-employer-stop-you-expressing-your-opinion>> (published 30 August 2017).
- <sup>95</sup> *Smith v Trafford Housing Trust*, High Court of Justice Chancery Division Manchester District Registry, 16 Nov. 2012 (2012) EWHC 3221 (Ch).
- <sup>96</sup> V. Mantouvalou, *supra* n. 89, at 116 – 117.
- <sup>97</sup> See *supra*, no. 4.
- <sup>98</sup> G. Ramsay, CNN, *Israel Folau guilty of code of conduct breach following homophobic post*, <<https://edition.cnn.com/2019/05/07/sport/israel-folau-rugby-australia-spt-intl/index.html>> (updated 7 May 2019).
- <sup>99</sup> Rugby Australia, *Code of Conduct*, 7, <<https://www.rugbyau.com/about/codes%20and%20policies/integrity/code%20of%20conduct>> (accessed 10 November 2019).
- <sup>100</sup> *Ibid*, at 6.
- <sup>101</sup> Instagram page of Israel Folau, <<https://www.instagram.com/p/BwEWt2uHcLI/>> (accessed 10 November 2019).
- <sup>102</sup> See especially P. Braasch, *The European Convention on Human Rights' Limitations in the Dismissal of Non-Clergy Church Employees*, 54 German Y.B. Int'l L. 721 (2011).
- <sup>103</sup> Eur. Court HR, *Obst v. Germany*, judgment of 23 September 2010, Application no. 425/03; Eur. Court HR, *Schüth v. Germany*, judgment of 23 September 2010, Application no. 1620/03; Eur. Court HR, *Siebenhaar v. Germany*, judgment of 3 February 2011, Application no. 18136/02.
- <sup>104</sup> Eur. Court of Justice, *Vera Egenberger v. Evangelisches Werk für Diakone und Entwicklung e.V.*, judgment of 17 April 2018, ECLI:EU:2018:257; Eur. Court of Justice, *IR v. JQ*, judgment of 11 September 2018, ECLI:EU:2018:696; for further information see also K. Pärli, *supra* n. 62.
- <sup>105</sup> Eur. Court of Justice, *IR v. JQ*, judgment of 11 September 2018, ECLI:EU:2018:696; For further details for this judgment see M. Sprenger, *Kündigung eines wiederverheirateten Ehefarztes in einem Katholischen Krankenhaus*, 99 – 110, EuZA (2019); Meanwhile the Bundesarbeitsgericht (BAG) (German Court for Labour Law) has made a decision within the meaning of the judgment of the European Court of Justice (Bundesarbeitsgericht, judgment of 20 February 2019, Az. 2 AZR 746/14); See for more information F. Malorny, *Diskriminierungsschutz als Grenze kirchlicher Selbstbestimmung*, 441 – 454, EuZA (2019).
- <sup>106</sup> Note that not all Convention rights are susceptible to waiver (i.e. right to liberty); See further *De Wilde, Ooms and Versyp v. Belgium*, No 1, judgment of 18 June 1971, (1979 – 1980) 1 EHRR 373.
- <sup>107</sup> R. Clayton and H. Tomlinson, *The Law of Human Rights*, (Oxford, Oxford University Press, 2000) paras 6.161 – 6.163; See also G.S. Morris, *Fundamental Rights. Exclusion by Agreement?*, 30(1) Industrial Law Journal 49 – 71, 53 (2001).
- <sup>108</sup> The same thought has been already been raised by H. G. Würzberg, *Moralisch oder cool? Die prekäre Rückkehr der Subjekte in die Ökonomie*, 37 (BoD-Books on Demand, Norderstedt 2013).
- <sup>109</sup> Google, *Code of Conduct*, *supra* n. 75.
- <sup>110</sup> US Bank, *Code of Ethics and Business Conduct*, *supra* no. 61, at 19.
- <sup>111</sup> See also V. Mantouvalou, *supra* n. 89, at 116.
- <sup>112</sup> A. Sobczak, *Codes of Conduct in Subcontracting Networks: A Labour Law Perspective*, Vol. 44 Journal of Business Ethics 225, 227 (2003).
- <sup>113</sup> See especially *Ibid*, at 225 – 227.
- <sup>114</sup> G. Davidov, *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, 26(1), Int. J. Comp. L. Law & Indust. Rel. 61 – 81 (2010).
- <sup>115</sup> *Supra* n. 72.