Renationalisation of the Integration Process in the Internal Market of the European Union
German and European Studies of the Willy Brandt Center at the Wrocław University

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Introduction

Robert Grzeszczak

The subject of the book is of great importance from the point of view of the current situation in Europe. The purpose of the book is to identify the legal effects of the renationalisation process on the EU and its Member States. The concept of renationalisation is expressed through the MS’s aim to verify the relationship with the EU. The thesis for the book is the return of renationalisation tendencies in the area of the Single Market, which is supported by, among other things, an open criticism of the foundations of EU integration or considerations on withdrawal from the EU by some MS and the problems caused by migration and immigration. Part of the book involves an analysis of the internal market freedoms and gives a clear indication of the effects of the continuing trend of renationalisation on consumers, workers, entrepreneurs and MS. A definite influence on the above is the new, more dynamic, competition between Member States for leadership in sectoral EU policies (eg energy or agriculture), in certain areas (the Euro) and in the Union as a whole.

The European Union and its law does not operate and develop in isolation. On the contrary – the factors influencing the development of international law and the condition of states have an even more considerable and twofold impact on the EU and its law. Thus, the comments of contemporary influential thinkers on general tendencies that shape the global processes of changes, conflicts and reforms refer just as much – or even more – to the European Union.

The changes in international law are to a large extent related to the fact that the condition of states is deteriorating. This process has been gaining momentum since the turn of the century and has greatly affected global governance as well as the foundations which allow the international community to support the states (Fukuyama, 2004: 2). However, the research on modern global societies forecasts renationalisation and the escalation of conflicts between nations resulting from the fact that globalisation makes politics independent from borders and national states. With reference to the view described above, Juergen Habermas brings to mind Kant’s hopes for a global internal policy (Habermas, 2011: 36-42). Samuel Huntington,
in turn, claimed that politics would be dominated by clashes between civilisations. International conflicts will result from cultural differences, which stem from religious divisions (Huntington, 1996: 81-125). These opinions are currently becoming reality in the EU (Grzeszczak, 2014: 98 and following). Jan Klabberson even argues that constitutionalisation, fragmentation and verticalisation form "the holy trinity of international legal debate in the early 21st century" (Klabberson, 2009: 18). These features are accompanied by disintegration and its derivative in the functional meaning – renationalisation of integration. Yet, Giuseppe Martinico, following the view of Fredrich Hayek, points out that while the process of law-making is not only targeted, but is also very often spontaneous, it is this feature that currently prevails in the process of constitutionalisation of the European Union (Martinico, 2012: 64).

The European Union of the 21st century is confronted with problems that were unknown at the beginning of its functioning. The onset of the second decade of the 21st century sees the reaching of a critical mass concerning the integration process. We can observe a political and substantive crisis of the European Union (hereinafter referred to as the EU), which results from the lack of clearly-defined integration goals and indecision as to the current and future shape of the European Union. Whether the EU internal market of 28 Member States will continue to exist is highly doubtful. Will its original goal remain limited to a federal organisation with an unusual political system or will the EU assume a totally new, post-modern shape that cannot yet be defined? These questions become pressing in the face of a decade-long economic and political crisis affecting the economy of the internal market, sectoral policies of the EU, and the economies of individual Member States (Grzeszczak, 2016: 9).

The present book covers current phenomena taking place in the dynamics of European integration processes. What is meant here are the ongoing processes of disintegration and fragmentation in the area of the single internal market of the European Union. The authors present the possible legal effects of renationalisation (disintegration) tendencies in integration processes for the European Union and its Member States.

Renationalisation of integration processes is understood as an attempt to redefine the relations of a state with the European Union and takes different forms: of political decisions and demonstrations, administrative practice or formal legislative amendments. Renationalisation is reflected particularly in the taking back of certain EU competencies by national authorities, strict state control of EU regulations by national parliaments and,
to a certain extent, also governments (especially in the area of economic and social policy as well as the regulations related to performance of work and economic activity) as well as the growing dominance of centralised politics. Such a state of affairs is inter-related with economic stagnation, financial crisis and increasing strains on social care.

Contrary to common expectations, the economic crisis in the last decade neither strengthened the cooperation nor deepened the integration. The Member States often took actions which sometimes even led to “renationalisation” of integration policies. A clear difference emerged between the rhetoric of Union documents and action and reform plans on the one hand and the practice of the activities taken by the state on the other. It is also important to stress that the refugee crisis has not been resolved and is deepening.

The crisis of (or in) the EU makes the visions of the processes of renationalisation of a number of policies more attractive. Currently, we can see some centralising tendencies and the dominance of politics over economics is increasing. The Member States have again started to compete for leadership in sectoral EU policies (such as energy and agricultural policy), in particular areas (Euro zone) and in the EU as a whole. The complaint is being made that the EU is unwieldy, which seems to imply that it is the states that are able to act more effectively. As a result, the national and EU interests are facing yet another stratification. This is clear, inter alia, from the fact that several initiatives for enhanced cooperation have been launched, i.e. a mechanism of stronger collaboration of groups of EU states. While some perceive it as a means of ensuring a more dynamic integration, others claim it is contrary to the spirit of solidarity. There have been views that this principle is the culmination of the differentiation of integration processes.

Growing renationalisation tendencies result mainly from economic reasons and the claims of national governments that there is a need to protect home economies. Multifaceted effects of the economic crisis have a major impact on the internal market and the attitude towards integration processes. Those aspects discourage activity in the internal market and give rise to disintegration tendencies. The following areas are particularly exposed to the negative effects of renationalisation: losing the achievements of European labour law, the risk of growing social dumping, issues related to the free movement of non-employees as well as to competition law (particularly due to the protectionist application of prohibited state aid), lower
consumer protection standards, infringement of the principle of non-discrimination in socio-economic terms.

Another aspect which is also vulnerable to renationalisation is the free movement of individuals without economic motivation whose right to residence is related directly to EU citizenship. Demands have been made for a reduction of solidarity with EU citizens on the move, particularly with respect to their entitlement to social security benefits. The argument concerning the, so called, social tourism is being put forward again: it is claimed that the free movement of persons is widely abused in order to obtain social benefits from the host states under false pretences. This risk of increased social dumping constitutes a particular research area of the book. Social dumping can be a consequence of renationalisation as regards several internal market freedoms – especially the free movement of persons and services and the freedom of establishment. As for the free movement of persons, it is of importance that as a result of leaving the EU or rejecting its standards, particular Member States may adopt regulations leading to a deterioration of working conditions in order to cut the costs of doing business and make the domestic market more attractive than the markets of those states which maintain the EU standards.

The development of renationalisation tendencies influences the current EU aquis and the legislation of the Member States. In this book, the authors indicate the resulting consequences, especially as regards internal market freedoms, with special attention paid to the effects of renationalisation upon the free movement of persons and goods.

This book is divided into seven chapters. In the first “From integration to fragmentation? Late and incorrect transposition of the EU directives” Jędrzej Maśnicki argues that the harmonisation of the Member States legal orders leads to the ongoing development of the integration tendencies. Within the area of the shared competences this process means the far-reaching limitation of the Member States competence to adopt legislation which does not have an EU-oriented origin. However, the so-called “positive integration” is diminished by several limitations. Member States are still empowered to choose the most adequate methods of adapting the national legal order to the requirements following from the EU legislation. The unavoidable processes of transposition and implementation also bring undesirable results; notably fragmentation of the EU legal framework. This is an effect of the “slow march” of the EU legislation, which is additionally postponed by the transposition delays. The negative results of the delayed transposition are evident in all areas covered by the EU legisla-
tion, which requires the implementation of measures necessary to ensure the effectiveness of the EU law within the national legal order. Even the fully-effective regulations (especially when they include the specific reference to the directives) are mostly dependent on the Member States’ legislation. Moreover, even if the timely transposition is ensured, several compliance drawbacks caused by the incorrect transposition may be raised. This develops the on-going legislation and implementation cycle, which leads from the integration provided by the measures adopted by the EU institutions (e.g. directives, regulations, decisions) to the fragmentation caused by the different transposition and implementation practices amongst the Member States. Therefore, the complete legal unification within the EU is the “Holy Grail” of the European integration, but it is worth searching for it.

In the next chapter Artur Nowak-Far presents an analysis of the National versus European component in the EU product conformity regulation. Free movement in goods is subject to a comprehensive Treaty regulation and CJ jurisprudence which give it its general form. With such an extensive set of rules meant to guarantee the free movement, it comes as a surprise that EU has developed so much product conformity regulation (PCR) in response to national penchant to regulate. PCR is usually adopted in order to harmonize national regulations and administrative practices which are to protect essential interests of customers and users of products. Thus, the basic function of PCR is to lower and/or to make uniform thresholds of market access of goods traded within the EU. Yet, the application of the resulting mixture of EU and national regulation remains the area of “turf bargaining” between the EU and its Member States.

Paweł Wojciechowski examines the National Regulations on Country of Origin Labelling. On the market of food and agricultural products it is clearly visible that EU Member States to a significant extent try to create protection of their own market, which on the one hand is not compatible with European integration (integration) and on the other hand it is an evidence of a strong trend towards diversity. A new trend that can be increasingly seen in agriculture and food law is a kind of re-nationalization of certain regulatory areas. The chapter analyzes this new re-nationalization trend in food law, basing on the example of new national regulations concerning food labelling of country of origin or place of provenance.

Issues concerning renationalization in the union’s social rights is the subject of chapters by Piotr Kwasiborski and Magdalena Gniadzik.
In the first chapter (Social Dumping on the EU internal market - a real challenge for the EU integration process?) Kwasiborski provides analysis of the problem of social dumping from the perspectives of treaty freedoms (of services, entrepreneurship, free movement of workers) where one of the biggest concerns is the regulatory competition - a practice of certain states to decrease the level of regulatory restrictions in order to encourage companies to set up business on their territory. It seems that the social dumping itself, when referring to the practices compliant with legal restrictions, does not necessarily constitute a threat for the EU integration process. Having in mind the protective approach of the old EU Member States to the practices including any usage of the lower social costs applicable in the new EU Member States one may argue that the claims of the threats caused by the social dumping are merely an excuse to limit the free competition on the internal market which may be the actual challenge for the EU integration process.

In the next chapter (Posted Workers Directive under revision - a step towards the fair competition or a demonstration of the EU integration process' reverse?) Kwasiborski argues that the upcoming revision of the directive on posting workers within the performance of services on the internal market, which is supported by almost all of the old EU member states, aims at completely changing the legal framework governing the institution of posted workers. It is, however, questionable whether the remuneration regulations being the main aspect of the directive actually need a revision in order to promote competition on the internal market. One may argue that the actual main objective of this legislation proposal widely supported by the old EU Member States is to ensure the dominant position of these Member States over the new EU Member States, which would be a pure example of the reverse of the EU integration process.

Magdalena Gniadzik pays attention to the Interpretation of the terms ‘integration conditions’ and ‘integration measures’. The chapter focus on recent rulings of the Court of Justice concerning so called ‘integration conditions’ and ‘integration measures’ that can be applied by member states to third country nationals (TCNs). The Court has blurred the lines between these two notions, so, de facto, any obligation can be imposed on TCNs as an integration measure. It appears that the scope of discretionary powers given to the member states can therefore undermine objectives of the common EU migration policy that is aiming at promoting social inclusion and granting TCNs legal status comparable to that granted to citizens.
of the Union and at the same time can lead to renationalisation of this policy.

In the last chapter Magdalena Gniadzik explores the changing notion of Union citizenship in the light of CJEU’s judgments. The latest judgments of the Court of Justice could be perceived as an effect of a certain paradigm shift as regards the interpretation of the substance of EU citizenship and the right to free movement. The Court is therefore no longer identifying objectives of Directive 2004/38 as to facilitate the exercising of the right to move and reside freely, but as to prevent Union citizens from becoming a burden on national social systems. It is argued, however, that concerns regarding social tourism were visible from the beginnings of developing the scope of rights granted by article 18 and 21 TFEU and have strongly influenced the legal status of EU citizens.

The fact that no decision has been made on the political outcome of integration processes weighs on all the considerations presented in the book. The European Union of the 21st century needs such a decision, especially as it is confronted with problems which were unknown to its founders in the 1950s. On the one hand, globalisation processes result in the states being open to regional integration processes. It can be therefore assumed that integration becomes an answer to globalisation and that integration processes, in turn, lead to enhanced regionalisation. We can see some centralising tendencies and the dominance of politics over economics is increasing. The Member States have again started to compete for leadership in sectoral EU policies (such as energy and agricultural policy), in particular areas (Euro zone) and in the EU as a whole.

References


Robert Grzeszczak


Chapter 1: From integration to fragmentation? The late and incorrect transposition of the EU directives

Jędrzej Maśnicki¹

Key words: transposition delay, compliance deficit, implementation, fragmentation, enforcement.

Abstract²

Harmonisation of national legislation with EU law is the main driver for the ongoing development of the European integration process. Within the area of the shared competences the harmonisation results in far-reaching limitation of the Member States competences to adopt legislation which does not have an EU-oriented origin. However, benefits associated with integration may be diminished by the late and incorrect transposition. Thus, the “slow march” of EU legislation may be postponed or even stopped by some invulnerable national actors – governments and parliaments, who do not wish to comply with EU directives. This leads to the another risk – instead of benefitting from integration, the European single market suffers fragmentation tendencies. These tendencies diminish the level playing field for European entrepreneurs and causes several distortions, which may lead not only to the legal uncertainty but also cause economic loss. This paper claims that these tendencies are relatively strong and should be adequately addressed in the EU’s regulatory policy. Otherwise, there is the risk that Member States would start picking a chocolate from the box and comply only with the EU legislation, which the most preferable for them.

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² The following paper constitutes a part of the research conducted within the framework of the project funded by the grant No. 2015/17/B/HS5/00467 “Renationalising the Integration Process in the Internal Market of the European Union”, financed by the National Science Centre of Poland.
One of the main specifics of the EU decision-making process is indicated by the fact that the existing legislation is the subject of constant evaluation and revision (Luchetta 2012: 561-562). Due to this process some directives and decisions are replaced by regulations and numerous other acts are replaced by a single piece of legislation. These tendencies appear to be additionally justified in the light of the already adopted “Better Regulation” agenda. Moreover, the further development of EU legislation is made through highly detailed sectoral packages such as the recently published “Clean Energy for All Europeans package”, the “Banking reform package” or the already adopted “Clean Air Policy Package”. This package method of providing proposals is the result of the implementation of the legislative action plans, which constitute the most important part of the Commission’s political agenda (Osnabrügge 2015: 242). One of the Commission’s priorities is definitely to explore the EU’s legislation in the new fields, within the competences, which would otherwise still be prescribed to the Member States (Haghighi 2008: 475). Moreover, as far as there are only a few Treaty-based limitations in the transfer of competences (e.g. Articles 194(2), 153(4), 168(7) of the TFEU), there is no limitation to completely diminish the Member State’s competences in the shared competences area (Ciclet 2015: 252-255). Thus, it is of crucial importance to focus on the method of harmonisation and the scope of the EU-originated provisions, which empower the Member States to act.

The method of harmonisation – minimum or full (exhaustive), is definitive in determining the scope of competences, which remains prescribed to Member States. As is indicated by the EU legislation itself, the full harmonisation method should considerably increase legal certainty and its effect “should be to eliminate the barriers stemming from the fragmentation

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of the rules and to complete the internal market\textsuperscript{6}. The exhaustive harmonisation method is the key tool to prevent the fragmentation of the internal market (AG opinion in case C-513/15 ECLI:EU:C:2017:98, point 69).

On the other hand, as was stated by the Advocate General N. Wahl, in case of the minimum harmonisation Member States are free to extend both the scope and the level of the protection provided for by the given directive. However, the reverse side of that kind of discretion is that there may be significant differences between the national implementing measures adopted to transpose the same directive (AG opinion in case C-184/12 ECLI:EU:C:2013:301, point 41). Thus, these potential differences may lead to fragmentation tendencies within the single market area. Moreover, the minimum harmonisation may even drive fragmentation tendencies by letting into the EU legislature the national-oriented “opening clauses” designed for particular Member States to uphold national provisions, even if they are not in line with the directive. Another case is provided by the “optional clauses”. Those kinds of provisions are weakening the overall aim of the harmonisation at the EU level (Möllers 2000: 683-684).

The choice of the harmonisation method also has an important impact on the transposition process and requires that Member States rely on the EU law provisions. To address the fragmentation tendencies caused by the minimum harmonisation measures it would be reasonable to apply in the legislative practice only the exhaustive harmonisation method. In such a case, the national legislature “is to be assessed solely in the light of the criteria laid down by the European Union legislature” (case C-159/09 Lidl, ECLI:EU:C:2010:696, paragraph 22). This method of the correctness assessment may support the copy-out technique as this one, which is provides, as much as possible, a similarity between the text of directive and the text of the national implementing measures (Giliker 2015: 12).

However, even under exhaustive harmonisation method some differences at the national level may occur due to the optional clauses provided by the directive itself. If Member States are given a wide discretion to decide whenever to make a choice between various regulatory outfits some

differences, and in result, fragmentation of the single market may become an everyday reality.

However, these drawbacks may not overwhelm the fact that the harmonisation always provides more integration of the national law and policies than the absence of the EU legislation in a given area. Thus, the opposition between “negative integration” and the “positive” one appears to reveal only the two different sides of the same coin and cannot be perceived as leading to the contradicting results. As was stated by the Advocate General P. Mengozzi, those: “two aspects of Community integration, often described, respectively, as ‘negative integration’, namely, in particular, an obligation of the Member States not to oppose the application of the freedoms of movement provided for by the Treaty, and ‘positive integration’ do not, however, conflict with each other” (AG opinion in case C-341/05, ECLI:EU:C:2007:291, point 51). It is by the fact that the direct application of some of the Treaty provisions as well as the direct application of some of the secondary law provisions not only requires fulfilment of an obligation “not to oppose”, but in fact requires the preparation of an appropriate framework to practically implement the EU law. Similarities between positive integration, which is recognised as the duty to adopt national legislation in order to bring effect to the legislation which is not directly effective and negative integration put in the first place the Member States and their role in providing an efficient regulatory design for the full application of the EU-originated rules. Nevertheless, it is not surprising that the EU legislators would like to avoid giving too extensive powers to Member States. In this respect it is revealed by the category of acts adopted after the Lisbon Treaty, which is shown in Figure 1:
Figure 1: Number of legal acts adopted 2010-2016, source: EUR-Lex database.

The post-Lisbon era of EU secondary legislation resulted in the adoption of nearly 22,000 different pieces of legislation. The most preferred forms of legislation are regulations and decisions. Directives, which were once recognised as the typical EU legislation tool, now constitute only a small part (approximately 4%-6% annually) of the currently adopted legal acts.

This mass-routinisation of the EU legislation is partially understandable by the fact that the greater part of the legal acts adopted within the post-Lisbon period are of the non-legislative (predominantly of implementing) nature, which is depicted by the Figure 2:

Figure 2: Number of non-legislative acts adopted 2010-2016, source: EUR-Lex database.
Non-legislative acts frame nearly one third of the all adopted acts within the analysed period and the implementing or delegated directives, which also requires implementation to the national law constitute only 87 of the more than 7000 acts. However, that number proves also that the acts adopted by the European Parliament and the Council are dominating in the post-Lisbon European *acquis*. Another tendency is that the main tools to provide integration by law are nowadays regulations and decisions. The number of directives is minimal in comparison with the other types of binding acts pursuant to the Article 288 TFEU. This may be seen as the intention of the European Commission – responsible for the choice of the measure to be proposed to avoid the Member States as the gatekeepers responsible for the implementation of directives. Therefore, it would appear that the scope of the implementing obligations which should be carried on by the Member States is also reduced, which may be proved by the relatively low number of acts which should be implemented in a given year, which is provided by the Figure 3:

*Figure 3: Acts which shall be transposed 2006-2016, source: EUR-Lex database.*

The average number of acts, which shall be transposed into national legislation within the last ten years, was 91 per year. However, we may observe that there are specific periods, in which that number was progressively increasing. The first such period was observed between 2006 and 2007 and the second between 2009-2012. The second period may be explained by the immense legislative activity which was undertaken in order to implement the Lisbon Treaty. Those acts were adopted one or two years before the Treaty’s entry into force (01.12.2009) and their transposition deadline
expired in 2010-2011. On average, the number of the acts to be transposed is relatively low in comparison not only with the number of the regulations and decisions but even the number of the adopted directives.

Due to the possible transposition delays, the EU institutions are more likely to use regulations and decisions as the key regulatory tools. They are less vulnerable to the risk of fragmentation of the common market (AG opinion in case C-298/05, ECLI:EU:C:2007:197, point 117). Regulations, even if requiring some additional legislative activity, minimize the EU law fragmentation, which may be caused by the incorrect or delayed transposition (Král 2008: 250). This is due to their direct applicability, which allows omitting time-consuming, and open for various stakeholders, implementation process.

**Obligations imposed on the Member States**

Nevertheless, these tendencies are based only on the quantitative findings. Thus, this may not be proof that the implementation of directives has become a less important task. Even the case of one directive’s non-implementation may cause several market distortions. As was stated by the Advocate General L.A. Geelhoed: “if a Member State does not fulfil its Community obligations where others do, this affects the uniform application of the Community measure involved, reduces its effectiveness and undermines the attainment of the result it seeks to achieve. It also distorts the conditions under which market participants in various parts of the Community operate and disturbs the balance of rights and obligations of the Member States under the Treaty” (AG opinion in case C-304/02, ECLI:EU:C:2004:274, point 8). The organization of the transposition process is left to the Member States.

The EU law defines only non-extensive requirements to the national implementing measures – unquestionable binding force, precision and clarity requirements in order to satisfy the need for legal certainty (case C-427/07 Commission v Ireland, ECLI:EU:C:2009:457, points 54-55). Thus, the Member States are granted wide discretion in choosing an appropriate form of the legal act, which should transpose the directive and in the choice of the transposition methods, which may be used in drafting national implementing measures. Only incidentally has the CJEU limited that discretion by stating that the transposition with general clauses does not meet clarity and precision criteria (case C-530/11 Commission v Unit-
ed Kingdom, ECLI:EU:C:2014:67, point 56). It was also stated by the Advocate General Ch. Stix-Hackl that: “to transpose a directive a national provision must in itself be comprehensible and sufficiently clear and precise in terms of legal certainty. Thus, where it is possible to interpret a provision only by reference to Community law as developed by the Court, the requisite legal certainty is not achieved” (AG opinion in case C-441/02, EU:C:2005:337, point 75). The reference in this case was made to the provisions of the primary law. The AG’s opinion also indicates that the reference to the secondary law in national implementing acts may raise some doubts as being non-compliant with the treaty. The CJEU did not directly rule about the references made in national implementing measures and it is rather a common practice applied by the Member States, so there are raised voices that it is an admissible method of implementation (Král 2016: 225). However, this practice should be omitted as causing additional concerns about the legal certainty and direct applicability of the implementing measures, which may arise for example if direct reference is made to the directive or to the regulation, which is referring to the directive (case C-37/06 Viamex Agrar Handel and ZVK, ECLI:EU:C:2008:18).

Having said that, it should be noted that there is no one silver bullet solution addressing the implementation of all directives, but the principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to EU law rules in such a way as to enable the persons concerned, by such measures, to ascertain the scope of their rights and obligations in the particular area governed by EU law (case C-29/14 Commission v Poland, ECLI:EU:C:2015:379, point 37). As far as it is beyond the scope of the EU law to determine the precise rules concerning how the directives should be implemented, Member States take the full responsibility on the timely and correct transposition of the directives.

However, the Advocate General L. A. Geelhoed has provided some theoretical considerations on how the implementation process may be understood in more conceptual way. In his opinion to the famous Irish Waste case (case C-494/01 Commission v Ireland, ECLI:EU:C:2005:250) he has precisely described what the implementation of the EU law means.

L. A. Geelhoed started with the division of the implementation process to the transposition phase and the operational phase. The transposition phase is maintained through the legislative activity, which is done by the adopting national implementing acts. The adoption of the relevant national provisions also requires adequate resources, which are provided by the organisational aspect of that activity (i.a. the administrative body within the
government responsible for the transposition process coordination, parliament’s legislative office). As far as normative and organisational aspects are essentially interlinked they both constitute the transposition phase. The sole effect of the transposition phase could be seen in terms of the numerous acts and secondary measures as being a “paper wall” erected in order to make directive’s norms and aims binding upon individuals. However, this may not be the end of the correct implementation process. The achievement of the aims provided in the directive depends on the operational phase, which is provided by the competent authorities and courts responsible for the application of the national implementing measures (AG opinion in case C-494/01, EU:C:2004:546, points 23-30). The Algorithm 1 refers to the described above implementation scheme.

Algorithm 1: General requirements of proper implementation according to the L.A. Geelhoed

The abovementioned conceptual scheme is a rather theoretical framework. Depending on the given directive, Member States may apply divergent solutions. Sometimes, the operational phase is not dependent on the prior transposition phase, thus these different phases may be conducted in a parallel way. This may be the case when the directive imposes on the Member States several reporting obligations or obliges the undertaking of non-regulatory activity (e.g. by issuing an action plan). However, even the consistent interpretation or even the direct effect provided by national authorities may not exempt Member States from conducting the transposition phase if it is required by the directive itself (case C-507/04 Commission v Austria, ECLI:EU:C:2007:427 point 162). Therefore, the transposition phase may not be omitted at all.

The operational phase is predominantly dedicated to the national implementing measures – acts and national regulations or orders adopted in or-
der to implement the particular directive. But, as far as the effectiveness of
the EU law may be dependent on the comprehensive application of the na-
tional provisions which are not directly dedicated to the transposition of
the directive, the scope of the operational phase may be widened to the
other legal acts. As was stated by the CJEU: “not only the national provi-
sions specifically intended to transpose a directive but also, from the date
of that directive’s entry into force, the pre-existing national provisions ca-
pable of ensuring that the national law is consistent with it must be consid-
ered to fall within the scope of that directive” (case C-2/10 Azienda Agro-
Zootecnica, ECLI:EU:C:2011:502 point 70). To ensure that the effective-
ness of the operational phase is achieved, it is necessary to apply a nation-
al implementing measure in such a way as to achieve the result sought by
the directive concerned (joined cases C 378/07 to C 380/07 Karampou-
sanos and Michopoulos, ECLI:EU:C:2007:675 point 194).

Timely and correct transposition of directives leads towards the greater
coherence of the legal orders of the Member States – even if the preferred
transposition method may result in different legislative techniques, the
normative meaning of the numerous national implementing measures
should lead to the same aim. Therefore, any obstacles which could be met
during the transposition of the EU directives infringes the legal coherence
of the European legal order. The late and incorrect transposition especially
results in fragmentation of the internal market7. As it was indicated by the
European Parliament: “timely and correct transposition and implementa-
tion of internal market legislation is a crucial prerequisite for the success
of the internal market”8. It should be also stressed that Member States are
conducting ‘regulatory competition’ through the EU legislation (Talus
2014:178). Thus, some of them are not always fully aware of those bene-
fits which are associated with the particular piece of the EU legislation –
especially may not be anxious to comply with legislation which is affect-
ing a given sector of the national economy.

7 Commission Recommendation of 12 July 2004 on the transposition into national
8 Internal market scoreboard European Parliament resolution of 22 May 2012 on the
Transposition delay and compliance deficit

The first main reason leading towards fragmentation instead of the progressing integration, is transposition delay. Transposition delays are often described in terms of numerous negative effects i.a. costs for industry\(^9\) or legal uncertainty\(^{10}\). Transposition delays are one of the major drawbacks of legislation by directives. However, this obstacle to the full effectiveness of the EU legislation appears to be a natural result of the so called “slow march of the European legislation” (Azzi 2000: 56). Transposition delays are very well recognised from the beginning of the European integration, in the 1970s and 80s nearly one third of the total number of directives were not timely implemented (M. Haverland, M. Romeijn 2007: 757-778).

Contrary to the commonly shared opinion, the transposition process is not finished at the date of the adoption of the act, the aim of which is to transpose the directive. The full transposition process requires not only adoption of the basic act but its entry into force as well as the entry into force of all national implementing measures (adopted by the parliament or by the government itself). Thus, the expiry of the transposition deadline is not meant to define the time in which the national implementing measures should be adopted but the milestone to entry into force of all implementing measures (case C-151/12 Commission v Spain, ECLI:EU:C:2013:690 point 40). It may mean that the real transposition delay is much greater than might be assumed from the relatively low transposition deficit records, which are referring to the gap between the number of EU directives and those transposed by Member States\(^{11}\).

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The level of transposition deficit is the subject of politically concluded targets. In 2007 the European Council set out its priority to decrease the transposition deficit up to 1%\textsuperscript{12}. The corresponding transposition deficit for overdue directives (exceeding a 2 year delay) should be lowered to a “zero tolerance” target\textsuperscript{13}. In the time of the lowest transposition deficit ever recorded (November 2014) – when implementing measures were not notified only for 0.5% – 0.7% of the single market directives, the Commission has proposed to lower the transposition deficit target to 0.5%\textsuperscript{14}. It should be noted that these targets do not diminish the duty to transpose every particular directive. Political aims associated with the transposition deficit do not undermine legal obligations, which are following from the EU legislation. The main aim of the transposition deficit is to give a statistical overview on how Member States are performing with their obligations. The latest results presented by the European Commission show the slight increase of the transposition deficit (up to 1.5% in November 2016), after several reports, in which the transposition deficit was recorded at the relatively low range or even below the 1% politically agreed target.

The transposition deficit does not entirely show how long the transposition delays are. Indeed, the Single Market Scoreboard shows also the transposition delays measured in months and the number of long overdue directives, which have been delayed for two years or more, but the method of scoring deficit and potential delays is simplified to the moment of notification to the European Commission the first implementing measure concerning the given directive. Thus, the Commission’s database may not recognise the partially conducted transposition, which means that the Member States are transposing a given directive by numerous acts, not by just the one single legislative measure. This means that even if only the first transposition measure is adopted (and possibly has entered into force) before the transposition deadline, they are crossed off the list of directives to be scored as not being transposed.

To avoid the problem of the mass notification of the national implementing measures, which are not in fact designed to transpose directives, there was introduced the second factor such as the compliance deficit,

\textsuperscript{12} 7224/1/07, Council of the European Union Brussels European Council Conclusions 8/9 March 2007 Presidency Conclusions, paragraph 9.
\textsuperscript{13} Presidency Conclusions Barcelona European Council 15 and 16 March 2002, paragraph 16.
\textsuperscript{14} European Commission, Internal Market Scoreboard 26, February 2013, p. 7.
which refers to the number of incorrectly transposed directives. The so-called “compliance deficit” is measured on the basis of the launched infringement proceedings. Why is this misleading? Infringement proceedings are semi-legal and semi-political procedures (Steunenberg 2010: 362–366, S. Andersen 2012: 25). Therefore, the non-compliance with the obligations following from the EU law does not always lead towards the opening of a formal case. Most of them are solved at the early informal stage, which precedes the formal application of the Article 258 TFEU. Even if several Member States are not compliant with the same directive – depending on the informal stage of the proceeding, the EC may decide to launch the administrative phase initiated by the letter of the formal notice to the some of the non-compliant Member States. The EC is given a wide discretion on the subject of initiating and conducting the infringement proceeding (case C-423/07 Commission v Spain, ECLI:EU:C:2010:211, point 78). Therefore, the compliance deficit factor shows only to what extent the EC was willing to open a formal case against the given Member State. The average compliance deficit factor has reached 0.7% in 2016, which may be seen as a proof of the outstanding performance or as the indication of the new Commission’s policy not to open formal proceedings if there is a possibility to find the best solution in the informal phase (Smith 2016: 51). The comprehensive overlook for the latest Single Market Scoreboard records of November 2016 is provided by the Figure 4.
Figure 4: Average transposition delay (months), compliance deficit and transposition deficit for the EU28 in November 2016, source: Single Market Scoreboard
Member States with the highest transposition deficit in 2016 were Portugal, Cyprus, Spain, Belgium, Luxembourg, Croatia, Finland, Romania and Ireland. It would be assumed that those Member States also would face the highest compliance deficit. It may be assumed that if the directives are not timely transposed, the Member States concerned also are not willing to comply with the European acquis, which should be revealed by the corresponding compliance deficit. However, contrary to the above-mentioned assumptions the Member States concerned as the transposition laggards have reached on average compliance deficit. On the other hand, some Member States with a relatively high compliance deficit (Poland, France, Germany) have reached on average transposition deficit.

This may mean that Member States, which tend to maintain a relatively low transposition deficit have the additional problem with the conformity check which may result in the increased number of the infringement proceedings. The third factor – average transposition delay does not reflect any correlation with the transposition deficit and the compliance deficit. The above-mentioned indicators depict that it is not easy to identify one group of Member States which may be classified as ultimate “transposition laggards”. All Member States (except rare exceptions) are facing some implementation problems identified in terms of compliance deficit, transposition deficit or transposition delay.

Moreover, transposition deficit and compliance deficit are depicting only a percentage of the non-transposed or incorrectly transposed directives in relation to the total number of single market directives, which should have been implemented. This means that not all directives, but only those which are dedicated to regulate the functioning of the internal market and the broad spectrum of the supporting policies\textsuperscript{15}. And even this relatively low percentage may cover a significant number of the directives.

The one very interesting, but unfortunately also abandoned nowadays, indicator is the fragmentation factor, which was developed to record of the percentage of the outstanding directives which one or more Member States have failed to transpose with the consequence that the Internal Market is not a reality in the areas covered by those directives\textsuperscript{16}. Although this indicator was last published in 2011, with the result of 6% of Internal Market directives as not having the full effect in all Member States, it may be

\textsuperscript{15} The latest list of the single market directives was updated in 2015 and is available at: http://ec.europa.eu.

\textsuperscript{16} Internal Market Scoreboard, 18/2208, p. 14.
useful to conclude which directives have caused the most implementation problems and in which areas there is a serious risk of internal market fragmentation.

According to the Commission’s registry the transposition deadline has expired within 2011-2015 period for 223 internal market directives. In nearly one third of those directives (73 cases) the Commission has issued a total number of 336 reasoned opinions, which were addressed to 28 Member States\textsuperscript{17}. The exact number of the delivered reasoned opinions per Member State (2011-2015) and the number of reasoned opinions issued per internal market directive (2011-2015) is depicted on the Figure 5 and the Figure 6.

\footnote{17 Based on the information provided by the European Commission by the press releases. For the research purposes there was counted the first reasoned opinion addressed to the Member State concerned.}
Numbers depicted on the Figure 5 and Figure 6 show that the fragmentation of the internal market, which is the result of late and incorrect transposition, is a mere fact. Some of the Member States are regularly facing transposition challenges, which is revealed by the relatively high number of reasoned opinions addressed to Poland (26), Portugal (26), Cyprus (23), Luxembourg (23), Romania (19), Belgium (18), Italy (18) and Finland (15). Moreover, some of the directives causes serious implementation challenges to the vast majority of the Member States. The most unimple-
mented directive was Energy Efficiency Directive\textsuperscript{18}, which has caused several implementation problems in nearly all Member States. Serious implementation problems have occurred also in other energy-related cases (Internal Market in Electricity Directive\textsuperscript{19} and Energy Performance of Buildings Directive\textsuperscript{20}). Over a dozen Member States faced infringement proceedings and had to respond to reasoned opinions concerning the implementation of the Patients’ Rights Directive\textsuperscript{21}.

For only internal market directives with transposition deadline in 2015, 85\% of the Member States at least faced transposition problems, which was shown by the fact that the Commission was forced to launch the infringement proceeding and issue a reasoned opinion. The reasoned opinion is perceived as the serious stage of the procedure and the last moment before the referral to the court to find an appropriate solution without engaging the CJEU’s authority (case C-535/07 Commission v Austria, ECLI:EU:C:2010:602, point 50).

Moreover, there is no good explanation as to why some Member States do not comply with the EU law – every directive is a different case. Combination of the available statistics with the coordination schemes relating to the EU issues applied in a given Member State does not provide satisfactory results. There are recognised four main EU matters coordination models, which are a combination of the two main factors: the type of coordination of the EU matters within the government (centralised v decentralised) and the scope of the EU related issues, which are within the political agenda of the given Member State (comprehensive coordination ambition v selective coordinating ambition). On that basis there are distinguished the following basic coordination types: 1) comprehensive central-

\begin{itemize}
\end{itemize}
izers\textsuperscript{22}; 2) comprehensive decentralized\textsuperscript{23}; 3) selective centralizers\textsuperscript{24}; and 4) selective decentralized\textsuperscript{25} (Kassim 2003: 90). This typology was later applied to the 25 EU Member States (L. Gärtner, J. Hörner, L. Obholzer 2011: 96).

To find out if these coordination types have influence on the transposition deficit we should compare average transposition deficit for these Member States in given categories – the result is presented on the Figure 7.

**Figure 7: Average transposition deficit and average compliance deficit with respect to the type of coordination of the EU matters within the government on the basis of the November 2016 Single Market Scoreboard data**

![Graph showing average transposition deficit and average compliance deficit for different coordination types.]  

<table>
<thead>
<tr>
<th>Coordination Type</th>
<th>Average Transposition Deficit</th>
<th>Average Compliance Deficit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive Centralizers</td>
<td>1.20%</td>
<td>0.68%</td>
</tr>
<tr>
<td>Comprehensive Decentralized</td>
<td>1.23%</td>
<td>0.60%</td>
</tr>
<tr>
<td>Selective Centralizers</td>
<td>2.03%</td>
<td>0.60%</td>
</tr>
<tr>
<td>Selective Decentralized</td>
<td>1.95%</td>
<td>0.60%</td>
</tr>
</tbody>
</table>

As we can find out on the basis of this combination the comprehensive centralizers are facing with the highest average level of compliance deficit, but at the same time they can deliver the lowest average transposition deficit. The next lowest transposition deficit was delivered also by the Member States with comprehensive decentralized coordination type, but in comparison with comprehensive centralizers, with the slightly lower average compliance deficit. The highest transposition deficit was recorded in

\textsuperscript{22} France, United Kingdom, Poland, Sweden, Denmark, Lithuania, Latvia.
\textsuperscript{23} Slovenia, Hungary, Greece, Italy, Holland, Austria, Czech Republic, Germany, Belgium, Slovakia.
\textsuperscript{24} Spain, Portugal, Malta, Ireland.
\textsuperscript{25} Bulgaria, Romania, Cyprus, Estonia.
case of selective centralizers and the Member States with a selective decentralised coordination model. These records prove the fact that the Member States, which are covering within their interest all types of EU policy, are more efficient in transposing EU directives. It is understandable due to the fact that the administration of these Member States is also involved in all regulatory issues before an EU act is adopted. In the selective type of coordination the national administration has to deal with some directives only when it comes to the implementation phase.

Moreover, it appears that the centralisation of the EU coordination within the government does not improve the timeliness of the transposition. It may be explained by the fact that, even within the centralised model, the leading role is played by the ministers responsible for the given regulatory issue and the supervision eventually provided by the specialised unit within the government may not interfere with the particular tendencies. The second explanation of this tendency may be that not all governments are interested at all to transpose directives on time.

Concluding remarks – fragmentation as an unexpected result

Despite some of the profound Commission's efforts and political declarations made on several occasions by the EU intuitions and national governments alike, the incorrect and delayed transposition still remains a serious challenge. The already recorded transposition deficit remains the main source of the fragmentation tendencies. This risk is so imminent that the source of the transposition delays remains hidden and the quantitative findings may not always give conclusive answers. It should be stated that in the comprehensive model of the EU matters, coordination improves the overall compliance performance. The Commission minimises the risk of the single market fragmentation by choosing decisions and regulations instead of directives and improving its own enforcement tools. However, these actions are of the long-term nature and may not give timely solutions during ongoing legal disputes.

Thus, to prevent fragmentation that is caused by late and incorrect transposition of the EU directives, it is of crucial importance to extensively apply decentralised enforcement, which should be provided by the competent national authorities and the courts. The already developed judge-made instruments such as the direct effect, consistent interpretation and the autonomous EU law interpretation may provide effective remedies to
the fragmentation tendencies (AG opinion in case C-256/15 ECLI:EU:C:2016:619, point 90). However, the full application of these instruments requires the adaptation of the new approach to the interpretation of several national concepts such as the legality principle (Verhoeven 2011: 163). It is due to the fact that, with the precedence of the statutory legislation these judge-made decentralised enforcement tools may only be a temporary solution and may not absolve a Member State concerned from undertaking a legislative action to comply with the EU legislation.

The negative results of the delayed transposition are evident in all areas covered by the EU legislation, which requires the implementing measures necessary to ensure the effectiveness of the EU law within the national legal order. Even the fully-effective regulations (especially when they include the direct reference to the directives) are mostly dependent on the Member States’ legislation. Moreover, even if the timely transposition is ensured, there may be raised several compliance drawbacks caused by the incorrect transposition. This develops the ongoing legislation and implementation cycle, which leads from the integration provided by the measures adopted by the EU institutions to the fragmentation caused by the different transposition and implementation stage among the Member States. Therefore, the complete legal unification within the EU is the “Holy Grail” of the European integration, but nevertheless it is worth looking for it.

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Chapter 2: National versus European Component. in the European Union Product Conformity Regulation

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Key words: free movement of goods, EU internal market, technical harmonization, product conformity assessment, New Approach Directives, product certification, CE marking, Cassis de Dijon

Abstract

As rules adopted within the mixed EU-EU Member States competence area, product conformity regulations require the coordination of regulatory effort at the EU and national levels. This coordination should make it possible to achieve a balance between the effectiveness and efficiency of the EU internal market and the protection of interests enshrined in Article 36 TEU and in Cassis de Dijon judgment, because of their likely localized nature. This coordination is, in fact, about striking a proper balance between various interests having different scales, where every option yields a different cost/benefit ratio to different societal groups. These ratios in fact also define collateral of every regulatory policy choice located on a continuum of uniformity-fragmentation of the EU internal market.

Despite its unambitious goals and objectives, EU PCRs have failed to prevent fragmentation in many areas of the EU internal market. Especially, they should not be considered as being fully effective in preventing the Member States from using the Keck formula to indirectly restrict intra-EU trade by the means of national regulation concerning the use of specifically identified products and/or the use of those products in specifically identified contingencies. The EU PCR have not been effective in simultaneously ousting its own conformity marking systems in areas where it can be considered superfluous and, therefore, with no value added. Nor, they have been entirely satisfactory in restricting national practices of PCR application to divert and – as a result – to reduce the importance of national
technical requirements for buyers of products otherwise subjected to EU PCRs.

Introduction

Free movement in goods is subject to comprehensive Treaty regulation and much CJ jurisprudence. The topic has been extensively investigated in scientific research. Yet, it is important to notice that the EU secondary regulation concerning product conformity (i.e. the EU PCR) has not attracted the attention of academic legal circles commensurate to its economic significance. The core of the EU PCR is a harmonized at the UE level product conformity assessment (PCA) which represents an examination of whether substantive and procedural rules set forth in the EU PCR are met by a given manufacturer, and as a result that his/her products conform specific quality features enshrined in these regulations. In most cases, these rules (like their international counterparts) concern safety, but some of them concern other aspects of product quality, thus reflecting consumer preferences as well as hazards emerging as a result of technological advancement or increasing market integration (e.g. Mattli 2001:328-344).

In fact, the EU PCR (understood as a widely applicable regulatory format) had been triggered in the 80’s and later developed in response to the national penchant to regulate product technical requirements with the quite justified intention of providing an adequate level of protection of the legitimate interests of consumers and users (if they are not, in the same time, consumers) of industrial products. European Union PCR usually assumes the form of provisions which harmonize such national regulations and administrative practices which are intended to protect these essential interests. Thus, these provisions intend to provide some coordination of national market practices. The basic function of this kind of PCR is thus to lower thresholds of market access of goods traded within the EU and/or to make their essential parameters to be similar if not identical. An equally important (yet not so expressly vocalized by the EU legislator) motive for enacting them is to provide for a better level playing field which could make it possible for EU manufacturers to achieve more favourable economies of scale resulting from consequential to PCR reduction of diversity of mandatory features of products, and thus, to their more comprehensive standardization.
Irrespective of the exact motive of the EU PCR and their specific interplay with national regulations in a given EU Member State setting, the application of the resulting mixture of the EU and national regulations remains an area for “turf bargaining” between the EU and its Member States. More subtle forms of it seem to have escaped attention of researchers, so far.

This chapter is intended to give an account of these areas of divergence and to propose their interpretation in terms of the integration versus fragmentation of the EU internal market (in fact being the consequences of, respectively “communitarisation versus re-nationalisation”). For the sake of this chapter, the term “re-nationalisation” shall be construed as bringing a given area into the realm of national authorities and the national legal system logic. In contrast, “communitarisation” means locating a given area within the realm of EU competence (and its legal system logic) in a form of unification or – more likely – harmonization of technical requirements pertaining to products. The former term means eliminating any divergence in legal/institutional arrangements, whereas the notion “harmonization” shall mean eliminating divergence of such arrangements deemed (from the point of view of the, accepted at a given time, model of the EU internal market) excessive and/or undesired.

The challenges

In the non-harmonized area (i.e. in the area of product quality regulation, where no EU harmonizing rules apply), only the general TFEU rules pertaining to economic freedoms and their interpretation offered in the CJEU’s jurisprudence may constrain EU market-fragmentation. These rules have quite a strong impact on the national legal systems of the EU Member States and their administrative practices. Yet, in the first place, their enforcement requires that economic operators be aware of the relevant EU law, willing to have them applied and have the stamina to use the national courts to invoke them. Unfortunately, economic operators very often happen to be opportunistic in the sense that they do not want to get involved in any legal battle concerning their products sold or bought. In such cases, they abstain from entering into transactions which might give rise to any legal problem; instead, they seek assurances that the product they are about to buy conforms to national legal standards, irrespective of whether it is or it is not in line with the EU law. Only where the advan-
tages of buying a potentially “problematic” product significantly exceeds the cost of getting involved in a legal battle over its conformity with some allegedly illegal national requirements, these economic operators would be prone to accept such a deal and concomitant legal risk.

The so defined additional cost of customer opportunism is very often taken into account by manufacturers who may, therefore, design their manufacturing processes to conform to the perceived diversity of national requirements. As a result, they do not enjoy the full extent of economies of scale which might have otherwise arisen from the product standardization resulting from the EU internal market as intended by the EU legislator. This cost is spread evenly in the market as it is more likely to occur in manufacturing undertakings which produce compound products, such as e.g. those operating in portable machinery industries. The reason for this phenomenon is quite clear: those manufacturers have to meet standards applicable to machinery and to trucks on which this machinery is mounted. The resulting practice (which I investigated in Poland) is that those undertakings produce largely uniform machinery yet significantly diversified trucks used to make this machinery portable. This manufacturing behaviour could be attributed to the fact that quality standards applicable to machinery are subject to a more general, yet intensified, EU legislation the enforcement of which is assured at the national level in a fairly concentrated manner (by the notified PCA bodies) whereas trucks are subject to dispersed control: the ones performed by the police and/or road transportation authorities on each and every motorway within their jurisdiction.

According to the information provided for in preambles of respective pieces of EU technical legislation furnished to eliminate or abate technical barriers to infra-EU trade, such barriers result from the following national arrangements (all potentially falling within the ambit of Articles 28 and 30 TFEU) unless they are justified on the grounds of the public interest, are proportionate and non-discriminatory:

- technical specifications (concerning designation, form, size, weight, composition, presentation, labelling and packaging), which might also be applied in public procurement procedures as a well-established practice;
- requirement to use official languages in testing and certification procedures as well as in any aspect of the distribution of imported products,
requirement to obtain, prior to marketing of the product in a given EU Member State, an authorization without which the product could not be marketed on its territory.

In addition, also the conservatism of many groups of buyers (distributors, wholesalers, retailers and final customers) contribute to the EU market fragmentation. Thus, they may insist on additional quality (mostly safety-related) marking of products offered to them – being, in fact, a disguised form of notifying that the product traded has been manufactured in a specific Member State and/or that it conforms with the national technical requirements. Thus, in many markets, industrial products subject to the EU PCR bear multiple markings: the EU one (in most cases “CE” mark) and markings indicating conformity with some local standards set forth in national rules applicable in a way which could not contravene the EU law or in non-harmonized technical standards (which – by definition - are applicable on a facultative basis). Thus, if an electric cord is brought onto the market in Germany, it is likely to bear not only “CE” mark, but also German safety “SG” mark and indication of conformity with relevant German DIN technical standards.

It is important to note that the mere requirement of an authorization prior to the placing of a product on the market, as such, does not constitute a “technical rule” as it is normally construed within the EU PCR. Hence, a decision to exclude or remove a product from the market exclusively on the grounds that it does not have such an authorization should not constitute a decision relevant of this type of regulation. Instead, a decision to reject the application for the said authorization based on an applicable technical specification(s) falls within the realm of EU PCR.

“Re-nationalisation” in the realm of free movement of goods

Bearing in mind this basic information, it is possible to provide for a conceptualization of “re-nationalization” applicable in the context of the EU regulation concerning the free movement of goods. In theory, “re-nationalisation” can have distinctive procedural and substantive aspects. The former aspect might occur in a situation where a given EU regulation had been repealed without another, new, EU regulation replacing it. In such a
case, pursuant to the well-known ERTA principle\(^1\) (and Article 2(2) TFEU), Member States might be able to regulate afresh (at a national level) the area so abandoned by the EU legal system. As a result, procedural modification would have had a substantive affect in regulating a subject matter at a national level in a different way than the repealed EU regulation had done. Such a situation is not at all common in the EU as – for good reasons which will be explained later in this chapter – over many years, the Union has rather intensified its legislative intervention in the area of free movement of goods than reduced it.

Since the EU regulation concerning the free movement of goods does not seem to be subject to re-nationalisation understood to be just a replacement of EU rules by national rules of Member States, neither is the regulation which is the subject matter of this chapter, i.e. the PCR, “re-nationalized”.

Another conceivable form of “re-nationalisation” of the EU free movement of goods is substantive. It may be a consequence of an autonomous (of EU regulation) amendment of respective Member States’ laws, regulations, or administrative practices which give rise to the hindrances of access to their markets. PCR, considered to be mandatory rules pertaining to some attributes of their quality (i.e. most often their safety and reliability, but also some other aspects of their marketing or placing on the market, such as, for example, labelling) are definitely the subject of some “re-nationalisation” understood as an autonomous specie. Moreover, some divergence in this realm may result from diversity of institutional (substantive and procedural) arrangements pertaining to national authorities designated to assess product conformity.

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**Imperfections of the Cassis de Dijon formula**

In the judgment in the case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*\(^2\), the Court of Justice held that if a product which had been lawfully produced and marketed in one of the Member States, the sale of such a product might not be

\(^{1}\) Case 22-70 Commission of the European Communities v. Council of the European Communities (European Agreement on Road Transport), ECLI:EU:C:1971:32.

subject to a legal prohibition on the marketing. In addition, however, the Court formulated yet another rule, according to which:

“[i]n the absence of common rules, obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of a product must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer”.  

The Court position represented an important rectification (or even extension) of the provision of what is now Article 36 TFEU which specifies (in fairly general terms) exceptions to the prohibitions essential for free movement of goods set forth in Articles 34-35, i.e. the ones which concern quantitative restrictions on trade and measures having effect equivalent to such restrictions.

It is important to note that the Treaty regulation on these prohibitions is augmented by the prohibition of tax discrimination related to products enshrined in Article 110 TFEU. This provision requires that the Member States abstain from subjecting, directly or indirectly, products from other Member States to internal taxation of any kind “in excess of that imposed directly or indirectly on similar domestic products”.

An obvious intention of the Cassis de Dijon judgment was to provide for a rule of mutual recognition which would apply not so much to products but rather to relevant national regulations of respective EU Member States applicable to such products to make them safe and to protect whatever interests (also of economic nature) enshrined in domestic regulation and, at the same time, falling within the scope of the objectives of the EU set forth in Articles 2-3 TEU. According to this rule, importing Member States have to accept products legally made and/or marketed in any other Member States as meeting an adequate level of protection of these interests regardless of whether it is based on the EU or national law. The Court treats the regulatory discrepancies (being, in fact, barriers to trade, as the Cassis de Dijon judgment reckons) as acceptable collateral of this high-priority interest protection rule.

3 See para. 14, last sentence of the Cassis de Dijon judgment.
4 See the second sentence of the Cassis de Dijon judgment repeated verbatim in para. 8 second tiret of the judgment.
The Cassis de Dijon judgment, essentially in line with Article 36 TFEU, signals that the acceptability of the said collateral is not unlimited. National rules which pass-by the general prohibition of measures having equivalence to tariffs or quantitative restriction effects should be justified by interests listed exhaustively. In other words, the intention of the Treaty legislator and the CJ has always been that exemptions did not go too far: the CJ required them to be justified on the grounds of Article 36 (and any of its rectifications or extensions provided for in the CJ’s jurisprudence), implying that relevant general principles of EU law (especially the principle of proportionality) were applied, too (Tridimas 1999).

The Cassis de Dijon judgment indicates that an analytical framework of all the legislative arrangements and the Court of Justice jurisprudence can be interpreted as the ones which attempt to reconcile legitimate protected interests (other than free movement of goods) with this very economic freedom in a manner which strikes a balance between the macroeconomic and microeconomic effects i.e. respectively (a) between the EU market unification versus market fragmentation and (b) between product standardization (uniformisation) versus product country-specific adaptation (differentiation). Both balance counterweighing values are associated with different levels of achievable subsidiarity (obviously higher with fragmentation and adaptation) and different average product manufacturing costs tag (obviously lower with product uniformisation).

These trade-offs represent the basic rationale underlying the application of the proportionality principle to any exemption set forth in Article 36 TFEU whenever a Member State makes recourse to it. It is important to bear in mind that the principle of proportionality works here as a checking formula for any Member States’ interventions which concern the methods of production, safety of products and other aspects of the EU internal trade in products understood to fall within the ambit of competence which is shared by the European Union and its Member States. For this reason the rule requiring justification and proportionality of national exemption measures applies to any national product requirement, regardless of whether this requirement is adopted in the area where no EU regulation has been adopted yet and in the area where any relevant EU regulation already applies. Thus, the said justification applies not only to the already existing national rules but also to those which are to be legislated at the national level (i.e. having the form of legislative drafts).

Yet, despite its obvious merits and high potential as a source of effective legal argumentation which could be presented before national courts,
Cassis de Dijon has failed to produce an across-the-board liberalization of intra-EU trade. There are the following reasons for this failure:

- interpretative vagueness of the free movement of goods-concerned regulatory “safety valves” (i.e. the imperative requirements enshrined in Article 36 TFEU and in Cassis de Dijon), which makes the clauses concerned open to an overstretching interpretation or to overt abuse;
- incompleteness of the PCA EU regulation which does not cover all market sectors and all products thus paving the way to any national regulation complementing the protection system set forth at the EU level;
- divergence of the EU Member States with respect to PCA-relevant regulatory density resulting from the stand-still rule applicable to some products (e.g. breaking device of motor vehicles\(^5\));
- fragmentation of the market-surveillance system, in which every Member State designates its own network of bodies authorized to make the entire PCA system happen; under such a system, law-specified quality standards can be occasionally double-checked provided that the checks are in line with the principle of proportionality (e.g. Dauses 2014: 197-198).

The said stand-still rule means that at the moment of the entry into force of an applicable EU legal act, the Member States are able to maintain the non-harmonized (procedural or even substantive) elements of their PCA system until it would be subjected to some EU harmonization in the future. Such a rule, however, implies that the existing PCA systems can be preserved with no amendments and no new national PCA systems can be developed unless the EU adopts a harmonizing legal act on this issue.

Market fragmentation versus market harmonization in the Court of Justice jurisprudence

Cassis de Dijon judgment can be considered a rectification and concretization of a definition of measures having effect equivalent to quantitative restriction offered in an earlier CJ judgment in Dassonville. In this judgment the Court formulated a broad concept of national measures pro-

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hibited as restrictions of intra-Community trade having an effect equivalent to quantitative restrictions. These were construed to be:

“all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade”.\(^6\)

The potentially far-reaching ambit of this rule was significantly limited in the CJ judgment in *Keck*, where the Court upheld that measures used by the Member States to organize sales should not be prohibited in line with the reasoning presented in *Dassonville* as long as they do not produce discriminatory effect.\(^7\) In *Keck*, the Court of Justice held that:

“…the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue (…) applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged.”\(^8\)

Further, the CJ emphasized that:

“[s]uch legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.”\(^9\)

The Court held that restricting or prohibiting certain selling arrangements was not such as to hinder directly or indirectly, actually or potentially, infra-EU trade whenever they were not discriminatory *ad personam* and *ad rem*, i.e.:

- so long as those provisions applied to all relevant traders operating within the national territory (non-discrimination *ad personam*);
- so long as they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (non-discrimination *ad rem*).\(^10\)

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\(^{7}\) Joint cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard, ECR 1993, I-6097; ECLI:EU:C:1993:905.

\(^{8}\) Keck, para. 8.

\(^{9}\) Keck, para. 13.

\(^{10}\) Keck, para. 16.
According to the CJ, such rules pertaining to the organisation of sales, in fact, fall outside the scope of Article 36 TFUE. This negative classification implies that they are not hindrances to intra-Union trade; therefore, it makes no sense to classify them as justified or non-justified in the context of this Treaty provision. This means, however, that national measures pertaining to features of products should be considered different from the measures pertaining to the organisation of the markets in which these products are offered to potential buyers and sold, even if the two aspects (i.e. the substantive one – related to products and the procedural one – related to the organisation of markets) are interrelated. Hence, essential requirements of products subject to mutual recognition of standards should be considered substantive measures falling within the remit of Article 36 TFEU. The procedures used to verify whether such requirements have been met, fall also within this very provision of the Treaty, as the CJ’s jurisprudence quite consequently indicates.¹¹ Yet, it is important to note that the CJ applies restrictive interpretation to this Article.¹²

The national measures adopted under Article 36 TFEU have a discretionary nature. Yet, at the same time, they have to be in line with the proportionality principle. This principle requires that any national measure be assessed as to whether it does not exceed what is adequate and necessary to protect/realize a legitimate interest. Thus, in the context of EU law, identification of the interest at stake is always a necessary element of the application of this principle (however, see different opinion in: Gormley 2010:1593-94). Protection of such an interest should be the aim of national provisions to be assessed. In general theoretical terms, the proportionality assessment involves checking the following:

• legitimate ends, i.e. whether a measure pursues a legitimate aim,
• suitability, i.e. whether the measure is capable of achieving this aim,
• necessity, i.e. whether the measure impairs the right as little as possible,
• proportionality in its narrow sense, i.e. whether the measure represents a net gain when the reduction on enjoyment of rights is weighed against the level of realization of the aim (Klatt, Meister 2012: 8).

¹² E. g. 46/76 Bauhuis v. the Netherlands, 1977 ECR 5. (para 12-13).
The interest suitable to a limitation in the context of Article 36 is the enjoyment of the free movement of goods. Thus, Article 36 can be interpreted as the provision identifying higher (non-primarily-economic) value interests which might sometimes be at stake in a situation faced by national legislators and which require striking a balance with the enjoyment of free movement of goods which is essentially a bundle of economic rights. The counterweighing interests which may be taken into account include protection of health (also public health – as it is enshrined in the Cassis de Dijon judgment\(^\text{13}\)) and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property.

The requirement of Article 36 TFEU that measures adopted within its ambit do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States require additional comment, as especially the latter requirement is indeed perplexing. Non-arbitrariness in this context can be construed as having a good, explainable reason. Thus, the measure is non-arbitrary, if it has a good rationale rooted in Article 36 TFEU, presumably, within a plausible cause-effect model of public intervention. The requirement of not being “a disguised restriction” on intra-EU trade is even more vague and perplexing as it is quite difficult to plausibly classify a restriction for trade as being “disguised”, either intentionally or not in any case where this restriction pursues one of the goals enumerated in Article 36. It does not need to be said that the application of national rules within the scope of this Treaty provision always gives rise to doubts that the restriction created by them is “disguised”. Moreover, the very intention of the national legislator might, in some cases, be to use the need for the protection of interests enshrined in Article 36 as an excuse for imposing “disguised” restrictions on trade, yet without any significant negative consequences to vital interests of the counterparties involved in the free movement of goods. That is to say that “disguised” form of restriction under Article 36 TFEU does not create a viable autonomous criterion which could plausibly be used to evaluate whether a national measure is in line of the EU law. If at all, it is taken as such into account only if the intent to make it such becomes notorious or if the intent to protect legitimate interests (listed in Article 36) is grossly overshadowed by the intent to provide some non-legitimate advantages for one or more national indus-

\(^{13}\) Cassis de Dijon, para. 8.
tries.¹⁴ Even though, however, the Court made the argument of the breach of the principle of proportionality to be its first-rank argumentation.¹⁵ Thus, in practice, the principle of proportionality is an assessment anchor of the last resort, regardless of specific modalities presented by the CJ in its explanation of respective judgments which at all touch on the assessment of the Member States’ intensity of public intervention (which includes regulatory intervention).

The Keck judgment gave rise to recurring waves of national practices which have tested the acceptable limits of allowed measures which intended to organize trade, yet – at the same time – produced detrimental effects to intra-Union trade. The fundamental intention of these national practices can be interpreted as the attempts to explore an axiological tension created between the stringent approach offered in Dassonville and the more relaxed one set forth in Keck. This tension became paramount in cases where the CJ had to assess national rules pertaining to use of products, e.g. in a form of a ban to exercise certain functions of products or to make use of products in specified conditions. In such cases, the Court sought the identification of legitimate interests protected by the disputed national measures (which had to fall within the catalogue of interests enshrined in Article 36 TFEU); the CJ also investigated whether these measures conformed the principle of proportionality.

Nevertheless, there are cases adjudicated by the Court which represent a clear, yet indirect, defiance of the principle of mutual recognition: despite any certification of conformity pertaining to a product issued in any other Member State, this product cannot be used (as intended by the manufacturer in response to some demand) in a Member State imposing a limitation on the use of this product. In other words, in such an instance, the product is considered to be in conformity with some mutually respected standards of quality (especially safety) so that mutual recognition is fully

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¹⁴ E. g. 40/82 Commission v. United Kingdom (poultry meat and heat treated eggs), 1984 ECR 283 C-203/96 Chemische Afvalstoffen Dusseldorp BV and others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, 1998 ECR I-4075.

¹⁵ See e. g. Commission v. United Kingdom (poultry meat and heat treated eggs) para. 14 and 24; in the case Dusseldorp (see citation 13 above) the Court did not expressly mention the principle of proportionality, yet in practice, it applied this threshold by judging to what extent the environmental law principle of self-sufficiency and proximity of waste treatment applied to the national arrangements favouring national treatment of waste plants over its foreign counterparts.
extended to the certification authorities of the Member State from which the product has originated.

Yet, regardless, this product cannot be used as intended in the Member State of actual or intended destination because it has imposed a ban or a limitation of the use of this product. The re-nationalisation of the realm occurs here in a disguised manner, as the applicable national rule does not contradict EU rules on the free movement of goods directly, but indirectly: by making it impossible or (in the best case) quite difficult to use the products concerned as intended by their manufacturers. Discriminatory effects may in some instances be also disguised: if the consequential reduction of demand concerns only products imported from other EU Member States as distinguished from the domestic production.

Examples of such a practice are quite abundant in the CJ’s jurisprudence. For example, in the case Commission v. Italy (trailer-towing mopeds)\textsuperscript{16} the CJ dealt with the Italian prohibition of towing of trailers by mopeds registered in Italy. According to the national legislators, the prohibition was needed to increase road safety. In this context, the fact that the ban did not concern foreign-registered mopeds represented a perplexing element. In another case, Mickelsson\textsuperscript{17}, the Court considered the Swedish prohibition to drive personal watercraft on specifically identified (in the applicable national regulation) waters. The prohibition was justified by the Swedish authorities by the rigours of environmental protection. Another, especially interesting, case involved the Portuguese prohibition of sticking coloured foil on the windows of motor vehicles used for the transportation of persons or goods. This case was adjudicated by the Court in its judgment Commission v. Portugal (motor vehicles windows foil).\textsuperscript{18}

In all these cases, the CJ found that the applicable national measures had a detrimental effect on the national demand for products to which they pertained. Yet, the CJ considered these measures to be, conceivably, justified under Article 36 TFEU provided that they could be deemed proportional. At the end of the day, the Court found that the measures concerned in Commission v. Italy (trailer-towing mopeds) and in Commission v. Portugal (motor vehicles windows foil) did not meet the standards of propor-

\textsuperscript{16} Case C-110/06 Commission v. Italy (trailer-towing mopeds), ECR 2006, 519.
\textsuperscript{17} Case C-142/05 Åklagaren v. Percy Mickelsson and Joakim Roos, ECR 2009, I-4273; ECLI:EU:C:2009:336.
tionality. Only in *Mickelsson*, the CJ specified the case-specific proportionality criteria and left it to the national court to ascertain whether they have been met.

Irrespective of how adjudicated, the cases involving restrictions on the use of products already legally brought in the EU market invariably arise from a defiance of *Cassis de Dijon* (and *Dassonville*) basic formulae and indicate that the “safety valves” represented by the imperative requirements submitted in *Cassis de Dijon* (and Article 36 TFEU) and, in fact, *Keck*, may be used to reduce the reach of the free movement of goods as originally construed in the Treaty. The Court of Justice jurisprudence indicates that it may accept some limitations to the intra-Union trade especially in the area in which requirements of safety or other essential attributes of quality have not been harmonized at the EU level. In such instances, the Member States may prevent placement of products falling within the sphere of non-harmonized domestic regulation on their market, whenever they do not satisfy the conditions laid down for that purpose in the applicable national law. Nevertheless, the so-defined intrusion of the national law in the free movement of goods enshrined in the Treaty is admissible so far as it is still in line with general rules of the EU law, especially with its general principles.19 First and foremost, in such instances, the Member States must ensure the compliance with the principle of non-discrimination of the same or similar products originating from other EU Member States; in other words, they still have to guarantee free access of such products to the national market on an equal footing, unless there is a good reason to restrict that access and unless this restriction is proportional.20

It is of significant importance, that in the non-harmonized regulatory area, the Member States have a significant margin of discretion in choosing:

- the lexical priority of interests to be protected i.e. setting the priority of what interest is more important than other (Zamir, Medina 2010: 86-87);
- the intensity of protection;

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19 See e. g. case C-296/00 Prefetto Provincia di Cuneo v. Silvano Carbone, in his capacity as sole director of the company Expo Casa Manta Srl, ECR 2002, I-4657, ECLI:EU:C:2002:316, para. 31-32 or judgment in joint cases C-154/04 and 155/04 Alliance for Natural Health et al. v. Secretary of Health et al., ECR 2005 I-6451, ECLI:EU:C:2005:449, para. 95.
20 See e. g. Keck para. 16-17.
• the protective measures which would apply in a given situation (Gormley 2010: 1614-15).

The principle of proportionality requires that these Member States state reasons for the adoption of particular protection arrangement and that in the context of these reasons, they provide evidence that no other measure – less detrimental to the intra-EU trade – could achieve the same socially legitimized objective(s).\(^{21}\) Such evidence is needed because, in practice, the restriction involved often undermines yet another important principle of the free movement of goods: the principle of mutual recognition of the PCA bodies established and notified in respective EU Member States.

The CJ's recent judgment C-525/14 *Commission v. Czech Republic (hallmark recognition)*\(^{22}\) can provide an interesting illustration of the axiologically and materially complex nature of mutual recognition in PCR-related cases. In the judgment, the CJ found the Czech practice concerning refusal to recognize Dutch hallmarking made by adequately authorized body on products of precious metals (legally imported to the Netherlands from third countries which means duly assimilated in the EU) to be too restrictive. The Court found that double-hallmarking (i.e. affixing on the products imported to the Czech Republic from the Netherlands, Czech hallmarks in addition to the already affixed Dutch ones) resulting from the non-recognition represented an unjustified restriction of the free movement of goods which could not be defended also on the grounds of proportionality principle.\(^{23}\) Requiring double affixation contradicts the free movement of goods because it undermines their equal treatment on each EU Member State’s market. Most importantly, the Court dismissed the argument that the principle of mutual recognition is still fully respected by the national authorities because this principle applies only to the stage of placing the product on the market – as contrasted with its marketing. The CJ dismissed this argument stating that:

“[m]arketing in accordance with the law in force is one of the requirements of putting into free circulation, and thus a condition for obtaining the status of EU goods, not an additional stage necessary for the principle of mutual recognition to apply. Moreover, the Member State of putting into free circulation


\(^{22}\) Case C-525/14 *Commission v. Czech Republic (hallmark recognition)*, ECLI:EU:C:2016:714.

\(^{23}\) *Commission v. Czech Republic (hallmark recognition)*, para. 22.
Having said so, the CJ dismissed the Czech argumentation that the principle of mutual recognition requires that two consecutive stages be followed in a given context: (a) the putting of the goods into free circulation in the EU (under Article 29 TFEU applicable to imports from third countries) and (b) the marketing of the goods in the market of that Member State in accordance with its non-tariff legislation. According to the Czech argumentation, this sequence has not been followed, because the products concerned were just hallmarked in accordance with Dutch legislation, yet they have never been marketed in the Netherlands. The CJ found the last argument inessential for the establishment whether free movement of goods rules applies to such a product. Moreover, the Court upheld that hallmarks of different Member States should therefore be considered “intelligible” for customers. This essentially discounted another argument of the Czech authorities that the affixing of an additional Czech hallmark on the products made of precious metals is the only viable means by which the Czech Republic can monitor the entry into the EU market of goods hallmarked in third countries and, protect local customers. Also the argument of the French intervention was dismissed. According to this argumentation, the principle of mutual recognition should not be applied to hallmarking of precious metals as hallmarking represents a “regalian” (as the Court calls it) prerogative, i. e. the prerogative inherently attributed to the state. The function of this prerogative is to guarantee fineness of precious metals to anyone involved in trading. As such, hallmarking should allegedly be performed only on the territory of the Member State to which such goods have been imported. Double hallmarking, therefore, should not be considered a measure restricting trade.

The CJ ruling in the case Commission v. Czech Republic (hallmark recognition) reveals again the CJ penchant to adopt restrictive interpretation of the exemptions forming the catalogue of admissible imperative requirements. It is also indicative of how the CJ sometimes construes economic reality for the sake of its legal reasoning. In this particular case, in paragraph 26, the Court held that hallmarks of different Member States

should be considered “intelligible” for customers to realize the consumer-
protective function of hallmarking. Such a statement is either an unverifi-
able supposition or a proposal for action (to make diverse hallmarking “in-
telligible”), but cannot be considered an objective statement about the re-
ality. Thus, it is analogous to the predicate of “being lawfully produced
and marketed” in an EU Member State formulated in Cassis de Dijon. In
this case, too, the predicate can be fully meaningful for the competent
state authorities, but may have no pragmatic value for customers whatso-
ever: they can be as “illiterate” to foreign hallmarking practices or regula-
tory regime of production or marketing of a given product as they had
been before the CJ judgment. And it is them who make the purchasing de-
cisions. Whenever they do not enter into a transaction for a foreign prod-
uct because of lack of, so badly needed by the CJ (and so desperately pos-
tulated by it), “intelligibility” of, in fact PCR rules, the EU internal market
will not be made in practice.

EU harmonizing measures versus national discretion in PCA

In order to eliminate market fragmentation arising from the legislative ac-
tivity of the EU Member States, the EU institutions have stubbornly pur-
sued harmonization of rules pertaining to the essential features of products
marketed in the EU and to many aspects of marketing. These are the
“common rules” to which the Court of Justice had referred in its Cassis de
Dijon judgment.

Moreover, the EU legal system was augmented with some horizontal
legislation which made the national product-related decision-making (and
the resulting national rules) more transparent to the European Commission
and all the EU Member States, irrespective of the national jurisdiction in
which new national regulations originate. Most importantly, this horizon-
tal legislation includes:

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The Directive 2015/1535/EC imposes on the Member States an obligation to notify to the Commission and other Member States of any national draft of technical regulation concerning any *de iure* and *de facto* mandatory requirements pertaining to products which is meant to be applicable in the non-harmonized (i.e. not subject to the harmonizing EU law) area. The notification so required should include an explanation of the grounds which make the enactment of that specific national regulation necessary.

The most important function of Regulation No. 764/2008/EC is to ensure that the principle of mutual recognition is correctly applied in individual cases to specific products subjected to any national regulation concerning their features (i.e., in other words, to mandatory requirements). Most importantly, the Regulation imposes an obligation on competent authorities of respective EU Member States to indicate the technical or scientific reasons for any national court or administrative decision which prohibits or restricts the free (i.e. in line with Articles 28 and 30 TFEU) marketing of any product in its form presented by importers or distributors. It quite interesting to note that pursuant to the Regulation No. 754/2008/EC, the relevant authorities of the Member States are not obliged, in the context of this Regulation, to justify the restricting technical rule(s) itself. They are, rather, required to justify the possible application of the disputable technical rule to a product lawfully marketed in another Member State.

In the context of Regulation No. 764/2008/EC another piece of EU legislation, namely Regulation (EC) No 765/2008 is quite important as it sets forth the material basis for mutual recognition of all the essential out-

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comes of the product conformity assessment authorities, i.e. of their cert-
tificates issued within the framework of the EU system conveyed in the
PCR. Within the accreditation framework established under Regulation
No. 764/2008/EC, all these authorities must show their technical compe-
tence and independence from entities seeking product conformity assess-
ment of them, which means that they are fit to perform the so called
“third-party” (i.e. independent of the examined undertaking and unbiased)
product conformity examination and certification.

Regardless of this far-reaching harmonization at the EU level concern-
ing substantive and procedural PCR-related matters, Member States have
retained a significant deal of discretion in shaping their product conformi-
sity system. Depending on the intensity of the EU intervention in a given
area, this discretion can be limited or quite broad.

Having said that, it is quite essential to note that in the EU legal system,
there are two types of directives harmonizing technical requirements of
products and setting forth the procedural framework of the PCA applica-
table to them: the so called “old” approach directives and the New Ap-
proach Directives (NADs) introduced, as a legislative solution, in 1985,
within the Single European Market programme. These legal instruments
differ with regard to the legislative method they employ. The “old” direc-
tives pertain to narrowly defined products (often being just components/
spare parts of a final product) and set forth relevant technical requirements
in a detailed fashion. In contrast, NADs concern generically defined
groups of products (such as e. g. machinery, recreational crafts, high pres-
sure containers) and involves a fairly standardized legislative technique
which apply a uniform PCA approach. Thus NADs usually set forth:

• common technical competence requirements for national authorities
designed to check product conformity (with the technical requirements
specified) and specifying the limits of their intervention in this realm;
• common technical quality reference system intended to cover the com-
plete production and distribution value chain pertaining to the regulat-
ed (generically defined) group of products;
• uniform definition of all the methods which can be used to assess prod-
uct conformity, differing with regard to the required procedural trans-
parency, assessment-related technical competence, and credibility level
of the resulting check – with the difference in the stringency of these
requirements corresponding to the risks associated with the product to
which any piece of EU legislation pertains.
In other words, the rules applicable to various products differ not only in terms of their subject matter, but – which I consider to be much more important - also in terms of the scale and scope of their regulatory remit. At one extreme of the scale and scope of the legal intervention continuum, there are rules which specify in detail some quality features of a narrowly defined product; at the other extreme of the continuum, applicable EU rules pertain to generally defined groups of products to which comprehensive requirements pertain. These comprehensive requirements took the form referred to as “essential requirements” in relevant EU regulation.

The new legislative technique employed in NADs was set forth in the Council Resolution 85/C/136/01 of 7 May 1985 on the new approach to technical harmonization and standardisation. This act was later augmented by yet another Council Resolution (90/C 10/01) of 21 December 1989 on a global approach to conformity assessment the for the various phases of the conformity assessment procedures which are intended to be used in the technical harmonization directives. The latter piece of legislation was significantly amended by virtue of the Council Decision of 22 July 1993 concerning the modules for the various phases of the conformity assessment procedures and the rules for the affixing and use of the “CE” conformity marking, which are intended to be used in the technical harmonization directives. All these acts set forth principles of a fairly comprehensive EU PCA policy. The most important of them are as follows:

- the EU PCA pertaining to all the products covered by NADs should involve tests selected from a uniformly defined (at a systemic level) set of tests,
- the EU PCA should invoke ISO technical standards,
- the EU PCA policy should encourage Member States to create national technical accreditation systems, where the participating bodies established in one EU Member State will be able to share their experience and compare their own PCA practices with their counterparts operating in other EU Member States;
- the national PCA system should apply mutual recognition of product testing and certification;

29 OJ 1985, C 136/1.
30 OJ 1990, C10/1.
• respective EU Member States should pursue the elimination of any divergence in the quality of PCA technical infrastructure so that the results of PCA procedures applied throughout the Union would reflect the same technical competence level of testing and certification and, therefore, ensure equal credibility of their procedures and the resulting technical documentation.

The so promoted global approach to testing and certification of products in the EU is also characterized by an institutional solution meant to increase intelligibility of documentation resulting from PCA processes. EU legislators may introduce different regimes for certification of technical conformity, Depending on the legislator’s choice determined by his evaluation of risk associated with a given product; this conformity can be documented in:

• the producer’s own declaration based on the prescribed in the applicable law own assessment of the producer’s own assessment or an assessment performed by competent bodies of his choice (with whatever level of dependence of that producer);
• a certificate issued by an independent (of the producer or anyone interested in the distribution of the product concerned) testing laboratory;
• documentation of assessment raised by an independent testing laboratory.

Products which meet the prescribed essential requirements of applicable NADs can be marked with the European conformity marking "CE". This marking is meant to indicate that the product concerned conforms with all the essential requirements specified in a NAD applicable to it. In a deeper legal sense, that marking gives rise to the presumption of conformity applicable to the product which bears the “CE” sign; it also signals that the product has been subjected to testing in a form prescribed in the applicable NAD and, therefore, invites mutual recognition of the results of this testing. However, as has already been said, NADs do not exclude double checking provided that its scope and/or scale is/are in line with the principle of proportionality. Thus, if the double check indicates that the product with the “CE” marking, in fact, fails to meet the applicable essential requirements or that failure transpires because the product concerned has appeared to be defective.
An example of a NAD is Machinery Directive 2006/42/EC which applies to a broad range of products which are traded under the name of “machinery” (intended for civil use) generally meaning “an assembly, fitted with or intended to be fitted with a drive system other than directly applied human or animal effort, consisting of linked parts or components, at least one of which moves, and which are joined together for a specific application” (Article 2(a) of the MD). The MD applies as long as no other, more specific directive applies to hazards presented by a piece of what appears to be machinery (Article 3 MD). As a rule, the MD requires that only safe machinery is allowed to be brought to the EU market and put into use there. Such machinery has to conform with the quality requirements set forth in Annex I to the MD. If they do so, they can be marketed with a special EU-wide conformity marking “CE” and enjoy free movement. According to Article 7 MD, whenever a product bears this marking, it will enjoy a presumption of conformity with the applicable essential requirements.

A very important token of the MD (as with any other typical NAD) is that it indicates two manners in which conformity with essential requirements (and, as a result, presumption of conformity) can be achieved:

- in an substantive manner verified by conformity – i.e. by applying by manufacturers whatever quality assurance system considered by them apt to achieve conformity with these essential requirements;
- in a formal manner giving rise to the presumption of conformity – i.e. by applying by manufacturers harmonized (at the EU level) technical standard(s) identified (in the MD) as apt to achieve conformity with these essential requirements.

The MD (like any other NAD) relies on the principle of mutual recognition (which can be construed as a specific form of the principle of mutual trust). Specified in Article 6 of this directive obligation requires the Member States to allow free movement of products which comply with the essential requirements applicable by virtue of this act.

The MD (in Article 4) requires that the Member States take appropriate measures to prevent unsafe machinery from being marketed and/or put into service (which should be made evident by affixing CE marking to it).

The Member States are required to institute and appoint national competent authorities to monitor conformity of such machinery with essential requirements set forth in the MD (in its Annex I). The so appointed authorities’ tasks, organisation and powers should be established by the Member State concerned. The Member State should, however, notify the Commission and other Member States about this appointment and the relevant arrangements pertaining to the notified authority. Since the so notified bodies undertake conformity checks, the principle of mutual conformity applies, first and foremost, to them. Thus, intra-EU cooperation between them is quite important for the achievement of uniformity in the application of rules which, albeit set forth in the implementing national acts, originate in the MD. Article 10 MD, indeed, obliges Member States to ensure that these authorities cooperate with each other and with the Commission, transmit to each other the information necessary to enable this Directive to be applied uniformly and to share experience.

It is important to emphasize that most of the PCA-relevant “old” approach directives and NADs concern product safety and safety is the core interest protected by the regulatory framework they set up. Only a very limited number of such directives (e.g. the textile-nomenclature one, now replaced by the relevant Regulation)\(^\text{34}\) concern primarily the protection of economic interests of customers. Having the predominant importance of safety in the entire PCR, some pieces of general, horizontal regulation should be considered to complete the system of safety-assurance. These are:

- General Product Safety Directive (GPS), i.e. the Directive 2001/95/EC\(^\text{35}\) pertaining to all products, irrespective of their very nature, which can be bought or used by individuals in whatever regular situational context;
- General Food Safety Regulation (GFS), i.e. the Regulation No. 178/2002/EC on the safety of food products.\(^\text{36}\)


\(^{35}\) OJ 2002, L 11, p. 4.

Both legal acts require products placed on the EU market to be safe. The formulae for achieving this goal is quite peculiar for both, because of the specific scope of their application. Namely the two acts apply as long as no more specific EU rules regulate a given matter in a more precise manner. This implies that GPS and GFS are intended to simultaneously:

- fill out any gaps in the systemic assurance of safety provided for in any other the EU legal acts;
- harmonize the most important aspects of the general system of safety which might have otherwise been conceived independently by respective EU Member States, thus contributing badly to the fragmentation of the EU internal market.

Both GPS and GFS make a generous recourse to, harmonized at the EU level, technical standards as the primary source of (non-mandatory) guidelines for economic operators’ value chains (extending from the product design to the post-sales service, if applicable). All NADs, GPS and GFS are based on the principle that performance of any product safety-related function in line with such standards which shall be deemed to produce conformity. However, in the case where there are no harmonized legal rules or technical standards, GPS requires that the manufacturer of a given product shall present that his production performance is designed in such a way which assures a repetitive quality assurance/management process. At the same time, GFS requires that the quality management system (HAACCP) is up and running in the food production facilities.

However, neither GPS, nor GFS determine exact parameters of the national market-surveillance system. Thus, respective EU Member States enjoy institutional autonomy in designing their own relevant institutions and procedures provided that the solutions they have adopted are apt to meet the systemic goals set forth in these respective EU regulations. This means that even in a so densely regulated area, the national component plays an important role.

**Conclusions**

PCR is a mixed regulatory area in the EU. This means that in this realm, EU legal acts coincide with acts adopted by respective Member States of the Union. However, this coincidence is significantly coordinated as the national PCR legislation observes the ERTA principle: it concerns matters
not subjected to EU rules of technical harmonization or matters left to such rules to the Member States discretion in their implementation.

The resulting regulatory mixture is an obvious consequence of locating the area of the EU internal market in the realm of competences shared between the European Union and its Member States. Such a location of the regulatory remit is – to a great extent - justified by the principle of subsidiarity. In the particular area of the EU internal market it is construed to indicate a “proper” (i.e. adequate to the nature, scale and scope of emerging challenges) protection of significant enough interests which – because of diversified characteristics of respective national markets – may not replicate themselves in a uniform fashion in each and every national market. Thus, with a proper application of the “safety valve” formula of Article 36 TFUE (and its Cassis de Dijon rectification) within the limits set forth by the principle of proportionality, a fairly complete system of protection of vital interests of those involved in the intra-EU trade of goods has been developed.

The relative completeness of the emergent protection system can be achieved only when both national and EU rules apply in a coordinated manner; consequently to a classical concept of coordination (Thompson 1967: 55-56), it should provide for an adequate level playing field for:

• planning of protective legislation so that a model of effective and proportional regulatory impact of the protective measures is thus achieved,
• setting forth relevant standards,
• exchanging significant information between various levels of organisation of this system.

One of the evident, yet not so strongly exposed in research, motives of the EU PCR is, in fact, to provide for a uniformly structured and organized level playing field for the coordination of monitoring activities of national PCA authorities. In this context, an evident intention of the EU legislator is to increase the systemic consistency of the PCR, developed at the EU and national levels also by increasing of frequency and significance of interaction agenda among PCA notified bodies, i.e. the authorities designated by the Member States to perform third party (independent of manufacturers or distributors) product assessment functions.

It is quite important to make a remark that, historically, it is EU law which has intruded into the realm which was originally developed at the national level. Yet, it is equally correct to say that the EU law in this realm has had a tremendous gauging and development-inducing impact on na-
tional regulations and practices because it has motivated many Member States to increase the quality of protection and to make it more consistent, not only domestically, but also with regard to the intra-EU trade. Thus, the EU PCR indeed has been a very important element of the EU internal market programme which represented a strong PCR communitarisation agenda.

Technically speaking, in the PCR realm, EU rules are invariably intended to eliminate excessive diversity of protective requirements afforded in the relevant national regulations. Thus, from this perspective, their protective function (pertaining to such interests as those enshrined in Article 36 TFEU and the Cassis de Dijon judgment) can be interpreted as being of secondary importance. This can explain why the resulting regulatory framework, consisting of the EU and national elements, usually sets forth substantive protection standards, also including the technical competence of PCA authorities, yet it leaves the Member States with significant discretionary powers to decide upon the organizational and procedural arrangements pertaining to the application of these substantive rules.

Moreover, although based on the principle of mutual recognition, the resulting system allows double-checking of imported products already subjected to the EU PCA procedures in the country of their origin. This solution is meant to be a systemic “safety valve”, which provides the measure of the last resort protection of the highest lexical priority interests enumerated in Article 36 TFEU (i.e. life and health of humans, welfare of animals), yet at the same time, undermines the consistency and, above all, completeness of the EU PCR construed in a radical fashion.

The EU PCR has proven ineffective in preventing the Member States to use the Keck formula to indirectly restrict intra-EU trade by the means of national regulation concerning the use of specifically identified products and/or the use of those in specifically identified contingencies. It, rather, took the authority of the Court of Justice of the European Union to correct the problematic practices which were brought before it for adjudication and to adequately influence the national courts judicatory practice.

The EU PCR has not been effective in ousting simultaneous to its own national conformity marking systems. As a result, together with the marking designed in the PCRs, products placed on the EU market very often bear a national conformity marking. Such a phenomenon results from the facultative practice of “double-marking” as the products concerned must conform with the EU essential technical requirements and, therefore, can bear the EU PCR mark as well. The “double-marking” is evidently intend-
ed to provide purchasers of products with more assurance of conformity. On the other hand, such a practice contributes to fragmentation (re-nationalisation) of the EU market because it reinforces the apparent significance of national technical requirements which replicate the EU PCR ones or which assure redundant quality aspects of products or, alternatively, which concern important aspects, which should, with no undue delay, be taken into the remit of the a EU technical legislation – amended or entirely new.

The national rules applicable to products in regulatory areas which have not been subjected to the EU PCRs or in the areas where the EU PCRs have left the Member States with some discretion are justified whenever they meet the general EU requirements set forth in the relevant Treaty regulation on the free movement of goods and whenever they are proportional and non-discriminatory. Nevertheless, in many industries, the existence of such rules is detrimental as these rules contribute to fragmentation (re-nationalisation) of the EU market thus preventing the economic operators concerned from achieving more favourable economies of scale (achievable in a uniform market). This negative phenomenon permeates, especially, with respect to manufacturers of composite products as their risk of falling within the ambit of the non-harmonized national rule is significantly higher. Therefore, it is advisable to:

- increase the EU PCR regulatory effort to extend harmonization of technical requirements onto the areas still covered with national legislation,
- review the scope of discretion left to the Member States in the EU PCR to identify areas where this discretion does not properly reflect the principle of subsidiarity,
- review the scope of application of directives as the predominant EU PCR legal forms and consider the application of regulations unless there are good subsidiarity reasons not to regulate a given PCA aspect in this form.
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Chapter 3: National Regulations on Country of Origin and Place of Provenance Labelling – Renationalisation of European Food Law?

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Key words: food labelling, country of origin, place of origin, free movement of goods, consumer protection

Introduction

Since ancient times food production and marketing have been important for human relations. All societies have developed regulations concerning this basic human activity (Meulen van der, Velde van der, 2008: 41). Food has been regulated ever since antiquity (Barton Hutt, 1990: 17; Barton Hutt, Barton Hutt II, 1984: 3; Kowalczyk, 2014: 17). The main reason for the first regulations was food adulteration, which had taken place since food products had become subject of trade, with the most commonly adulterated products being processed foods such as wine, beer, bread and olive oil (Kowalczyk, 2014: 17). In the Middle Ages, different European countries adopted legal regulations regarding the quality and safety of eggs, cured meats, cheese, beer, wine and bread (MacMaolain, 2007: 3). As a result of growing food sales and the mass production of food, in the 19th and at the beginning of the 20th century modern regulations on food came into force. The industrialisation of food production, the development of international trade and globalisation processes and, in the European Union, mostly the emergence of a single market have made it more difficult to determine the origins of products. With a view to optimising their revenues, manufacturers of processed food have been increasingly concentrating

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1 This chapter was drawn up on the basis of the paper “Mandatory Indication of the Country of Origin and Place of Provenance – the End of a Single Food Market?” presented by the author at the 18th Scientific Conference of the Faculty of Law and Administration of the University of Warsaw entitled “Legal issues and challenges of the European Union”, Warsaw, 3-4 March 2017.
their production activities in large manufacturing facilities which – given the scale of their operations – have to use raw materials from outside the region where the facility is located. On the other hand, in order to compete successfully, smaller manufacturers also tend to use products offered at optimum price, often from distant parts of the world. At the same time, food business operators (FBO) very often use the information on the origin of the product as one of unique factors distinguishing their products from the ones of competing brands. This is also compounded by the fact that consumers are increasingly interested in the origin of the products they eat and drink.

The aim of this chapter is to present the solutions adopted in food law concerning the requirements regarding the indication the country of origin or place of provenance. Particular attention should be given to the tendency to complement EU law with national provisions, which now concern areas previously covered exclusively by EU law.

**Union food law – basic outline**

When considering legal solutions regarding country of origin and place of provenance labelling, the development of EU food law should be first discussed. Food law regulations have been adopted at the Community, and now Union, level from the earliest days of the European Economic Community. For the first several decades of existence of the EC, harmonisation had been achieved through the creation of common standards for individual food products (the so-called vertical harmonisation), including relevant standards and technical specifications, such as detailed description of composition and production methods (Korzycka-Iwanow, 2007: 38; Meulen van der, Velde van der, 2008: 229). Following the method of vertical harmonisation (the so-called recipe, compositional or technical standards legislation), standards for numerous products or product groups were established (MacMaolain, 2007: 4; Meulen van der, 2009: 314). However, due to disharmonised requirements of individual Member States concerning the composition of particular products and the huge number of goods to be regulated, the work on establishing common standards using the vertical method was slow and inefficient (Paliwoda, 1997: 42; Korzycka-Iwanow, 2007: 39; Meulen van der, 2009: 314, Meulen van der, Velde van der, 2008: 231). The driver for a shift from the vertical method (standard) to the horizontal one was the *Cassis de Dijon* judgment of 1979.
(Case C-120/78, Rewe-Zentral AG, ECLI:EU:C:1979:42), which established the mutual recognition principle (Meulen van der, Velde van der, 2008: 235). The aims of horizontal legislation were presented by the European Commission in 1985 in the Communication on the legislation for the implementation of a single Community market for foodstuffs (Communication from the Commission, 1985). Under horizontal harmonisation, instead of regulating each product separately, general issues regarding all foods or a vast group of such products were covered (Paliwoda, 1997: 43; Korzycka-Iwanow, 2007: 40). Under horizontal harmonisation, issues such as food labelling, food additives, official control of foodstuffs, hygiene of foodstuffs and frozen food processing methods were regulated. Both vertical and horizontal regulations issued at that time were primarily aimed at ensuring the free movement of food, while consumer and health protection played only a secondary role (Korzycka-Iwanow, 2007: 41). Already at that point criticism was voiced about overregulation, inconsistencies and non-transparent law.

As a result of increased risks to health and life of humans deriving from food and, most importantly, the BSE crisis (Bovine Spongiform Encephalopathy, the so-called mad cow disease), in the 1990s the work on a fundamental reform of food law: changing the market orientation towards ensuring safety was commenced (Meulen van der, Velde van der, 2008: 229; Meulen van der, 2009: 313, O’Rourke, 2001: 6, 95; Vos, 2000: 231). In 2000, the White Paper on food safety was adopted, a non-binding document outlining the measures which needed to be taken to raise food safety standards in order to ensure the best level of protection of public health (The White Paper 2000). On the basis of the assumptions outlined in the White Paper, the current Union provisions on food law, which now form a set of rules covering the entire food chain, have been adopted.

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2 BSE – bovine spongiform encephalopathy, the so-called mad cow disease. It is characterised by degeneration in the grey matter of the cerebral cortex. It was first identified in 1986 in Great Britain. Following single cases in the late 1980s, the disease started to spread rapidly amongst the bovine animal population, with a total of as many as 138,359 BSE cases in 1994. In 1988, meat-and-bone meal used in animal feed was recognised as a factor transmitting the disease and banned as animal feed in Great Britain. In 1996, the advisory committee of the British government announced a likely link between BSE and Creutzfeldt-Jakob disease, which occurs in people. For more information on the BSE crisis see J. Wakefield, BSE: a lesson in containment? Avoiding responsibility in the compensation action, European Law Review 2002, vol. 27, no 4, p. 427 and following.
Of crucial importance is, in particular, Regulation No 178/2002 adopted in 2002 (the General Food Law – GFL\textsuperscript{3}), containing the basic definitions (of food, food law, food business, risk analysis, placing on the market, retail, final consumer, etc.), setting goals and general principles of food law as well as establishing a specialised expert body – the European Food Safety Authority, which plays a crucial role in ensuring an appropriate level of food safety despite the fact that it has no executive authority and is only a consultative body.

Given the fact that the differences in the national provisions of individual Member States regarding food labelling may significantly reduce the free movement of goods, of vital importance for the development of EU food legislation is also Regulation No 1169/2011 dated 2011 on the provision of food information to consumers,\textsuperscript{4} which outlines the basic aims, principles and requirements as well as responsibilities regarding both labelling and other issues related to the provision of food information to consumers. The fact that the requirements concerning food labelling have been regulated at EU level since the beginning of the 1980s indicates the importance of that issue.\textsuperscript{5}

Apart from Regulation 1169/2011, which is horizontal and general, i.e. sets labelling requirements in relation to all kinds of foodstuffs, food labelling is regulated at EU level also in specific legislative instruments ap-


plying solely to specified foods (the so-called vertical regulations). Because of the vast number of EU regulations, the possibilities for the Member States to adopt national legislative texts concerning food labelling on the basis of the Treaty principle of the division of competences are reduced. However, EU legislation provides for the possibility of adopting domestic provisions regarding specific issues by the Member States, as long as the criteria laid down in Union law are met.

One of the many matters which are covered both by Regulation 1169/2011 and by specific legal instruments is country of origin and place of provenance labelling.

Basic concepts and importance of the information on the country of origin and place of provenance for consumers

First of all, it should be noted that in Regulation 1169/2011 two terms are used: “country of origin” and “place of provenance”. The notion of the country of origin has been clarified in the Union Customs Code and in principle it means the country where goods were wholly obtained or where they underwent their last substantial transformation (Article 60 of the Union Customs Code). The place of provenance has been defined in Regulation 1169/2011 as any place where a food is indicated to come from and that is not the “country of origin” (Article 1(2)(g) of Regulation No 1169/2011). The place of provenance may therefore mean the name of a region, locality, etc.

Regulations on country of origin and place of provenance labelling should in the first place take into account the expectations of consumers. In consumer research, the origin of the food is the fifth out of 11 most important aspects which influence purchasing decisions (Study, 2013: 10, Report, 2013: 8). In a consumer market study regarding the meat market, the information on the country of origin was indicated as the fourth key aspect consumers take into account when purchasing products containing meat (with 48% of consumers paying attention to that aspect), losing only to the use-by-date (68%), price per kilogram (67%) and price (67%) (Final Report 2012: 19). Other data show that the majority of EU citizens find it

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necessary to indicate the origin of milk sold as milk or used as a component in milk products (84%) (Report, 2015: 6). Moreover, the results of consumer research including more targeted testing of different kinds of processed meat products indicate that over 90% of respondents considered the indication of origin to be important (Report, 2013: 8). The research also covered the reasons why consumers were interested in the place of origin of food. The respondents indicated the following reasons: supporting domestic and local production (42.8% of respondents), food quality assurance (12.9% of respondents), environmental protection (12.8% of respondents) and ensuring food safety (10.8%), with the results varying from one Member State to another (Report, 2013: 6). Therefore, it follows from the research that consumers are interested in the origin of food products, especially meat and milk products, and the information on the country of origin or the place of provenance is a factor influencing purchasing decisions, although it is not as important as the price or ‘use by’ date.

**Horizontal regulation**

A principle underlying Regulation 1169/2011 is that information concerning food shall not be misleading and should be accurate, clear and easy to understand for the consumer (Article 7). These general requirements apply also to country of origin and place of provenance labelling (as it is possible to mislead the consumer about the country of origin and place of provenance). The regulation divides information displayed on food labels into two types: mandatory and voluntary. It presents a list of mandatory food information which must be included on the label and lays down detailed requirements for the application of that information. The information on the country of origin and place of provenance is regarded as mandatory only in specific cases defined in the regulation (Article (9)(1) (i) and Article 26(2)). Pursuant to the regulation, it can be concluded that the information on the country of origin or place of provenance is, as a rule, voluntary. However, the regulation provides for a number of exceptions, i.e. situations where the indication of the country of origin or place of provenance of a food is mandatory.

The cases when the indication of the country of origin or place of provenance is mandatory may be systematised and divided into the following types:
(1) general EU exceptions (i.e. situations where the obligation to indicate the country of origin or place of provenance concerns each type of food on EU territory – as provided for in Article 26 (2) (a) and in Article 26 (3) of Regulation 1169/2011);

(2) sectoral exceptions (i.e. situations where the obligation to indicate the country of origin or place of provenance concerns certain categories of food such as honey, fruit and vegetables, unprocessed fish, beef, pork, lamb, poultry);

(3) national exceptions (i.e. situations where the obligation to indicate the country of origin or place of provenance is laid down in national regulations of individual Member States based on Article 39 of Regulation 1169/2011).

**General EU exceptions**

It is obligatory to indicate the country of origin or place of provenance where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the foodstuff, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance (Article 26(2)(a)). This provision gives concrete form to the general rule under which food labelling shall not mislead the consumer (Carbonnelle, Cowper, Lim, Lotta, Tarr Oldfield, 2016: 473). The regulation adopted is, however, not clear on this issue. In order to conclude that it is mandatory to indicate the country of origin or place of provenance, it is necessary to first determine whether the absence of such information may mislead the consumer, which is very complicated.

It should be noted that in spite of the introduction of EU definitions of the country of origin and place of provenance (indicating – respectively – the country where a food was fully obtained or underwent the last substantial transformation or the place where a food is indicated to come from), consumers’ perception of the geographical origin of the product is more complex, which should be taken into account when assessing whether the absence of the information on the country of origin or place of provenance is likely to mislead the consumer. Consumers may regards information other than the information on the country where a food was manufactured or where raw materials come from as indication of the country of origin or place of provenance. For consumers, the bare information about the regis-
tered office of the manufacturer, the owner of the manufacturing plant or persons engaged in the production of a food (pasta sauce produced in Poland by a company with an Italian-sounding name or produced according to the recipe owned by a person with an Italian-sounding name may indicate Italy as the country of origin) may be sufficient to associate a food with a particular country of origin or place of provenance. In the definition of the place of provenance, the EU legislature has indicated that the name, business name or address of a food business operator displayed on the label do not constitute an indication of the country of origin or place of provenance of food within the meaning of Regulation 1169/2011 (Article 1(2)(g) of Regulation 1169/2011). Nevertheless, given the objective of the regulation (consumer protection) and the context in which the phrase has been used, it should be considered that the name, business name and address of a food business operator cannot be regarded in positive terms as the country of origin or place of provenance. Hence, where it is mandatory to indicate the country or origin or place of provenance, providing the above-mentioned information is not sufficient. This information, without being an indication of the country of origin or place of provenance in positive terms, may mislead the consumer as to the country of origin or place of provenance.

The consumer may also associate the information referring – even indirectly – to names of regions, localities or the country as a whole with the country of origin or place of provenance. This concerns primarily pictorial elements displayed on the label: flags, emblems and other elements unequivocally linked by consumers with the place of provenance (e.g. pasta produced in Poland with a label reminiscent of Italian symbols, such as the colours of the Italian flag or a drawing of the Coliseum, or potatoes produced in southern Poland and sold to Spain labelled “from Galicia”) (Kafel, 2012: 389). Importantly, it is impossible to give general guidelines in this regard. Each case needs to be resolved individually, taking into account the popularity of and familiarity with different kinds of symbols, designations and names. On the other hand, it is not always that using the name of a particular country, region or city evokes associations with a particular country or region. In the case of numerous products, the use of a geographical name is purely generic (e.g. Frankfurters, Berlinki or Krakowska). An additional element leading to difficulties is the dynamics in the perception of a great deal of information by consumers. In a globalised and digitally networked society certain information and the associations it sparks off become immensely popular in different social groups.
and even in the society at large. Moreover, although in the case-law of the CJEU a concept of an average consumer has been developed, the diversification of consumers in the Member States, resulting from different traditions and the culture of the society, is not insignificant. As a result, the same information provided on the label may be perceived differently by consumers in different Member States. Also the differences between certain specific consumer groups (such as children, elderly people) should be noted. All these circumstances need to be taken into account both by business operators and official food control authorities (in a given Member State) when assessing whether consumers are not misled by the absence of the indication of the country of origin or place of provenance. Given the general objective of food law, i.e. protection of consumers’ interests, in the case of doubts the information on the country of origin or place of provenance should definitely be displayed on the label or the information on the label should be modified so as to avoid any doubt.

The second general exception is where the country of origin or place of provenance of a given food is indicated and where it is not the same as that of its primary ingredient. In such a case, the country of origin or place of provenance of that ingredient should also be given or the country of origin or place of provenance of the primary ingredient should be indicated as being different to that of the food (Article 26(3)). The primary ingredient is defined in Regulation 1169/2011 and means an ingredient or ingredients of a food that represent more than 50% of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantative indication is required (Article 2(1)(q)). The application of this obligation depends, however, on the adoption of the implementing act by the Commission, which has not been issued yet (in 2016, i.e. five years after Regulation 1169/2011 had been adopted, the Commission only prepared a working draft of the implementing regulation).

7 An average consumer is a person who is reasonably well-informed, observant and circumspect, i.e. who has some information and can use it, is observant when making purchases, critical of the marketing messages addressed to them and can acquire information necessary to make purchasing decisions. (Miąsik, 2012: 631) and case-law, in particular CJEU rulings: case C-210/96 Gut Springenheide and Tusky, ECLI:EU:C:1998:369; case C-465/98 Darbo, ECLI:EU:C:2000:184; case C-356/04 Lidl, ECLI:EU:C:2006:585; case C-470/93 Mars, ECLI:EU:C:1995:224.
The above-mentioned provision points out that it is necessary to indicate the country of origin or place of provenance of a primary ingredient where the country of origin or place of provenance of a given food has been indicated. It can be reasonably assumed that the country of origin or place of provenance of a food means any information, including symbols, designations and drawings which a reasonably well informed consumer may perceive as an indication of a particular country of origin or place of provenance. The label as a whole should be taken into consideration (such a broad concept is proposed in the working draft of the implementing regulation). This means, however, that in each case it is necessary to assess whether a given label might create an association in the mind of the consumer with a particular country of origin or place of provenance. Furthermore, while the recognition of a primary ingredient does not pose any problem if the ingredient represents more than 50% of the food, difficulties arise in the case of ingredients which are regarded as primary ingredients because of the fact that they are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required. In the latter case, when assessing whether it is mandatory to indicate the country of origin or place of provenance of a given food, it will be necessary to refer to the consumer’s associations regarding a given ingredient. The implementing rule of Article 26(3) will certainly not remove doubt regarding the scope of obligation of country or origin and place of provenance labelling of the primary ingredient, but it may reduce it. The failure of the Commission to adopt the implementing act will result in a total lack of efficiency of consumer interests’ protection in terms of country of origin or place of provenance labelling of the primary ingredient, which should be heavily criticised (all the more so since the Commission is aware of the expectations of consumers and the market conduct of food business operators).

**Sectoral exceptions – EU vertical regulations concerning certain products**

The indication of the country of origin or place of provenance is mandatory for many products such as honey, fruit and vegetables, unprocessed fish, beef as well as fresh, chilled or frozen meat of swine, sheep, goats or poultry.

Detailed rules for country of origin and place of provenance labelling of fresh, chilled or frozen meat of swine, sheep, goats or poultry are laid
down at EU level in Implementing Regulation No 1337/2013 issued by the Commission on the basis of Regulation 1169/2011. With some exceptions, it is mandatory to indicate on the label the country (a Member State or third country) where the animals were raised (“reared in”) and the country where the animals were slaughtered (“slaughtered in”). The place of rearing is the country where the final rearing stage took place, with the minimum period of that stage, depending on the kind and age of the animal, from one month for poultry to six months for pigs, sheep and goats, and, for younger animals, the entire period of rearing. If the required length of the rearing stage was not achieved in any country, the following information on the place of rearing is given, depending on the countries where the animals were reared: “reared in: several EU countries” or “reared in: several non-EU countries”, or a list of the countries of rearing is provided. However, if there is not sufficient information to determine a third country that could be regarded as the place of rearing, the information “reared in: non-EU” is given, with the indication of the place of slaughter. If the meat is obtained from animals born, reared and slaughtered in one country, it is possible to give information on the origin instead of the information on the place of rearing and the place of slaughter. Furthermore, if there are meat cuts with different indications of the place of rearing or slaughter in a single package, a list of the countries for each meat species should be provided on the packaging. As regards minced meat, the information on the place of rearing and the place of slaughter is limited to the information whether the animals were reared and slaughtered within or outside the EU. Only with regard to minced or cut meat obtained exclusively from meat of animals born, reared and slaughtered in various Member States, it is possible to provide the following information “origin: EU”. Such a system of labelling requires traceability at all stages of meat production and distribution, from slaughter to packing, in order to ensure a link between the labelled meat and the group of animals that the meat was obtained from. Therefore, Regulation 1337/2013 lays down detailed rules for ensuring traceability.

Much earlier, in 2000, in the aftermath of the crisis related to bovine spongiform encephalopathy, in order to maintain and strengthen the confidence of consumers in beef and to avoid misleading them, Regulation 1760/2000\(^9\) was issued, introducing the compulsory country of origin labelling of beef and beef products. Nonetheless, it must be recognised that the system of compulsory labelling introduced by the regulation has in fact two objectives, i.e. it should ensure a link between the identification of the carcass, quarter or pieces of meat and the individual animal or animals from which the meat was obtained (Article 13(1)) and it should provide adequate information to consumers (the requirements concerning the latter objective became effective on 1 January 2002 – Article 13(5)). The requirements concerning the indication of the country of origin (i.e. the country where the animal was born, reared and slaughtered or the name of one country if all of them took place in one country) introduced by the regulation raised consumers’ expectations regarding the information of the origin of meat (Report, 2013: 4).

In terms of fishery and aquaculture products, Regulation No 1379/2013 on the common organisation of the markets in fishery and aquaculture products\(^10\) introduces the requirement to indicate the area where the product was caught or farmed, which for fishery products caught at sea involves the name of the subarea or division listed in the FAO Fishing Areas as well as the name of such zone expressed in terms understandable to the consumer or a map or pictogram showing that zone, and for fishery products caught in inland waters – a reference to the body of water of origin in the Member State or third country of provenance of the product.

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Furthermore, pursuant to Directive 2001/110 relating to honey, the country or countries of origin where the honey has been harvested should be indicated on the label, and if the honey originates in more than one Member State or a third country, the indication of the countries of origin may be replaced with one of the following, as appropriate: “blend of EU honeys”, “blend of non-EU honeys”, “blend of EU and non-EU honeys”.

Detailed rules have been laid down for country of origin labelling of food and vegetables covered by Commission Implementing Regulation No 543/2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed food and vegetables sector. The regulation introduces, inter alia, the obligation to indicate the country of origin at the point of retail sale of fruit and vegetables. In the case of fruit and vegetable mixes, if the fruit and vegetables originate in more than one Member State or third country, the full names of the countries of origin may be replaced with one of the following, as appropriate: “mix of EU fruit and vegetables”, “mix of non-EU fruit and vegetables” and “mix of EU and non-EU fruit and vegetables”.

It may be noted that the detailed solutions adopted are some sort of compromise between the expectations of consumers and the possibilities of business operators. If the manufacturing process takes place in different locations or if raw materials coming from different places are used, it is possible to provide general information indicating only whether a food comes from within or from outside the EU. In such a case, the consumer in fact obtains no information regarding the country of origin or place of provenance. However, the solutions adopted for individual types of products have undoubtedly contributed to giving rise to consumers’ expectations concerning the indication of the country or origin or place of provenance.


National regulations adopted on the basis of the procedure provided for in Regulation 1169/2011

In addition to the above EU sectoral regulations introducing the obligation to indicate the country of origin or place of provenance of certain food-stuffs, Article 39 of Regulation 1169/2011 provides for the possibility for Member States to adopt national measures regarding the mandatory indication of the country of origin or place of provenance of food. The provision allows for the introduction of domestic regulations if the three conditions are met, i.e.:

1) on grounds of at least one of the following:
   a) protection of public health or
   b) protection of consumers or
   c) prevention of fraud or
   d) protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition, and
2) where there is a proven link between certain qualities of the food and its origin or provenance,
3) where there is evidence that the majority of consumers from a given state attach significant value to the provision of that information.

On the basis of Articles 39 and 45 of Regulation 1169/2011, several Member States have taken steps towards introducing national legislation on the labelling of certain foods (France, Italy, Lithuania, Romania, Portugal, Greece, Finland and Spain), and by the end of 2016 the Commission accepted the national legislation proposed by France and Italy (Jacobs 2016; Carbonnelle, Cowper, Lim, Lotta, Tarr Oldfild, 2016: 475).

In France on 19 August 2016 Decree No 2016-1137 was adopted regarding the mandatory indication of the country of origin or place of provenance of milk and meat as well as milk and meat used as ingredients.\(^\text{13}\) It specifies in detail product categories which need to be labelled with the country of origin or place of provenance. Following the submission by France of the draft decree, the Commission had doubts as to the compatibility of the draft with Regulation 1169/2011, in particular as to

the relationship between the quality and country of origin. Furthermore, the Commission noted that voluntary information on the country of origin is sufficient. What convinced the Commission to accept the French proposal was the fact that the French regulation is “experimental”, i.e. was introduced for a trial period from 1 January 2017 to 31 December 2018 (Carbonnelle, Cowper, Lim, Lotta, Tarr Oldfild, 2016: 477).

Pursuant to the decree, the information on the country of origin must be included in the list of ingredients, directly after a given ingredient or under the list of ingredients. Where it is impossible to indicate one country, the information “origin: EU”, “origin: non-EU” or “origin: EU and non-EU” is provided, depending on the countries of origin of the product or ingredient.

With respect to milk products listed in the decree where milk represents more than 50% of the product (such as cream, butter, curd and yoghurt), the indication of the country of origin of milk is mandatory. This information includes the country of milking and the country of processing, and if it is one and the same country it is sufficient to use the terms “origin [name of the country]”. If milking and processing take place in one or several Member States, the terms “origin: EU” can be used, and if they take place outside the EU – “origin: non-EU”.

In the case of products with the content of meat or mechanically obtained meat from animals listed in the decree (cattle, pigs, poultry, goats, sheep) exceeding 8%, the information involves the country of birth, rearing and slaughter. If all of those took place in one country, that country is indicated as the country of origin, and if they took place in several Member States or third countries, “origin: EU” or, respectively, “origin: non-EU” may be indicated.

The provisions of the French decree do not apply to products bearing a protected designation of origin or a protected geographical indication and to organic products. Nor do they apply to products which were manufactured or placed on the market in a Member State other than France or a third country. In fact, they apply to products manufactured and placed on the market in France (e.g. cheese made in Germany and placed on the market in France is not subject to the regulation, but cheese made in France from milk originating in Germany must indicate the information on the country of origin of milk).

In May 2016 Italy also submitted to the Commission domestic provisions introducing the mandatory indication of origin, but only with respect to milk and dairy products, and in July the Commission accepted the solu-
The Italian regulation on country of origin labelling of milk and milk products was issued on 9 December 2016. It concerns milk and milk products listed in the annexe to that regulation (such as cream, butter, curd and yoghurt). The information given on the label of milk and dairy products includes the country of milking, the country of processing and the country of packing, and if they all took place in one country, it is sufficient to indicate the country of origin (“origin: [name of the country]”). If milking, processing and packing took place in two or more countries other than Italy, the name of the country may be replaced with, respectively, “EU” or “non-EU”, or, if EU states and third countries are concerned: “origin: EU and non-EU”. As is the case in France, those provisions do not apply to organic products and to products bearing a protected designation of origin or a protected geographical indication. Furthermore, also as it is in France, those provisions are on a trial basis and are in place for the same period of two years (until the end of 2018).

Both regulations can be regarded as non-compliant with EU provisions for several reasons. First of all, neither France nor Italy has provided evidence of a link between qualities of the food and its origin, and pursuant to Article 39(2) of Regulation 1169/2011 the link should be based on objective evidence and not on consumer sentiment (moreover, it is hard to find a criterion allowing to distinguish “French” or “Italian” milk (Treuil, 2016:491; Carbonnelle, Cowper, Lim, Lotta, Tarr Oldfild, 2016: 477).

Secondly, although the provisions introducing the obligation to indicate the origin result in more rigorous requirements for domestic producers (the so-called reverse discrimination), which is basically acceptable in the light of the EU freedoms, those regulations in fact provide a facilitation for domestic manufacturers (as consumers are interested mainly in domestic products), which can be regarded as a breach on the free movement of goods (Treuil, 2016: 491; case C-321/94 Pistre, ECLI:EU:C:1997:229). The regulations introduced might result in particular in domestic (Italian, French) manufacturers reducing the importation of raw materials from other countries in order to avoid the need to indicate their country of origin.

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Thirdly, it is hard to demonstrate the existence of any of the grounds listed in Article 39 of Regulation 1169/2011 justifying the introduction of a national regulation. The protection of public health can certainly not be the basis here (pursuant to the requirements under Regulation 178/2002, foods placed on the market must not be unsafe). Also the need to protect the interests of consumers and the prevention of fraud do not seem to be appropriate reasons here as consumers are in fact protected by the general exception discussed above, which obligates indication of the country of origin or place of provenance if the absence of that information could be misleading. However, the fact that the Commission has not adopted implementing provisions introducing the second of the general exceptions mentioned above is certainly a kind of “justification” for the adoption of national legislation, which to a large extent fills the legal vacuum concerning cases where the primary ingredient originates in a country other than the final product. It can be stated with the requisite degree of certainty that it was completely unfounded that the French authorities used the so-called horse meat scandal as an argument supporting the introduction of national legislation in France although the obligation to indicate the country of origin or place of provenance would have had no influence whatsoever on the outbreak of the scandal (Treuil, 2016: 491).

Both the solutions in France and in Italy in fact serve to protect the interests of domestic manufacture of products used as raw materials for other products manufactured in those countries (they serve to protect farmers). Labelling a processed product as originating in France or Italy will only be possible in the case of those products covered by national regulations which have not only been produced in a given state but also have been manufactured from raw materials originating in that state. If any stage of the production takes place outside a given country, the label must provide detailed information on individual stages taking place in a different country or on ingredients coming from a different country. The fact that the Commission accepted the French provisions has paved the way for other Member States to adopt similar solutions with the consequence of the fragmentation of regulations concerning food labelling (Treuil, 2016: 493). At the same time, the actions of the Member States in this regard may lead the Commission to step up its efforts to adopt uniform principles for the mandatory labelling of milk and meat products. This appears even more likely as in its resolution adopted in May 2016 the European Parliament called on the Commission to prepare legislative proposals concerning the obligation to indicate the country or origin or place of provenance.
for all kinds of drinking milk as well as milk and meat products and the obligation to indicate the country or origin or place of provenance of meat contained in processed foods (European Parliament resolution 2016).

It is worth noting that the Polish legislature was guided by the same or similar aim as the French and Italian lawmakers when adopting domestic legislation governing the rules of the use of the “Product of Poland” label on meat products and on products of animal origin other than meat on 1 January 2017. Pursuant to the regulation, meat can be labelled as “Product of Poland” if it was obtained from animals which were born, reared and slaughtered in Poland. Non-processed products of animal origin other than meat may be labelled “Product of Poland” if they were obtained from animals reared on Polish territory. As for processed products of animal origin, the “Product of Poland” label may be used mainly for products manufactured in Poland from raw materials that can be labelled as “Product of Poland”. That label can also be used for foods in the case of which at least 75% of ingredients meet the above criteria and the remaining 25% are different ingredients, unless they can be replaced with domestic ingredients.

However, as the Polish provisions do not introduce the obligation to indicate the country of origin and instead establish the rules for the voluntary use of the “Product of Poland” label, they have not been notified to the Commission pursuant to Articles 39 and 45 of Regulation 1169/2011 but pursuant to the implementing measures for Directive 2015/1535 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.  

To justify the bill introducing the new Polish provisions it was indicated that the new solutions address the interest of Polish consumers in the origin of products and that they aim to help clear up consumers’ confusion by increasing transparency as to what stages of the production or manufacture process took place in a given country as well as by increasing the consistency of rules for indication of the place of origin within different food

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categories and between them. The aim of introducing the possibility to use the “Product of Poland” labelling is, therefore, to provide consumers with clear and precise information that the foods labelled in that way actually come from Poland. The provisions help ensure consumer protection, but due to their vagueness consumer protection might be much lower than the assumptions made by the Polish lawmakers. Furthermore, they may lead to unjustified infringement of business rights.

**Summary**

The application of national provisions introducing the obligation of country of origin labelling for certain products (such as in France and in Italy), as well as provisions introducing the rules of voluntary indication of a particular country of origin (such as “Product of Poland”) will undoubtedly lead to the promotion of domestic products and, as a consequence, increased demand for products coming from a given state as well as higher demand for domestic raw materials which will need to be used by business operators interested in differentiating their products using the country of origin labelling. In the past, such solutions were criticised by the Commission as encouraging consumers to favour domestic products over those originating in other EU countries.

The fact that the Commission accepted the French and Italian national regulations introducing obligatory country of origin and place of provenance labelling shows that the Commission has moderated its position. Such a change means significantly less protection for one of the fundamental Union freedoms, i.e. the free movement of goods. It is worth noting, however, that that freedom has no intrinsic value. The values on which the European Union is based are laid down in Article 2 TEU, according to which the EU is founded, among other things, on the values of respect for human dignity, freedom, democracy, equality and the rule of law. The objective of the EU is to promote peace, its values and the well-being of its peoples (Article 3(1) TEU). In this context it is important that while establishing an internal market, the Union respects its rich cultural

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and linguistic diversity and ensures that Europe’s cultural heritage is safeguarded and enhanced (Article 3(2) TEU), and consumer protection requirements must be taken into consideration when designing and applying EU policies and measures (Article 12 TFEU). Additionally, in food law, the free flow of food is not treated as a priority goal. What is more, it should be noted that in food law regulations the achievement of free movement is considered as “conditional” upon the remaining goals (Meulen van der, 2010: 85; Wojciechowski, 2017: 134). As it is namely indicated in Article 5(2) of Regulation 178/2002, the aim of food law is to achieve the free movement of food and feed “manufactured or marketed according to the general principles and requirements” laid down in Chapter II of Regulation No 178/2002. This Chapter, inter alia, establishes the aims of food law, which indicates that in order to meet this target the remaining aims listed in Article 5(1) of Regulation No 178/2002 need to be reached, i.e. in order to pursue this goal, it is necessary to promote the remaining objectives, and not meeting any of the remaining targets makes it impossible to achieve the free movement of food (Meulen van der, 2010: 85). An argument in favour of a positive assessment of the national regulations is the fact that the information on the country or origin or place of provenance is of vital importance to consumers. Moreover, it should be noted that food not only plays a physiological role (fulfilling the need to eat) but it also has an important cultural function (social integration) (Korzycka, 2017: 174). As a result, the adoption of regulations increasing the importance of country of origin labelling fosters the protection of cultural diversity of the European Union. Yet, irrespective of the fact that the need to protect consumers is being stressed, the national regulations most of all protect domestic food producers in particular Member States, which at the same time restricts the freedom of movement of goods on the Union market.

Individual Member States have comprehensive knowledge of the current economic situation and public perceptions and, in accordance with the principle of subsidiarity, it is the state that is most legitimate to adopt legal solutions protecting its citizens (consumers and business organisations). It should be, however, emphasised that each of the Member States has sought to take account of the constraints resulting from the free movement of goods and has limited the impact of their domestic legislation, which is already a significant achievement of the European Union. After the adoption of national provisions for a trial period of two years in France and in Italy, both the Commission and the Member States can verify the impact
of provisions introducing mandatory country or origin and place of provenance labelling on the development of a common market. It seems that unless during that period negative effects for the EU economy are observed, it will be legitimate to respond to consumers’ needs and retain this kind of regulation in future. This in fact means renationalisation of certain food law regulations as the scope of domestic legislation regarding country of origin and place of provenance labelling covers an area which so far has been regulated exclusively by EU law.

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Chapter 4: Social Dumping on the EU internal market – a real challenge for the EU integration process?

Piotr Kwasiborski

Key words: social dumping, challenges for EU integration process, regulatory competition

Introduction

It is widely recognised that, recently, an increase of the anti EU-integration tendencies in the political and social environment among the EU Member States has taken place. The idea of European integration is being undermined more strongly than ever before and the political voices in this matter are reaching a legal dimension. Such a tendency may, to a certain extent, be also visible with regard to the issue of the occurrence of the so-called social dumping within the EU. Social dumping may be understood in many ways, and is used with regard to various fields of EU internal market operation, depending on the treaty freedom at stake. In the EU context it is mostly recognised in strict connection with the freedom of services where entrepreneurs acting in the internal market render transnational services with the use of the posted workers. In this respect a tendency of transforming political concerns into legal solutions has been revived at the EU level through the recent activity of the European Commission and its proposal to amend the 96/71/EC Posted Workers Directive\(^1\). This aspect will be, however, analysed in detail in the separate, subsequent chapter of this publication.

The social dumping concerns relate also to other treaty freedoms such as the freedom of establishment and free movement of workers. To a certain extent, some of these fields intertwine with each other, showing how

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complex the issue of social dumping is. This applies most to the problem of so called "regulatory competition" involving material differences in the scope and level of social protection (and other) regulations being in force in particular EU Member States.

In this chapter the main area of concern will relate to a problem of defining what social dumping actually means and what the outcomes of the social dumping concerns for the EU internal market operation are, in particular in respect of the regulatory competition in which the EU Member States consciously or unconsciously participate. This problem will be also taken into the consideration from the perspective of the challenges which the idea of European integration currently faces.

After the EU enlargement in 2004, the voices calling for combating the so called "social dumping" on the EU internal market have been intensified by the vast majority of the old EU Member States (the west- and north-European states being in the EU before 2004). Regardless of certain other features of the social dumping, it definitely has its role in disintegrating the EU community. One may argue that the old EU Member States call for combating the social dumping actually to protect their particular economic interests, whereas the new EU Member States (namely the entities based therein) may try to abuse the freedoms granted to them as a result of accession either to ensure the lowest possible social costs of their business activity or even to create an entire business plan on illegal or abusive practices. The border line between these two sides may, however, be very tenuous as very often the citizens or corporations originated in the old EU Member States cannot resist the desire of gaining profits from the material differences in the social and tax regulations between the old and the EU Member States. At the same time, a justified interest of the fair entrepreneurs based and truly acting in the new EU Member States must be taken into account. This makes the social dumping issue a patchwork of several stakeholders (employees, employers, other market participants, particular Member States), each with their own interests (Kwasiborski, 2015: 45-55).

This atmosphere of mutual mistrust undermines the core values of the European Union’s concept. Thus one may have an impression that social dumping becomes a factor affecting the EU integration process – either as a negative phenomenon and practice of EU new Member States (the entities based therein) mentioned above, or perhaps as an instrument in the hands of the EU old Member States to modify or even revolutionise the rules governing the EU internal market, established so far by the current
framework of EU law including also a material input of the jurisprudence of the European Court of Justice.

Problems with defining social dumping

The phrase "social dumping" appeared in the European discussion over thirty years ago on the occasion of the adoption of the Single European Act of 1986. This Act implemented certain changes with regard to the procedures governing the European Community’s social policy. They were said to reflect, among the other things, the purpose of securing higher and more consistent working standards of employees within the Community and thus preventing the social dumping threats (Schoemann, 2011: 241).

The social dumping concerns were mainly referring in those times to the risks of deregulating the national company laws by particular Member States in a way that these Member States would follow the path of the Delaware state in the United States in order to gather more foreign business on their territory (Kolvenbach, 1990: 711-712). They also referred to the enterprises' movements to Greece, Portugal and Spain having lower wage rates and social costs than the others in the Community (Klein, 1991: 419). The fears were also relating to the United Kingdom’s opt-out close from the Social Chapter as the other Member States felt that it could have granted the British entities a competitive advantage due to the less restrictive social policy (Barnard, 2000: 6).

Additionally the social dumping concerns were visible in the legal debate of a more general character at the EU level which resulted, among other things, with the indication by the Commission in its Green Paper that on European Social Policy that

"a commitment to high social standards and to the promotion of social progress forms an integral part of the TEU. A "negative" competitiveness between Member States would lead to social dumping, to the undermining of the consensus making process … and to danger for the acceptability of the Union"².

One may therefore notice, that the Commission has already predicted certain problems in the context of different social and labour laws across the

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Member States with detriment to the shape of the entire EU’s integration. The Commission has also indicated in the White Paper on Social Policy that:

"the establishment of a framework of basic minimum standards, which the Commission started some years ago, provides a bulwark against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness, and is also an expression of the political will to maintain the momentum of social progress"\textsuperscript{3}.

This standpoint was also maintained by the Council in its resolution on certain aspects of EU social policy\textsuperscript{4}. In the following years the fears against the social dumping were one of the reasons of introducing the directive 96/71/EC on posting workers within the performance of services on the EU internal market, hereinafter referred to as the "Posted Workers Directive". Even before the implementation of this directive the CJEU in the \textit{Arblade} case (Case C-369/96, \textit{Arblade}, ECLI:EU:C:1999:575) had already confirmed that the freedom of services may be limited by the requirement to pay a minimum remuneration to the posted workers where the issue of minimum remuneration may be in fact considered as the main and crucial factor determining whether the concerns referring to social dumping may be raised.

All the above considerations clearly confirm that the political fears against social dumping in the EU, at least in this context, have in some way occurred even before the large accession in 2004 where Eastern European states joined the EU. It seems, however, that the old EU Member States were not entirely prepared for, or even aware of, all natural consequences for the EU internal market following this accession. Whilst it was warmly welcomed due to the potential of new emerging markets (Barnard, 2008: 262), the threats related to the increase of social issues were only minimised by the old EU Member States with regard to the labour migration of individuals from the former communist states and fresh EU members. The old EU Member States seemed to be a bit overwhelmed with the side-effect of the accession related to the competitive advantage gained by transnational service providers from the new EU Member States using


\textsuperscript{4} Council Resolution (1994) on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union, O.J. C368/7, para. 10.
their cheaper employees to become an attractive option for the customers from the host Member States, or related to the opportunity to enjoy less regulative burden which the corporations from the old EU Member States decided to take. As long as the compelling moves away from the standards adopted by the richest EU Member States concerned only minor examples like Portugal or Greece, these Member States were more or less willing to accept it for the sake of a deeper integration process. The situation changed when it turned out that the 2004 accession would have changed the balance in the entire EU in this respect.

Such a discrepancy between the expectations of EU old Member States to the outcome of the 2004 accession and its factual legal dimension resulted with the increase of voices that the current legal framework governing the operation of the treaty-based EU internal market, mainly the Posted Workers Directive with regard to the posted workers institution, is not sufficient to combat social dumping on the EU internal market. Thus, one may argue that such claims of some of the old EU Member States constitute an unfair desire of changing the rules of the game after the "kick-off" made at the moment of the 2004 accession.

**Definition proposals**

It is not entirely clear what social dumping should mean – there is no ultimate, binding definition adopted either under the EU law (legal acts or CJEU judgments) or even under the laws of particular Member States. It is rather a phrase of a political and economic nature, which, however, may affect the legal environment governing an operation (at least of certain fields) of the EU internal market. That is why one cannot avoid putting this phrase into the legal context and trying to legally define it to the largest possible extent. This attempt is indeed very complicated and challenging as in various circumstances (depending on the applicable industry sector, the content of the legal framework referring to this sector or manner of behaviour of the market participant) various practices may be considered as examples of social dumping.

It is beyond doubt that it would be useful, or even necessary, to identify, at least in general way, what social dumping actually stands for. This is a critical issue which should be resolved before trying to ultimately decide whether social dumping should be combated as a negative phenomenon or arguing that it is only an instrument in the hand of the old EU Member...
States, constituting a threat for the integration process due to their reluctance to nurture the European integration with the new EU Member States in these fields of the EU internal market where they have been surpassed by these new EU Member States.

**EU institutions approach**

The lack of legal definition of social dumping is a fundamental problem in assessing whether and how it should be combated. It is crucial that by this time even the CJEU, although using this phrase several times in the context of justifying the imposing of local laws limiting the operation of EU freedom of services, has not explained how it understands social dumping. The EU institutions also did not present a consistent approach in this matter. In the opinion of the Economic and Social Committee social dumping should mean a situation where "the cheaper employees from the other member state take over the work places of the residents of a given member state"\(^5\), whereas, according to the Commission papers social dumping should refer to a situation where "the foreign service providers may take over the positions of local service providers due to the lower labour standards"\(^6\). None of these definitions is sufficiently precise to be proposed as the ultimate legal definition and, furthermore, they are completely missing the crucial point in describing social dumping from the legal perspective. They have rather been adopted by these institutions for a working purpose, in particular context, rather as an assumption and not as a dogma.

First of all, these definitions do not cover all possible features of social dumping. Additionally, even when assuming that they could be used at least to provide a legal framework for the institution of posting workers, they are not precise enough to do so. This is caused by the fact that they ultimately combine social dumping only with the core element of EU *acquis*; it means with the mere use of the internal market freedoms. The official adoption of such wording at the EU level would therefore lead to an internal contradiction of the EU law, since the mere use of the treaty freedoms may not be identified as a negative phenomenon which the authorities should combat. Under the current EU legal framework one should not


say that it is, in principle, wrong for the companies to take a competitive advantage from the lowest social and wage-cost frameworks they can find within the EU. It is an economic right (also protected by EU law) of such companies to exploit such advantages.

What is also striking, is that a wide range of the labour laws across the EU are already harmonised through a number of directives, including, among the other things, the directives regarding the non-discrimination principle, workers’ consultation, or the protection against unfair dismissals and protection in case of the transfer of the work plant. In consequence, there is a relatively high level of labour standards in all EU Member States and the major differences refer only to the wage rates which, however, are affected by economic factors. This significantly narrows the scope where the Member States can create an environment attractive for social dumping practices.

As it has been admitted by the CJEU’s *Laval* (Case C-341/05, *Laval*, ECLI:EU:C:2007:809), that if the companies adhere to the legal minimum requirements (including minimum wages) imposed either by the national laws or by the commonly used collective agreements, they are not involved in social dumping, or at least not in a way that it should be treated from the legal point of view as a negative phenomenon which would provide grounds to apply sanctions (Berntsen et al., 2015; 46). Therefore although the CJEU did not provide any exact definition of social dumping, it implied that it is a practice of violating legally adopted and binding standards for labour-cost advantage. Upholding the legal standards means that there is no social dumping.

However, mostly in political debates, social dumping is not understood in such a way; but the voices calling for recognising a broader perspective are visible – that any competitive activity relying on the cheaper labour forces resulting from the less restrictive regulatory frameworks of particular EU Member States or differences in wage levels constitutes unacceptable social dumping. Whereas from the political view such an approach may be somehow acceptable, from the legal point of view it cannot by maintained at the EU level, since it would simply overturn the core fundamentals of EU integration, which are the internal market and economic freedoms.

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7 Please see for instance the Directives: 2002/14/EC, 2001/23/EC, 98/59/EC, 2000/78/EC.
This problem has been, fortunately, recognised by the European Parliament which in September 2016, issued a special resolution regarding social dumping (the “Resolution”)\(^8\). The EP undertook an effort to come up with its own version of the social dumping definition. It considered that

“while there is no legally recognised and universally shared definition of social dumping, the concept covers a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimising labour and operation costs and lead to violations of workers’ rights and exploitation of workers”.

Such a definition of social dumping definitely deserves attention and should be appreciated by all stakeholders and other EU institutions, as it indicates the crucial issue of the manner of behaviour of the internal market participants leading to social dumping. It emphasises that social dumping occurs only when there is an intentional abuse or circumvention of the established laws connected with the unlawful minimising of labour and operational costs, the violations of workers’ rights and their exploitation. Such an approach is in line with the above mentioned thesis that the mere use of the treaty based freedoms cannot automatically lead to the occurrence of social dumping practices. If it is to be meant a negative phenomenon, it must cover only these actions which affect the current legal framework with the (potential or actual) negative effect to the social situation of workers. Hopefully this approach would be shared by the other EU institutions involved in the EU legislation process, should there be any attempt to put the social dumping issue within the legal boundaries at the EU level.

It is very important that the EP combined the problem of the social dumping with the intentional action of the internal market participant. Such an intention is therefore treated as a condition to even consider whether social dumping practice takes place. Still it is worth specifying what kind of intention such a practice should cover (whether only a wilful misconduct or also a gross negligence despite the lack of intention). If specified, this detail may ensure a protection for these internal market participants from the new EU members who generally do their best to operate

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the business in the internal market in accordance with the currently binding rules. Currently there is a relatively high level of legal uncertainty, creating a risk that these entrepreneurs will fail to fully observe the wide set of differentiated provisions in the various host Member States. As long as no intention or gross negligence in such single failure would be identified, these entities could expect exoneration from the social dumping accusations (even when they would generally be held liable for the failure to entirely conform to respective provisions applicable in the host member state).

Additionally, in its Resolution the EP emphasised that even while combating the social dumping practices, a due respect must be given to the adherence to the treaty based freedoms – it therefore praises the CJEU judgment in Laval by noting that the collective actions against social dumping can be enforced only if they do not constitute an illegitimate restriction to these freedoms (point G of the Resolution). In consequence the EP showed that a balance between the enforcement of social rights and the use of the treaty freedoms must be maintained, which definitely stays in favour of the new EU Member States.

The EP underlined three main aspects in which social dumping as a negative phenomenon can affect the relationships between respective stakeholders (point 1 of the Resolution). First is an economic aspect, where the EP stated that the illegal practices such as unregistered work or the abuses related to bogus self-employment may lead to a material distortion of the market to the detriment of the bona fide competitors. This let us identify the practices which the EP mainly recognised as social dumping – none of them relate to the pure use of the lower social costs of business operation in a given Member State. Unregistered work (including both the unregistered work of a moving worker as well as the lack of registration of posting workers) and bogus self-employment should be, beyond any doubt, combated, though no restriction should be imposed on the entities which stay within the legal boundaries when enjoying the less restrictive social regulations in their home Member States. Secondly the EP paid attention to the social aspect where social dumping leads to the discrimination and unfair treatment of the workers in the EU as well as to their deprivation of the possibility to efficiently use their social and employment rights. Given the current state of the EU labour law framework, especially
the directive regarding the discrimination prohibition⁹, it is unquestionable
that such practices constitute illegal acts and therefore will be always cov-
ered by the social dumping definition proposed by the EP. The third is a
financial and budgetary aspect – social dumping in this respect relates to
the non-payment of taxes and social security contributions which is a
threat to the financial stability of the social security systems and public fi-
nances of the Member States.

There is no doubt that these aspects are also always connected with the
illegal action which must be combated. It is therefore crucial that all these
aspects raised by the EP do not refer to any gain of a competitive advan-
tage on the EU internal market with the use of the lower social costs in the
home member state on the basis of purely the applicability of treaty free-
doms. This fact should be strongly taken into account by the EU legisla-
tors when deciding to intervene into the natural competitiveness factors
governing the EU internal market.

One should acknowledge that the social dumping definition proposed
by the European Parliament in its Resolution is a tremendous input to the
political discourse existing at the EU level in this respect. It clarifies many
doubts regarding the scope of what should be treated as social dumping
and marks the basis for any potential legislative works aimed at adopting a
legally binding definition of this phenomenon. What is the most important
is that the EP’s approach in this respect seems to be very balanced and fo-
cused on preventing disproportionate interference into the current rules of
the internal market operation, based on the years of nurturing the EU inte-
gration process. The EP clearly mapped out in this respect what actions
may be understood as a challenge for EU integration process in its current
legal framework – all such actions refer to the abuse or breach of these
rules, not to the mere use of the differences in the social costs and levels
of social protection established in respective Member States. The question
is now whether it will succeed with maintaining such a line when the more
extensive works on the regulation of the social dumping issue at the EU
level are commenced by the Commission, which, having in mind its cur-
rent doings, tends to pay more attention to the need of ensuring greater
position of the EU internal market of the old EU Member States.

work for equal treatment in employment and occupation, Official Journal L 303.
Public discourse

Also in the literature, rather of a political science nature, certain scholars tend to come up with the various definitions of social dumping. Although there are some authors pointing out that the differences in labour regulations across the Member States do not, in themselves, give rise to a distortion of the common market and that they should not be regarded without further features as partitioning the market on national lines (Deakin, 2008: 19), the scholarly proposals mainly boil down to the initial idea presented by the above-mentioned EU institutions other than the European Parliament. This means that they identify social dumping with the pure use of the treaty freedoms in the combination of the lower social costs and regulations in the home Member States. They often do not take into account specific aspects having impact on the occurrence of practices allowing for the qualification of social dumping as a negative phenomenon.

Even when certain authors supplement the definition of social dumping with the element of intentional abuse or breach of rights assigned to the EU entrepreneurs from the freedoms stipulated in the treaties, they do not make such a definition exclusive, and still open a possibility to undertake an action considered as social dumping without this factor (Berntsen, 2015: 45). For instance they indicate that this phenomenon occurs even when the enterprises which are sufficiently wealth to meet the wage standards in the host Member States still pay its foreign workers the remuneration which is well below that standard (Vaughan-Whitehead, 2003: 325-327).

Such an approach should not be appreciated, given the concerns of treating social dumping as the instrument of the old EU Member States to undermine the idea of the EU integration process. As already mentioned above, the mere fact of using the freedoms resulting from the treaties in a way that it gives a competitive advantage on the internal market should not be considered as social dumping, since it was actually the essence of the concept of extending the EU with the countries from Eastern and Central Europe. This approach must be also applied even when a given enterprise is able to match the standards of the host member state but decides not to do it due to economic reasons. As long as this is legal, it simply constitutes on of the ways of optimising one's own business and income (Greer et al., 2015: 136). The enterprises acting on the EU internal market cannot be deprived of their right to arrange such legal optimisations. After
all, only when a given enterprise is competitive can it survive in the market and therefore ensure the job positions.

Additionally, social dumping is a practice of the participants of the EU internal market which aims at weakening the enforceability of the social norms (which complies with the previously mentioned concept of abuse of rights), or even at avoiding the obligation to obey such norms, in order to reach the competitive advantage (Bernaciak, 2015; 2). In this case, connected in fact with the breach of the already adopted and binding regulations on the EU level, it should be clear that such practice should be considered as social dumping (treated in any case as a negative phenomenon) to be combated in order to eliminate it from the EU internal market. This approach also expressly complies with the idea proposed by the EP in its Resolution.

Therefore, one should admit that only the occurrence of at least one of the above mentioned aspects (abuse or circumvention of given rights meaning the weakening of the enforceability of the binding regulations, or express breach of such regulations – in particular the regulations implemented in order to eliminate the conflicts between the differentiated social standards of particular EU Member States) should allow combating a given practice or behaviour as a negative phenomenon of social dumping.

In the public discourse the various examples of social dumping threats are highlighted, including production or corporate relocations, and legislative reforms of governments increasing the labour market flexibility in order to make the state more competitive. It must be, however, emphasised that there are plenty of approaches related to the definition of social dumping, depending on the context in which this phrase is used, or on the group of interests speaking about social dumping and its actual dangerous features.

Due to the above, it is very difficult to adopt one ultimate legal definition of social dumping applicable in general way to all concerned industry sectors. On the other hand without such an adoption it is practically impossible to comprehensively resolve the problems resulting from this phenomenon in the EU, since it cannot even be identified for sure as to when social dumping actually occurs. This is one way how social dumping makes a challenge for the integration process since it results with no cooperation and agreement between old and new EU Member States in determining what should be changed in the EU internal market and how it should be done in order to maintain its fundamental features and at the same time ensure the justified protection for particular local stakeholders.
of each Member States. Perhaps the EP’s initiative shown in the Resolution will break the walls and constitute a first step towards the revolution in this complicated relationship.

**Analysis**

Since there is currently no one legal definition of the social dumping phenomenon at the EU level, it is not only very difficult to provide effective discussion about the remedies for it, but even to identify its nature and the mechanism constituting the basis of this phenomenon. Therefore it is also very difficult to answer the question as to why certain practices, visible within the EU internal market, should be even fought with the use of the EU legal instruments. Thus any legal interference into the legal framework governing the operation of internal market in this respect should be limited only to those fields which leave no doubts as to their negative dimension. From a legal perspective it may only concern the breach, circumvention of law or the abuse of rights resulting therefrom.

Still, whereas there is generally not that much ambiguity in defining where the breach of law occurs, it is more difficult to identify the circumvention of existing legal regulations or the abuse of rights resulting from them. It is not so much about the theory, but rather more about the practice. The differences in the national laws accelerate the companies’ works on pursuing cost advantages from the use of the less-regulated frameworks by employing its workers under such particular regime. The companies, being business-oriented entities, are in the constant process of handling the legal risks in checking what is legally acceptable under the current wording of the provisions of law. Such actions often end up with pretending the observance of existing laws while in fact undertaking practices manipulating the rules for a cost advantage, sometimes with the use of the temporary work agencies (which may be called as strategic posting) 53-. In this regard we may take into account two scenarios:

**Scenario 1**

A company from the new EU member state, incorporated by the citizens of this member state and originally based in this member state, decided to perform the cross-border services within the internal market with the use
of its own, cheaper employees, with the observance of the Posted Workers Directive and the local laws of hosting Member States to the extent it is obliged to do so under the Posted Workers Directive. Alternatively, a company from the old EU Member States decides to set up a branch in the new EU member state and transfer there the core production due to the lower labour and social costs.

In both alternatives no social dumping shall be identified from the legal point of view. Such companies only make use of the economic freedoms applying to the new member state’s accession to the EU. Yes, such entities created their competitiveness on the basis of the cheaper labour social costs as, thanks to that, they make the general cost of their operation cheaper. However, one often forgets that the cheap labour forces are not the only competitiveness factors – there are also such factors as productivity, quality, experience, business background, timing, and many others, which are often jointly analysed by the customers before making a decision which service provider to use or which product to buy.

Scenario 2

A business entity decides to set up a subsidiary as a so called letter-box company in a less labour-law-restrictive member state in order to formally employ its workers therein, so that they are, in fact, treated in their own countries of origin as posted workers. This is the case even though a posting company is legally required to have a permanent, original business activity in the posting state in order to be able to legally post workers (in consequence, the posted workers should formally have their general work in the member state where their employer is established). The original employer becomes only a "client" of the subsidiary and the workers formally employed by this subsidiary perform no work and do not even live in their country of payroll and social security registration. The original employer no longer has problems with the trade union involvement and employment claims. The subsidiary enjoys the lower tax regulations without performing any business in the state of registration which actually leads to the conclusion that the original employer commits a tax evasion. The subsidiary may be also, in such a comfortable environment, willing to circumvent the social security regulations to the detriment of the workers, as there is only a limited possibility to track such circumventions. The workers of the original employer are either not informed that their payroll is
transferred to another entity or are put under pressure by the original employer to accept this transfer.

Such a scenario should be clearly classified as an abuse, or even a breach, of laws on economic freedoms, and thus it should be treated as social dumping. It may also involve the business opportunists setting up letter-box companies with the services offered to general corporations, or a practice of establishing a cascade of several letter-box companies in order to hide the actual beneficiary and avoid a risk of piercing the corporate veil when abusing or breaching the social security and labour regulations.

The lack of a binding social dumping definition is connected with the problem that the perception of what social dumping actually encompasses is very subjective. It often happens that a particular situation which is treated as social dumping by a given worker or member state would not be treated in this way by the other Member States, employers or even the entrepreneurs from the old EU Member States taking advantage of cheaper workers (Barnard, 2000: 7). There is a wide range of ambiguity in the current public and political debate regarding this problem and, as long as the stable scope of consideration is not established in this respect, no works on adopting legal definitions could be even commenced.

The assessment of the situations connected with enjoying of the competitive advantage by certain entrepreneurs thanks to the low wage and social requirements in given EU Member States is also complicated as it is not entirely clear as to whether combating such situations (and the social dumping in general) is actually desired from the perspective of the mobile workers’ interests. This is caused due to the fact that the situation of such workers is interrelated with the situation of their employers in the internal market. If these employers are imposed with severe restrictions aiming at equalising the social standards and employment conditions above the minimum threshold (or the level of the home member state), these employers may suffer from the significant increase of costs of their business activity leading to the loss of any ability to remain competitive in the internal market. It creates a high risk that such employers may, at the end of the day, become eliminated from the market and thus be forced to close their business altogether. This is a chain of events which would definitely end with the loss of jobs by the employees (Kwasiborski, 2016: 405).

Therefore one should consider what is actually better for the workers, provided that no actual breach or circumvention of law or abuse of rights applies; to have a less remunerated job in comparison with domestic employees or not to have no job at all. The dilemma obviously arises for the
EU institutions and stakeholders who believe that additional restrictions to the operation on the internal market on the basis of treaty freedoms should be introduced for the sake of the workers’ interests. No attention to this issue is, however, given by the old Member States and its stakeholders who do not care, in fact, about the workers’ interests. Instead, they are strongly calling for the new regulations in order to protect their own internal market share. The above concerns lead to the conclusion that social dumping is a phenomenon of a purely economic character. In this respect it must be however emphasised that, according to the CJEU’s jurisprudence, the restrictions affecting the free operation of the EU internal market cannot be grounded with the purely economic reasons of any given Member States (Case C-49/98, Finalarte, ECLI:EU:C:2001:564). In consequence, the Member States seeking opportunities to protect their domestic economies with the excuse relating to the fight against social dumping, are forced to create a "better story" supporting their approach and activities, including, in particular, the exploitation of the workers’ situation and their protection as an overriding reason of the restriction, even though they have no true care for it.

The strong differences between the social standards and legal framework of particular Member States, connected with the problems in defining what social dumping entails and with the current political environment in the EU, make it impossible that adequate measures to combat social dumping will be produced at the EU level any time soon. As the political conflict between the old EU Member States and the new EU Member States is growing with respect to the terms of the mutual cooperation in various fields it is rather unlikely that a compromise will be achieved in this area in the foreseeable future.

This means that the only actors able to accelerate any legislation progress here would be the EU institutions. Whereas there may be certain doubts as to the objective approach of the Commission in these matters (in the context of its works on reviewing the Posted Workers Directive analysed in the following chapter), the European Parliament’s input provided in the Resolution must be considered as a positive factor. The standpoint provided in the Resolution seems to be a result of the careful analysis of the visible market tendencies and distortions, where the conclusions provide objective recommendations which are guided with the objective purpose of balancing the interests of all stakeholders and ensuring that the restrictions should address strictly the offenders of the legal fundaments of
the EU economic integration and the rules adopted in order to promote the
use of such fundaments.

As the social dumping slogan is commonly used with reference to sev-
eral various industry sectors, including transport as a whole and the con-
struction business, any potential harmonisation of legal provisions at the
EU level would require adopting the solutions of a more versatile and gen-
eral character, enforceable, more or less, to the same extent in the case of
any sector concerned. Nevertheless, due to the unique features the particu-
lar sectors possess as well as a differentiated structure of the employment
conditions and the nature of the relationships between the employees and
employers involved, it is rather impossible to imagine the introduction of
effective harmonisation for a comprehensive prevention of the social
dumping.

It is definitely possible to undertake particular measures with reference
to the respective sectors of the EU internal market, where the social dump-
ing threats have already been identified. Again, however, the problem is
with the starting point, as it would be necessary to agree first what a par-
ticular practice must entail in order to be classified as social dumping.
This is, in any case, a first step which should be made, at least with refer-
ence to a particular sector. A good example may be the transport sector
where an attention should be paid to the issues highlighted by the Euro-
pean Parliament in its Resolution (Point 23 and further of the Resolution).
Nevertheless, it is without doubt that such fragmented work would require
a lot of effort and will be very time consuming, which means that it would
only succeed if the willingness for political cooperation existed among the
old and the new EU Member States. This could be, in fact, an expression
of a comeback of integration tendencies in the EU.

Social dumping contexts

The issue of social dumping in the EU has been mentioned in various con-
texts but the discussions covering it dominate in the area of transport and
construction services performed within the EU on the basis of the set of
adopted regulations and in the more general area of posting workers with-
in the performance of transnational services within EU.

The issue of posting workers within the performance of transnational
services is the most EU-regulated area of potential occurrence of the social
dumping practices. The Posted Workers Directive introduced the scope of
labour law protection with which the posted workers must be granted in
the host member state at the minimum level applying to its domestic
workers. Subsequently, the application of this directive was well analysed
in the extensive set of the CJEU judgments and also strengthened by the
introduction of the 2014/67/EU directive aiming at ensuring the greater
enforceability of the Posted Workers Directive. Still, such a comprehen-
sive set of legal background is undermined by the old EU Member States
which results in the current conflict regarding the further revision of this
legal act. As this issue deserves a special attention, it will be separately
analysed in the following chapter.

Freedom of establishment perspective

At the same time the concept of social dumping is analysed from the per-
spective of the freedom of establishment, where regulatory competition
between EU Member States is deemed to be a significant factor in creating
a field for social dumping threats. The regulatory competition is under-
stood as a situation where particular Member States set out a legal envi-
ronment fostering the inflow of foreign business (either the actual or only
a formal one) by introducing a not so restrictive legal framework, based
mainly on the low social or tax costs of the economic operation, which
makes these Member States more attractive than the others (Deakin, 2006:
74). The regulatory competition creates a possibility of, the so called,
regime shopping (Cremers, 2015: 174-175, 187) where the entrepreneurs
can pick between relevant jurisdictions presenting differentiations in the
fields of social security costs and taxation and choose to enter the most at-
tractive state in this respect. Regime shopping is a clear consequence of
regulatory competition but it still does not directly lead to social dumping.
It is only a technical stage of choosing to enjoy a less restrictive jurisdic-
tion. The question is how the entities moving to such a jurisdiction decide
to operate once they already land in the more "friendly" environment.

The regulatory competition is an aftermath of the applicability and the
CJEU’s interpretation, in such cases as Centros (Case C-212/97, Centros,
ECLI:EU:C:1999:126), Überseering (Case C-208/00, Überseering,
ECLI:EU:C:2002:632) and Cartesio (Case C-210/06, Cartesio,
ECLI:EU:C:2008:723), of the treaty-based freedom of establishment (Ga-
bor, 2013: 74-80) according to which the setting-up of a business by en-
trepreneurs from the one member state in another EU member state cannot
be restricted, which also includes a setting-up of a branch or an agency. Therefore the freedom of establishment’s aspect in creating opportunities for regulatory competition may be assessed both from the perspective of the primary freedom of establishment principle as well as from the perspective of the secondary freedom of establishment principle.

In respect of the primary establishment the corporations deciding to move their seats to less restrictive regulation areas close entirely their formal links with the state of origin, so that the payroll and taxes related to the costs of the business operation are incurred only in the new EU Member States which introduce the tax reductions or more flexible national law where a space for it is left under the cover of the EU legal framework. Such a tendency could have been identified for instance with regard to the capital movements to Hungary or Slovakia (Šćepanović, 2015: 199-2014). It may also happen that particular corporations receive a tailor-made offer to set up a business from the governments of these Member States, including, among the other things, tax exemptions for the businesses located in special economic areas.

As regards the secondary establishment, the business operated in more restrictive member state is generally maintained but it is turned into a branch, with a main office in the new, less restrictive, location where there is no actual business. Such a possibility was clearly confirmed by the CJEU in Centros where it stated that the mere fact that no actual business is performed in the state of main office does not immediately mean that the abuse of the treaty-based freedom occurs (Paragraph 27 of this Judgment). That is why any attempts to impose material constraints for such free incorporation, in particular with the "real seat" principles widely applied by the EU Member States, may face, in case of a potential dispute involving a transnational effect, the challenges from the side of the companies trying to freely jump from one jurisdiction to another.

In terms of the regulatory competition Centros may be also invoked by market participants in the completely opposite context which means that it may serve as an argument for setting up branches in the less socially restrictive jurisdictions in order to transfer there the internal administration of the entire corporations (called a "shared service centre") or even the entire production with the use of the cheaper labour forces while retaining the formal establishment also in the state of origin. Therefore this judgment has a double effect, which perhaps was not overlooked but simply ignored by the CJEU due to the scope of the preliminary questions from the local court.
Trying to combine the regulatory competition aspect with the aspect of the occurrence of social dumping by the use of institutions of posted workers, social dumping may relate to the regulatory competition between EU Member States in welcoming the foreign companies to set up their legal offices in these Member States, employing their domestic workers, in order to send these workers to the original state where the business is actually performed. Such action is allowed after the CJEU’s considerations in *Centros* and thus should be considered as being in line with the rules governing the EU integration process. Therefore the old EU Member States trying to overturn it for the sake of their own labour markets would at the same time overturn the emerged attribute of such integration. By way of the *Laval* case the CJEU has finally ruled how the Posted Workers Directive should be interpreted – just as in case of other social policy EU directives and regulations, it introduces only a floor of rights (no complete harmonisation or even a level playing field has been introduced), above which the regulatory competition is possible (Deakin, 2008: 14).

Following this approach it is allowed to commence a competition between the particular Member States in adopting most favourable provisions for the foreign business, in order to equip it with the posts on their territory, designed for locating the cheaper labour forces therein to be subsequently sent back for the performance of services to the initial member state. In consequence *Laval* has revived the country of origin principle in respect of the regulations not falling within the scope of the minimum host Member States requirements disclosed in the Posted Workers Directive (Wagner et al., 2014: 403-419), which may be, in this context, also understood as a “regime portability” principle (Deakin, 2008: 5-6, 18). Regardless of the fact that such solutions remain legal, they create, however a temptation to go further and undertake practices being at the very edge of conformity with the laws regarding the operation of the EU internal market, the enforcement of which is at rather a poor level in the less restrictive Member States.

The practice of voluntarily decreasing the legal requirements and changing the national laws may definitely lead to a, so called, race to the bottom (Majone, 2006: 623-624). It means that as a result of the regulatory competition, the Member States losing the competitive advantage and domestic business due to the high level of social welfare legal framework are forced to decrease this level in order to maintain the interest of the corporations in locating their capital therein.
Historically, looking at the EU integration process with regard to social policies, the Member States being the founders of the European community were accepting and even supporting the fact that there is no complete harmonisation in the level of the social protection among the all Member States. Since in all first Member States this level was relatively high, the particular differences between the social systems of these Member States were only contributing to the, so called, race to the top, i.e. the increase of the social protection level in order to adjust it to the highest standards visible in the community, in order to attract the best skilled workers and the productive capital which, at that time, appreciated a high respect to the employment issues (Deakin, 2008: 19-20). This has also an impact on the wording of the legal measures adopted in the EU which were rather aiming at fostering the race to the top by describing only the starting points, not the maximum levels of protection (Deakin, 1996: 63). The situation has changed however as with the time of subsequent accessions the Member States with lower and lower levels of social welfare protection started to participate in the Community. Thus the differences between the social welfare standards among the EU Member States were growing, whereas the already adopted EU legal framework including a space for regulatory competition on the internal market became applicable to the all members. In consequence the race to the bottom replaced the race to the top and the entrepreneurs from the new EU Member States started to gain, in certain industry sectors, a competitive advantage on the internal market. It turned out that the old EU Member States sought then to change the currently binding legal framework in order to stop this tendency. One should however consider whether such claims of the old EU Member States are legitimate, given the fact that they were solely responsible for the EU enlargement decision and should have been aware (a typical legal test of a "reasonable man" should be applied in this respect) of the legal and economic consequences of welcoming new Member States in the EU.

The entire problem of social dumping is considered in the public debate only from the position of the EU Member States with a high level of social regulations and standards. For such Member States the operation on the basis of much lower wages and social costs is treated as unfair competition, whereas for the Member States with lower social regulations, where it is often connected with the general lower productivity or quality of goods or services, this aspect may often constitute the mere competitive factor favourable to them. Thus, for such Member States imposing any restrictions on them in this respect with an excuse to combat “unfair compe-
tition” or social dumping shall be treated as a limitation of their treaty
based rights to freely operate (perform services, set up a business, undertake work in other Member States) on the internal market (Verschueren, 2015: 133-134). From their perspective there is no negative phenomenon in using their own characteristics in the battle for a relevant market share and thus it is not clear whether objectively one may admit that the race to the bottom actually occurs (Gabor, 2013: 304). In consequence, the business costs optimisation with the use of treaty freedoms is a pure practical dimension of the operation of the EU economic integration fundamentals. Obviously one should mind that a different scenario applies where such a competitive advantage is being gained by “artificial” reduction of social costs – through the illegal or abusive practices.

The operation of letter-box companies

A typical example of the social dumping resulting from the regulatory competition is the operation of so called "letter-box" companies which were mentioned in the Scenario 2 presented above. These entities are set up through regime shopping in the more attractive jurisdictions but are, in fact, the artificial arrangements which do not operate real business in their home member states and only focus on using this organization as a place of formal employment of the workers sent to the other EU Member States (Cremers, 2014: 3-4). Such a practice makes the practical use of the freedom of establishment fictional and thus it must be treated as an abuse of the rights resulting from the treaties, even if legally it seems that this entity conforms to all the legal requirements in respect of social security, tax and employment laws.

This standpoint has been confirmed by the CJEU which in Societé de Gestion Industrielle (Case C-311/08, Societé de Gestion Industrielle, ECLI:EU:C:2010:26) argued that EU law does not eliminate the Member States’ rights to introduce national measures prohibiting companies from invoking EU law when, actually, there are only "wholly artificial arrangements" set up in order to circumvent national legislation through the abuse of the freedom of establishment with the aim of escaping the mandatory national rules (Paragraph 65 of this judgment). However, a more serious example of pursuing social dumping through letter-box companies appears when they are additionally used to intentionally breach relevant EU or national laws in order to get more profit from the internal market with the
minimised costs as the offenders feel safe under the guise of a cascade of artificial legal entities hindering the chances to penalise the offenders and enforce an adherence to the established laws. As these companies are in fact only the letter-boxes where it is difficult to track the real stakeholders standing behind this veil, they can constitute an instrument for breaching the law with a strong chance of bearing no liability for it.

To a certain extent the measures designed to counteract the arrangement of letter-box companies have been adopted in the transport sector, where under the provisions of Regulation 1071/2009 regarding the operation on the road transport sector a rule of "genuine" undertaking applies in order to determine whether a given company may be entitled to use the rights established for transporting services on the internal market (Article 3 and Article 5a of this regulation). In addition, Regulation 883/2004 on coordination of the social security systems goes a bit further and indicates that also for settlements in respect of the social costs the rule of "genuine" undertaking must apply (Articles 11.3 and 12 of this regulation). Furthermore Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 sheds a light for assessing whether a given undertaking is "genuine" by referring to an undertaking that ordinarily performs "substantial activities, other than purely internal management activities, in the territory of the member state in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question" (Article 14.2 of this regulation). The Commission has also published detailed rules concerning this issue in a broader perspective.

Nevertheless, the enforcement of this legal framework is, for various reasons, weak and thus the use of letter-box posting is growing (Berntsen et al., 2015: 53; Cremers, 2015: 177), which is matter of concern of the European Parliament (Points 13-14, 26 and 36 of the Resolution).

What is striking is that the analysis of the characteristics of the letter-box companies leads to a conclusion that such organisations are actually arranged by the entities from the old EU Member States (namely the Member States with higher labour law standards) in order to avoid the high level of social and wage requirements in the true state of origin.

Having in mind the features of letter-box companies, it is obvious that their operation combines the exploitation of the freedom of establishment

with the freedom of services through conducting the posting of workers formally employed in the letter-box company to the host member state. They therefore undermine the regulations of the Posted Workers Directive providing that the companies posting workers to another Member State within the performance of their services should actually perform business activity in the home Member State. As there was lack of sufficient enforcement of these regulations, together with poor enforcement in the other areas of the Posted Workers Directive, the new 2014/67/EU Directive aimed at ensuring a better enforcement in this respect, as the operation of letter-box companies constitutes the major problem related to the whole institution of posting workers. The new directive is to force the authorities of respective Member States to investigate whether particular companies truly perform business activity in the home Member States, since this is a condition for making the Posted Workers Directive applicable. As emphasised, however, by the EP in its Resolution, a part of the EU Member States is reluctant to transpose this additional directive or arrange such a transposition after the established deadline.

The presented attitude to the 2014/67/EU directive combined with the fact that no further solutions regarding the elimination of letter-box companies issue are included in the current Commission’s proposal on reviewing the Posted Workers Directive (though France proposed adding to this project a provision obliging the companies to have at least 25% of their turnover in the state of establishment, but this idea has not been followed at the further stage of consultations\(^\text{11}\)), and the old EU Member States are not willing to wait for the results of the Enforcement Directive’s transposition, shows that although letter-box companies are one of the biggest social dumping threats, there are still Member States who are not committed to fight these problems. Having this in mind one should identify a lack of the common attitude among the Member States to focus on the fight with the social dumping threats, which is definitely an issue from the integration perspective. Instead of mutually contributing to eliminate the practices clearly affecting the EU internal market, the old Member States prefer focusing on the areas where an abuse of rights or breach of law does not necessarily appear, but a strong competition from the new EU Member States is recognised.

Bogus self-employment

The phenomenon of, the so called, "bogus self-employment" is usually recognised as a situation where a given worker sets up their own entrepreneurship in their member state of residence, so that their true employer, based also in the same member state, can avoid paying higher social and tax contributions and potentially have also the possibility to circumvent other social or labour laws (Jorens, 2008: 6). As long as there is no transnational factor (e.g. the worker is a citizen of another EU member state) this is rather an internal matter of concern.

However, a transnational factor would apply if the self-entrepreneurship would be incorporated in a state other than the state of origin, as a result of the execution of the freedom of establishment. Such a scenario could provide a clear example of the abuse of the treaty based freedom of establishment (and, consequently, of the freedom of services) which may be classified as social dumping. The working method in this respect is that a company puts pressure on its worker to set up an entrepreneurship in the member state with lower state of social protection and lower social costs, and then concludes with such a worker a service agreement, according to which this worker formally renders the transnational service through his entrepreneurship in the member state of the employer. This is another example as to how the problem of regulatory competition may combine the freedom of establishment and the freedom of services with the aftermath of the occurrence of social dumping practices on the EU internal market.

However, any efforts to eliminate such practices should respect the situation of the fair acting and genuine self-employees who truly render services for a low number of customers. This issue was highlighted by the EP in the Resolution where it summoned the Commission to undertake necessary measures aiming at preventing the occurrence of bogus self-employment which, at the same time, cannot discriminate against the said true self-employees (Point 28 of the Resolution). The problem is that, if the Commission decides to undertake the measures in the similar manner as it did with regard to the revision of the Posted Workers Directive (analysed in the following chapter), it will not make sufficient steps to distinguish these two groups of self-employees and the proposed solutions would again affect the entire sector instead of facilitating a separation of the bogus self-employees from the genuine ones. The real self-employees will then have to be sacrificed in order to weed out the rotten apples constituting only a part of the entire group of the self-employees.
Discussion

Having in mind the all issues presented in respect of the social dumping contexts, it should be stressed that all the regulatory competition aspects facing the allegation of the fostering of social dumping practices should be considered as negative factors only if they involve an actual breach of the currently binding provisions of EU law or the national laws implemented on this basis, or at least an abuse of rights resulting therefrom or a circumvention of such provisions. As was confirmed by the CJEU in Centros, the mere fact of enjoying the advantages resulting from the operation of the freedom of establishment does not automatically constitute an abuse. The regulatory competition does not therefore automatically lead to social dumping, it only creates and environment where a possibility of undertaking such practices exist (Giubboni, 2013: 15, and Sayde, 2012: 408). In consequence, it also means that the regulatory competition creates a field where counter-integration actions mentioned above may be undertaken (Marginson, 2006: 12).

On the one hand, there is a field where the old EU Member States may lodge, in the response of the fears of the old EU Member States' societies, the excuse for protecting the domestic market (Kvist, 2004: 306) and call for limiting the operation of the internal market by affecting the competition existing on it with legal measures. Thus, a point was made that social dumping is used as a “politicised label in conflicts about who gets what work and how much they should be paid” (Berntsen et al., 2015; 46). On the other hand, there is an environment for actually abusing or breaching, in a manner difficult to control, the laws governing the operation of the internal market. It only confirms that the current legal framework regarding the EU internal market was based on a fundamental mutual trust, respect and desire to integration – that is why the boundaries thereon have been marked quite broadly. Nevertheless, when a general EU integration crisis takes place, this field is very vulnerable to any practices challenging the status quo.

Free movement of workers perspective

The voices on the occurrence of social dumping practices are also raised with regard to the actions undertaken with the use of the free movement of workers principle. Thanks to the fundamental rules resulting from this, the
workers from the EU Member States unable to offer the payment rates even at the minimum level of the other Member States may easily move to the ones with higher payment standards and take a job considered as unattractive for the domestic labour forces due to the low remuneration in the view of the life standards on these territories. Whereas the mere fact of taking such an opportunity should not be considered as a social dumping practice, the situation changes when such work is undertaken without any registration and thus without paying taxes and social security contributions. This tendency, called unregistered or undeclared work (Williams et al., 2012: 20), is a clear breach of the national laws of a host member state resulting from the abuse of the right to move to another member state with only limited powers of the host member state to control such movement.

The lack of registration of work has a double effect. First of all, it definitely affects the economy of the host Member States as it deprives them from the standard profits related to the taxation of income gained by the individuals on their territory and the contributions they should make to the local social security system. At the same time, however, it also leads to the application of employment conditions at a level below the standards or even the minimum requirements imposed by these Member States. Even though this seems to be also a decision of the workers using the free movement principle to take a job in such conditions, one should acknowledge that this decision is not entirely voluntary, as it is often driven by a difficult economic and personal situation of such workers, what can be easily exploited by the employers from the host Member States.

This aspect of social dumping concerns, expresses that such practices also involve and are even fostered by the entrepreneurs from the host Member States, being in most cases the old EU Member States. In the public debate, it is even suggested that the unregistered work problem (together with bogus self-employment, which may be also demanded by the employers from the host Member States as a condition precedent to even consider the employment of a foreign worker) constitutes a real and major problem in the view of social dumping concerns12, rather than the irregularities identified within the use of the institution of posting workers which takes more or less only one percent of the entire EU internal market.
operation (Pacolet et al., 2014: 15, and Point U of the European Parliament’s Resolution).

Remedies to the concerns regarding social dumping.

There are various remedies or counteractions applied by the Member States in order to combat the practices classified by them as social dumping. One solution, which is basically a standard repeated in the recent enlargements, is the introduction of transition periods in order to limit, for a certain period of time, the access of the nationals from the newly acceded candidates to the labour markets of the current Member States (Bernaciak, 2015; 1-2). As these measures are an effect of mutual negotiations as to the wording of the accession treaties between the candidates and the current Member States, there is no doubt that such solutions are completely legitimate and thus widely observed. This is the case even though they are only of a preventive nature since, before the accession, no legal environment was created to enhance the possibility of the occurrence of the social dumping involving such a candidate state on a larger scale.

The stage of introducing the transition periods to the accession treaties is therefore the core (and last before any legislative measure is introduced on the basis of the compromise achieved between the conflicted states) moment when such restrictions can be legitimately set up. It is a time where all the rules of a given Member State’s presence on the internal market may be comprehensively agreed and invoking these rules after the accession by the new Member States should not be challenged by the old EU Member States, since no rules of the game should be changed after the kick-off, unless all players involved agree to it. That is why the secondary introduction of anti-social dumping measures should be justified with more factors than the pure use of the currently binding principles governing the operation of the EU internal market.

On the other hand, one may identify the applications of certain unilateral measures by particular Member States, where the most recent examples are the introduction of the general minimum wage rates in Germany.
(MiLog)\textsuperscript{13} and France (\textit{Loi Macron})\textsuperscript{14} and the actions undertaken by French authorities with regard to the process of posting the employees, i.e. the imposition of an obligation to pay, by the sending employer, EUR 40 for each worker posted to the territory of France\textsuperscript{15}, as well as the \textit{Moliere} clause which relates to the imposition by the French local authorities in certain regions of the country of a requirement to employ, on the public construction sites, only French-speaking workers\textsuperscript{16}. The \textit{MiLoG} and \textit{Loi Macron} regulations have been already questioned by the Commission, which is in the process of investigating whether these provisions are unjustified or disproportionate\textsuperscript{17} and has proposed the adoption of measures which would explicitly limit, in the transport sector, the application of general domestic minimum wage rates only to transport workers who spend more than three days in a given Member State in a given calendar month\textsuperscript{18}.

These actions may be definitely treated as the effects of the social dumping concerns. The question is, however, what these concerns actually relate to – a growing market share of the entities from the new EU Member States in comparison with domestic ones or a true concern about the problem of the social exploitation of workers coming to their territory?

Regardless of what the outcome of the Commission’s investigation will be, and regardless of whether the additional French measures will also become a subject of such investigation, one should remember that, in its judgments, the CJEU (CJEU Case C-244/04, \textit{Commission vs. Germany},

\textsuperscript{14} http://www.stowarzyszenie.szn.pl/en/\textbf{France-minimum-wages-for-\textbf{foreign-professional-drivers-2/} - date of display: 15 August 2017.}
\textsuperscript{17} http://europa.eu/rapid/\textbf{press-release_1P-16-2101_en.htm} (accessed 15.08.2017).
ECLI:EU:C:2006:49) emphasised that any restrictions on the use of the freedom of services should be withdrawn if they are able to withhold, limit or make less attractive, the transnational services performed by a provider based in another member state where it legally provides the same services, even if these restrictions apply without any difference both to the domestic and to the transnational providers (Paragraph 30 of this judgment).

The CJEU, therefore, insists on taking into account the legitimate interest of the transnational entrepreneurs when combating social dumping practices, implying at the same time that such preference applies only when the real business is performed in the home member state. Such an approach is also coherent with the set of judgments in which the CJEU repeated that the achievement of social policy aims should be balanced with the rights of the transnational entrepreneurs resulting from the treaty-based freedoms (Paragraph 105 of the Laval judgment). At this point it is also worth recalling the CJEU’s judgment in the Finalarte case, where it confirmed that the purely economic objectives such as the protection of domestic businesses cannot amount to overriding reasons justifying the limitations imposed on the treaty freedoms (Paragraph 39 of this judgment).

Given that social dumping is a phenomenon connected strictly with economic threats for the host Member States, the judicial framework of the CJEU significantly limits the EU Member States' discretion in introducing restrictions to the operation of the EU internal market by transnational entrepreneurs. The overriding reason, which most likely would be always approved by the CJEU in cases involving the imposition of such restrictions, is definitely the protection of workers (domestic or those immigrating). However, in the view of the often participation of the corporations from the host Member States in such practices as bogus self-employment, unregistered work and most of all the operation of letter-box companies, it seems that this is not the actual main goal of the host Member States while trying to combat the practices constituting, allegedly, social dumping. Instead, the host Member States are rather focused on the calls to ensure the "fair competition" on the internal market or improving in "coordinating the social security systems" in order to cover behind this veil, an intention to protect the domestic market against the competitive advantage gained by transnational entrepreneurs in a legitimate way. One should admit that this is evidence of the undermining of the EU integration processes.
What actually constitutes a challenge for the EU integration process?

The outcome of the considerations included in the above sections sheds a light on a new argument to the considerations regarding the classification of social dumping as a challenge to the integration process. One should admit that the actual role of the old EU Member States and its domestic participants in pursuing the true social dumping practices is, in many cases, essential. In such areas as the operation of letter-box companies, the unregistered work or the bogus self-employment their participation, or even initiative, is a condition precedent for the identification of the social dumping practice. This, in consequence, undermines the arguments currently presented by the old EU Member States for combating social dumping, focused on the area of posting workers. If true care was given to the situation of employees moving to other Member States for working purposes, the calls for the introduction of social dumping remedies would be focused on the areas highlighted above.

As it is completely otherwise, it seems that the old EU Member States are more willing to accept such negative aspects, rather than tolerating the competitive advantage being gained in the internal market by entrepreneurs from the new EU Member States. This shows their real current attitude to the integration process in the EU internal market as both the willingness to affect the natural competition factors with legal measures and the ignorance of the difficulties of workers using the free movement principle or forced to operate the fictional self-employment business, clearly indicate that the particular interests of these Member States are to take back the control over the operation of the internal market on their territory and to set there rules fostering the development of domestic companies only.

The acknowledgment of such motivation has been clearly made within the introduction of the Commission’s legislation proposal regarding the amendment to the Posted Workers Directive. Whereas, by this time, the calls for combating the social dumping for the sake of the employees’ interests could be convincing to the objective public opinion, after the publication of this project there are no doubts as to the actual motivations of the old EU Member States’ campaign to continue changing the legal framework in the area of the posted workers’ institution. This problem will be further analysed in the following chapter.

Having in mind the above, it should be noted that, in its Resolution, the EP concentrated on calling on the Member States and the Commission to
ensure a greater enforcement and implementation of the current legal framework adopted at the EU level (in particular the 2014/67/EU Directive), as well as the improvement of mutual cooperation and exchange of information in order to control the social conditions of work, and combating the frauds related to social security contributions, tax evasion, bogus self-employment and unregistered work (Points 18-28 of the Resolution).

This problem has been already recognised in the scholarly debate, where it was pointed out that the social legislation adopted at the EU level was in many cases formulated with the best of intentions, but it was then suffering from poor implementation and enforcement, as well as from the overwhelming primacy of the treaty-based freedoms (Cremers, 2015: 174). The effective enforcement of the binding regulations with regard to cross-border activities is very difficult, due to the language differences, little cooperation of local labour inspectorates and time-consuming procedures.

Such a combination of features constituted, in fact, the said problem of the regulatory competition and affected the level of the social protection across all EU Member States. It promoted the, hardly controlled, use of the freedoms, in particular the freedom of establishment, and thus left open the door for social dumping. The EP therefore implied that a lot must be done; most of all in the Member States' attitude and willingness to truly counteract the infringements or circumventions of the EU law (and the national laws adopted on such a basis) and the abuses of rights resulting therefrom. This underpins the arguments for identifying (at least from the legal perspective) social dumping only in case of a practice including any of such negative acts.

As a matter of fact the EP called on also the Commission, in very general way, to combat the legislative shortcomings in the current legal framework from the social dumping issue perspective. In details, it basically referred only to the need of the new legislation works concerning the transport sector, where the problem of bogus self-employment is very visible (Points 23-28 of the Resolution). This goal is not covered at the advanced level by the current Commission works, which now focus on reviewing the Posted Workers Directive. Although this appears to be at its forefront in the anti-social dumping campaign, this is not the main area which requires urgent intervention according to the conclusions coming from the core points of the EP Resolution.

The problem is that, in the view of the old EU Member States, it is more profitable to concentrate their efforts on protecting the position of...
their domestic entrepreneurs on the internal market rather than commencing a true campaign against the social dumping issues truly appearing in the internal market, as this would also affect the said entrepreneurs. Due to the increased use of letter-box companies, bogus self-employment or unregistered work one may argue that these areas require more legislative initiative and not only more effort in enforcing the existing set of regulations. The problem is, however, that currently among the Member States there are both no actual efforts to mutually cooperate for the sake of the better enforcement and at the same time no particular common willingness to come up with new legal solutions in this respect. That is why these problems are rather ignored in the Commission legislation proposal to amend the Posted Workers Directive and taken in a very limited way into account in the Commission’s proposal regarding the amendment of the regulations regarding the coordination of social security systems\textsuperscript{19}. This inconsistency should be treated as a real challenge for the further development of the EU integration process.

The fear that the internal market participants from the Member States with lower social standards will get a higher market share due to such circumstances is understandable, but this is a natural consequence of creating the internal market as a whole and deciding to enlarge the EU with the states falling behind the social standards of the old EU Member States. Such a state of play was arranged by the old EU Member States on their own, which means that now they should bear the consequences of these decisions.

\textit{Conclusions}

The undefined social dumping impedes the EU integration because it is a bone of contention; one of the material hot spots between the old and the new EU Member States. This leads only to deepening the clash between these sides due to the economic differences existing between them, since the Member States suffering from the social dumping practices are not

willing, anymore, to open their domestic markets so widely for the entrepreneurs from the Member States with lower social and labour standards, which obviously is to the detriment of their development.

However, since there is no one binding definition of social dumping, it is relatively easy to raise it as a negative issue, and to use it as an excuse to protect the domestic economy against transnational entrepreneurs from other EU Member States, especially when the domestic entrepreneurs from the old EU Member States very often participate in social dumping practices as well. This clearly affects the EU integration process.

On the other hand, the real and unquestionable social dumping practices, related to the breach, abuse or circumvention of the existing internal market regulations, undertaken by the entrepreneurs from the new EU Member States, constitute a justified reason for the old EU Member States’ concerns. Such practices may finally lead to identifying social dumping as a negative phenomenon which should be combated, either by the greater enforceability of the already existing rules, or by the modification of the rules which turn out to be ineffective. Unfortunately, they also facilitate the use of excuses in other cases where no breach, circumvention or abuse of the legal framework from the side of the entrepreneurs based in the new EU Member States occurs – at least as long as the clear definition of social dumping is not adopted. At the same time these practices encase, in the political discourse, the issue of entrepreneurs from the old EU Member States being also involved in such aspects as unregistered work, bogus self-employment or the operation of the letter-box companies.

Having this in mind, the ultimate conclusion is that the social dumping phenomenon should be finally defined at the EU law level. This term is widely used in a public and political discourse, but in various ways, depending on what is actually advantageous for individual stakeholders. This creates a field for mutual reservations between all sides of the conflict and allows using it commonly as an excuse to promote the need of protection of local markets and entities, which is a step towards the renationalisation process on the EU internal market. Of course, one must be aware that the adoption of a single binding definition of social dumping may be impossible due to the variety of issues involving practices of this kind in any particular industry sector. However, it therefore should be considered whether at least the more detailed and only sector-oriented definitions can be adopted, together with appropriate counteracting legal measures, tailored to the specifics of the particular sector.
Putting social dumping into the EU legal framework, through the introduction of its definition, would, ideally, prevent the participants of the political discourse from squandering this term. On the one hand, it could not serve anymore as an excuse from the old EU Member States to impose their own particular interests. On the other hand, it could provide more legal certainty preventing the entities from both the new and the old EU Member States (those taking improper advantage of the regulatory competition initiated by the new EU Member States) from applying practices abusing the rights resulting from the treaties and the internal market – it would simply be easier to identify which actions can be conducted and which ones would constitute an illegal behaviour.

The adoption of any definition would have to be based on a mutual understanding and political compromise between old and new EU Member States which, as we may conclude from the current events at the EU level, is now very difficult to reach in many areas of their cooperation. That is why social dumping creates another challenge for the EU integration process. As long as no such definition is provided, an extensive input might be needed from the CJEU, whose role is always crucial in case where there is no, or there is insufficient, scope of legislation at the EU level. In the context of the regulatory competition creating a risk of social dumping the CJEU would probably have to review, in the nearest future, the circumstances which may be classified as social dumping affecting the internal market integration. In order to do so, it will probably be forced to articulate first, what the social dumping slogan entails and then how it should be combated in order to avoid a distortion in the mutual relations between the EU Member States.

Given all the above mentioned concerns, the Resolution of the EP may be deemed as a step towards the commencement of the legal framework governing the social dumping problem. It provides an objective and balanced proposal regarding the wording of the social dumping definition and the fields where it particularly appears. The problem is that such a massive input from the EP’s side focuses on such problems as bogus self-registration, unregistered work and letter-box companies where the crucial roles are played by the stakeholders from the old EU Member States. These contexts are, therefore, not in the area of main interests of the governments from the old EU Member States, which prefer instead to focus their efforts on providing social dumping excuses to eliminate the competitive advantage of entrepreneurs from the new EU Member States in the inter-
nal market, often gained through activities conducted in the full compliance with the provisions of the EU and currently binding national laws.

From that perspective one should realise that the social dumping phenomenon may constitute a challenge for the EU integration process, not only as a form of breaching or abusing the EU and national legal framework referring to the operation of the EU internal market (by entities both from the old and the new EU Member States), but also as an excuse applied by the old EU Member States with regard to the activities not involving their domestic entrepreneurs, with the aim of ensuring the stronger position of their entrepreneurs in the internal market. In consequence, in the first case the impairment of the competitive position of the fair entrepreneurs from the new EU Member States is (only) the aftermath of the measures adopted to combat the social dumping phenomenon, being often disproportionate as the tackling methods reaching the entire industry instead of being devoted specifically to track and eliminate single rotten apples. In the second case, however, the impairment of the competitive position of the fair entrepreneurs constitutes a hidden, but a true, purpose of enforced restrictions for the transnational activity on the EU internal market.

The above leads to the conclusion that the EU integration process is being undermined in the same way when a given entity breaches or abuses the treaty-based freedoms in order to become more competitive through incurring only the lower costs of the social and wage requirements (as it avoids following the already established rules), as well as when the mere fact of lower social and wage requirements in the other EU Member States is used by the old EU Member States as a false argument to have greater control over their domestic market, as it calls for changing the market and competition rules after the "kick-off".

The above-mentioned actions, as well as the entire conflict arising between EU Member States in respect of the use of the treaty freedoms with the advantage of lower social and wage requirements in given Member States, may be classified as forms of renationalising the integration processes where the renationalisation aspect is strictly connected with the measures undertaken against the currently binding EU fundaments of the EU economic integration for the sake of particular interests, and with no respect to the other participants of the internal market. By putting the differences in the national labour regulations across the Member States into the social dumping context, they lead to the distortion and fragmentation of the internal market through the enforcement of the national interests,
which undermines the core idea of economic integration between the Member States. That is why the political arguments around the social dumping issue should be finally resolved and the actual social dumping practices affecting the proper operation of the internal market should eventually be eliminated.

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Chapter 5: Posted Workers Directive under revision – a step towards the fair competition or a demonstration of the EU integration process' reverse?

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Key words: Posted Workers Directive, EU integration crisis, internal market competition, protection of domestic markets

Introduction

Last year the Commission presented a legislation proposal regarding the revision of the Directive 96/71/EC concerning the posting of workers within the provision of services (the "Posted Workers Directive" or the "PWD")\(^1\). As these works entered into the decisive phase in October 2017, it is worth considering, regardless of the detailed structure of the solutions to be finally adopted, whether the general assumptions of this proposal should be welcomed from the perspective of the EU integration process and whether the proposed core transformations to the institution of posting workers will generally match the idea standing behind the original provisions.

In the proposal the Commission stated that the reason for the revision is to combat the "unfair" competition existing on the EU internal market in the field of services performed with the use of posted workers. That is why the Commission wants to amend the PWD in the view of a general rule that the same work in the same place should be remunerated in the same way (Page 2 of the proposal).

The proposal is to amend three main areas: terms regarding the remuneration which must be provided to the posted workers in accordance with the local law of the hosting Member State, specific legal solutions regard-
ing the long-term posting and new rules on the using of temporary agency workers. One of the core amendments following this project, being also an interesting example of translation of the EU anti-integration tendencies into the legislation activities, is the complete rearrangement of the rules of remunerating the posted workers. That is why this aspect of the proposed amendments will be a matter of concern in this chapter.

This action of the Commission, supported and even instigated by several old EU Member States, has been significantly criticized by the Eastern new EU Member States (acceding as of 2004) and Denmark. That is why they decided to challenge the proposal with the subsidiarity control mechanism, otherwise called as the "yellow card mechanism". On the other hand five old EU Member States submitted the opinion that the Commission’s proposal is in line with the subsidiarity principle. The Commission reassessed its proposal but the review, including the dialogue with the national parliaments, did not lead to the modification of the proposal in its original framework.

The works on revolutionising the institution of posting workers by completely rearranging the rules of their remunerating requires analysis from several perspectives. First of all, it is necessary to consider whether there is a true legitimacy to introduce the changes to the Posted Workers Directive in the proposed way, especially in the view of the fundamental rules governing the EU internal market. Following this issue, the circumstances of introducing the proposed changes lead to the concerns regarding the impact of the EU integration crisis on the EU area in which the posted workers are used (i.e. the use of the freedom to provide services on the internal market). It seems that within the sector of cross-border provision of services on the internal market with the use of posted workers, the impact of the EU integration crisis lies in the development of renationalisation tendencies in the practices of particular EU Member States, aimed at restoring the national character of local markets. Such tendencies lead to the fragmentation of the internal market by adopting legal measures aimed at protecting the interests of local entrepreneurs and, at the same time, hindering the access to local markets for cross-border entrepreneurs. Furthermore, due to the legal character of the amendments proposed by the Commission and the circumstances of its introduction (involving a strong pressure of some particular EU Member States), the Commission’s proposal

needs to be also reviewed from the perspective of the good governance standards.

How the rules on posted workers’ remuneration will change?

As mentioned above, the main aim of this Commission’s activity in respect of the institution of posting workers is to combat the unfair competition which, according to the Commission, is visible on this sector of the EU internal market. Implementing the rule of the same pay for the same work in the same place is said to be a general remedy for such unfair competition. Such an approach of the Commission indicates that the main area of concern was the rearrangement of the terms of remunerating the posted workers for their work in a Member State other than the Member State of their permanent residence.

The Commission argued that the current provisions of the Posted Workers Directive (introducing local wage requirements only at the minimum rate level) led to the enormous differences in remuneration of local workers and the posted ones, which provides cross-border entrepreneurs with an advantage in respect of social costs comparing to the local entities. In its PWD impact assessment to the proposal\textsuperscript{3} the Commission stated that such an advantage should be eliminated. At the same time the Commission admitted, however, that such an amendment would be detrimental to entrepreneurs from the Member States having lower wage requirements (page 3 of the Commission Staff Working Document Executive Summary), regardless of whether they render services in a fair way or not as the Commission did not differentiate such scenarios.

Specifically, the amendment of Article 3 item 1 of the Posted Workers Directive is proposed, through replacing the phrase of "minimum wage rate" with the sole term of "remuneration". It is also intended to impose on the EU Member States the obligation to publish the information on all components of the remuneration applicable in a given member state. The "remuneration", for the purpose of the amendment of the Posted Workers

Directive, shall mean all components of the remuneration which are mandatory under the local statutory, executive and administrative laws, as well as under the collective bargaining agreements or the arbitrary judgments, which are considered as generally applicable (or if there is no system of considering such agreements or judgments as generally applicable, other collective bargaining agreements or arbitrary judgments in the meaning of Article 3 item 8 of the Posted Workers Directive, adopted in the hosting member state).

In practice, if the above proposal is enforced by the European Parliament and the Council, the posting employers will be obliged to pay the posted workers the remuneration structured entirely in the same way as the one received by the local workers – the same minimum basic remuneration plus all the benefits to which the local workers are entitled. Just to remind, under the current wording of the Posted Workers Directive the posting employers are only obliged to pay the minimum rate of wage for work established in a hosting member state. As regards the calculation of the minimum wage rate, it may be only increased by the allowances which are strictly related to posting, unless they are paid in order to return the expenses actually incurred as a result of posting, such as travel, accommodation and nourishment costs (Article 3 item 7 of the Posted Workers Directive). Therefore the minimum wage rate could be increased, for the purpose of the entire remuneration required from the posting employer, e.g. by the allowance for the separation with the family.

In consequence, this simple word replacement may cause material consequences for cross-border entrepreneurs. If the amendment comes into force in the wording initially proposed by the Commission, all typical benefits usually paid to local workers would have to be also paid to the posted ones (even in case of a short-term posting).

What is a true motivation for amending the posting rules?

The presented proposal seems to overturn the objectives governing the operation of the Posted Workers Directive. Currently, the PWD aims at accelerating the performance of cross-border services in combination with the justified protection of posted workers and maintenance of fair competition in the EU internal market. Such objectives clearly come from the preamble (Motives 1 and 5 of the Posted Workers Directive). One should note that according to the current regulations the objective related to the
acceleration of using a freedom of services on the internal market by cross-border employers (i.e. in fact mainly employers from the new EU Member States) is not subordinated to the other ones (Cremers et al., 2004: 27-28). It has already been confirmed by the Court of Justice ("CJEU") in Laval (Case C-341/05, Laval, ECLI:EU:C:2007:809) (and this standpoint was maintained in subsequent judgments) that such a framework of objectives governing the institution of posting workers provides a balance between the interests of the cross-border entrepreneurs and their posted workers (Paragraphs 104-105 of this judgment).

Moreover, if any of the said objectives is supposed to be the principal one, Laval suggests that this status should be assigned to the interests of the cross-border entrepreneurs providing their services with the use of the posted workers (Deakin, 2008: 15). All the more so since the PWD has its treaty base in the treaty provisions on free movement, not on the social policy provisions, as with the other directives governing the social policy matters. In the course of time further EU case law shifted the priority towards the interests of the posted workers (Case C-315/13, De Clercq, ECLI:EU:C:2014:2408 and Case C-396/13, Elektrobudowa, ECLI:EU:C:2015:86), but it never emphasised that the question of fair competition (understood as a guarantee of keeping sufficient market position by the entrepreneurs from the host Member States) must be principally appreciated.

The above approach, presented both on the legislative and judgmental dimension, has been questioned by the Commission and the old EU Member States calling for the changes, which official motivation is to eliminate the "unfair" competition allegedly existing on the internal market in the field of performing cross-border services with the use of the posted workers. Such a turnaround must be criticised from two essential perspectives.

First of all, when looking deeper into the Commission’s proposal, in the opinion of the Commission the competition is unfair solely due to the differences in the remuneration paid to the posted workers, resulting from huge variations of the social costs which must be incurred by the employers in respective Member States. This means, in fact, that the competition existing in the market is unfair as the current rules are for the benefit of the entrepreneurs from Member States with lower social costs (i.e. basically the new EU Member States) – the Commission clearly admits that it follows such an interpretation. Nothing is said, however, about any further investigation of the facilitators of the "unfair competition".
In particular, the Commission does not combine the occurrence of the "unfair competition" with any negative aspect in the behaviour of the cross-border entrepreneurs from the "new EU" Member States. Therefore it only derives the unfairness from the existence of a certain objective factor, not dependent on these entrepreneurs, being always one of many competitiveness factors, and merely the one which was facilitating the use of the freedom of services in the internal market by the entities from less developed EU Member States. In other words, one may interpret that, according to the Commission’s standpoint, the unfair competition of the internal market results solely from the pure fact of using the treaty-based freedom of services, even if no misconduct on the user’s side may be identified. This is a complete overturn of fundamental principles of EU economic integration (Kwasiborski, 2016a: 21). It also reflects the concerns of undermining the current factors of the EU integration process by affecting the operation of the EU internal market to the detriment of the users who use the freedom of services in the legal and not abusive form (Kwasiborski, chapter no. 4 of this volume).

Secondly, the reasoning presented in the proposal and followed by the majority of old EU Member States in the political discourse would be more convincing, if the overriding objective of the planned changes would be a desire to ensure a greater protection of the interests of posted workers. Introducing the changes for this reason would even be in line with the tendency, visible recently in the CJEU judgments, where the CJEU heads in a direction of more appreciation of the workers’ interests with regard to the interests of their employers (in the De Clercq and Elektrobudowa cases). However, the Commission gave a strong impression in the text of the proposal that the increased protection of the posted workers is not the objective of this proposal, or at least not the main one.

It is puzzling that in its replies to the reservations of national parliaments submitted within the procedure of the yellow-card\(^4\), the Commission tried to reason its proposal only with the claims on the efforts to ensure a sufficient protection of the posted workers' interest, just as it was an overriding aim of introducing the proposed changes. For instance, in the reply delivered to Polish Parliament\(^5\) the Commission stated that the different rules of remunerating local and posted workers are a problem, and it

is "unfair" that the posted workers are protected in the host member state only through the minimum rate of wage, whereas the local ones enjoy the comprehensive protection based on a set of mandatory remuneration rules (Paragraph 2 of the reply). Regardless of whether the Commission has a point or not in this respect, it must be noted that, after all, the Commission has not renounced its beacon objective of eliminating the competitive advantage of cross-border entrepreneurs from given Member States resulting from lower wages. Still it does not refer specifically to the protection of the posted workers. It is therefore striking that the perspective of the posted workers serves the Commission as the main shield against the reservations raised by certain Member States.

At the same time in the said replies the Commission itself admitted that "a member state may not have the same interest in protecting workers posted from other Member States to its territory, as it has to protect its own local workers" (Paragraph 3 of the reply). Nothing could be truer. This acknowledgement is, however, critical given the fact that the EU Member States who host the majority of the posted workers are the ones which were strongly demanding the changes in the Posted Workers Directive in the shape more or less presented by the Commission. It only confirms that the true motivation of this amendment is not ensuring a greater protection of the posted workers. Instead, it reflects these Member States' desire to protect their local markets to the largest possible extent. Therefore if the Commission really cares about the situation of the posted workers, it should seek other solutions for ensuring their protection, instead of favouring the measures promoting the conflicting interests of the host Member States, especially that the adoption of the proposed amendment may very likely worsen the situation of the posted workers. The reduction of the competitiveness of their employers on the internal market may directly affect their business opportunities. In consequence the cross-border work of the workers may be significantly limited or they may even lose their jobs due to the financial difficulties of their employers (Kwasiborski, 2016b: 405).

In the view of the above issues, there is no doubt that the proposed amendment aims, in the first place, at ensuring a special protection for the domestic entrepreneurs in the hosting Member States who now must face the challenge from the competitors based in other Member States, using the treaty-based freedom of services to operate on the internal market. In consequence, it is without any doubt that the objective of this new legislation is to protect economic interests of only a particular group of the EU
Member States. What is striking, according to the settled EU case law (Case C-35/98, Verkooijen, ECLI:EU:C:2000:294), is that no particular Member State could officially use such an objective as a reason for limiting the accessibility to its local market (Paragraph 48 of this judgment). The EU institutions, and in particular the Commission, acting as a treaty-guardian, should adhere to this rule as well and refrain from giving any preferential treatment to any Member State.

Marianne Thyssen, the Employment Commissioner, mentioned that "The reform of the Posted Workers Directive translates a clear commitment of this Commission to promote a deeper and fairer internal market, set out in its Political Guidelines." The real effect of the proposed reform will be completely adverse. Having in mind the terms of the proposal, these decisions tend to appreciate more the other competitiveness factors, typical for the entrepreneurs from the old EU Member States (e.g. productivity, quality or modernity of provided services). However, the Commission admitted itself that there is a variety of factors creating the highly competitive internal market and the question of social costs constitutes one of such factors as well (Page 4 of the proposal). Therefore the Commission’s standpoint is not consistent – on the one hand it admits that the question of social costs is a one of the fundamental competitiveness components, whereas on the other hand it strives for its exclusion just as it was a negative aftermath of the operation of the internal market (Kwasiborski, 2016a: 14). Nevertheless, it cannot be both.

In consequence of the above, the internal market will not be getting deeper. Instead, it will suffer from the fragmentation process since the entrepreneurs from the new EU Member States will not afford the increase of the posted workers’ remunerations to the level applicable to the local workers of the host Member States. Apart from the increase of remuneration, they would still have to bear all of the other costs related to the provision of cross-border services, which do not have to be incurred by the domestic entrepreneurs. One should remember that the question of the competition on the internal market with respect to the services should not be assessed as a set of separate sectors where the posted workers are used or not. It is in fact the one and the same market, where the domestic entrepreneurs do not need to post their own workers since they are already


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based in the place of service, whereas the cross-border entrepreneurs may only render the services with the use of the posted workers having their place of residence outside the place of posted work. This issue initially provides a huge advantage for the domestic entrepreneurs in terms of their business administration costs (Benio, 2016: 6-8).

Unfortunately the authors and supporters of the new PWD wording seem to miss the above mentioned point. The Commission even officially stated that it is up for the reduction of the competitiveness on the side of cross-border entrepreneurs in exchange for granting a better position to the domestic ones (Page 3 of the Commission Staff Working Document Executive Summary). This issue may therefore also raise the concerns regarding the observance of good governance rules by the Commission which will be further analysed.

According to Mrs. Thyssen, the competition will be fair only if the same rules on remuneration for the same work at the same location will apply – "no more, no less"\(^7\) and this is the ultimate, overriding aim of the Commission's works. This approach suggests that currently there are no similar rules imposing remuneration requirements on the cross-border employers, which is not true – they exist with regard to the minimum rate of wage for work required in a given host member state. In that respect, in the impact assessment of the effects of the Posted Workers Directive the Commission stated that such regulations led to enormous differences in salaries between posted and local workers, which eliminate the existence of the equal conditions of operating business activity for both local and cross-border entrepreneurs by giving the advantage to the cross-border ones with respect to the social costs (Page 2 of the Commission Staff Working Document Executive Summary).

However the differences in remunerations result simply from the existence of the free competition on the EU internal market, facilitated by the use of treaty-based economic freedoms (Rebhahn, 2015: 295-307). Additionally it is, in fact, impossible to assess how much a company should actually pay its workers in order to satisfy the rule of the "same remuneration" (Bernaciak, 2015: 5). It is a question of a number of various economic and legal factors which combined together express the actual position of an entrepreneur on the EU internal market and affect its ability to stay

competitive towards the other market participants. In view of these concerns, one must appreciate that the European Parliament in its resolution on the social dumping (the "Resolution")\(^8\) underlined that the political catchphrase of "the same remuneration for the same work in the same location" and its implementation to the legal framework must be further clarified (point Ad of the Resolution).

One should realise, by the way, that the European Parliament is not very enthusiastic about this legislation proposal. In the Resolution it only noted that such a proposal is processed and insisted in this context that the rules on posting should be clear, proportional and justified (point of 22 of the Resolution). Through these insinuations the European Parliament seems to imply two issues. Firstly, it gives an impression that this proposal is not what it actually expected in terms of the efforts to improve the enforcement of fair competition and legal operation on the EU internal market with the involvement of posted workers. Secondly, the European Parliament seems to have doubts whether the proposed solution is justified and proportionate in the context of the actual threats for PWD's enforcement recognised in the field of posting workers and even if it would be the case, there are serious concerns about the clarity of the proposed amendments. All these reservations should be acknowledged.

At the same time it is beyond doubt that the idea of the competitive (among the private businesses and EU Member States) market was implanted as being fundamental to the EU integration process (Sayde, 2011: 366-378). Therefore one must realise that eliminating by legal measures only one of the competitive factors (strictly related to only a certain group of the market participants), whereas the others remain unaffected or even gain the advantage, is contrary to this initial idea, reflected in all developments adopted at the EU level since the very beginning of forming this structure (Kwasiborski, 2016a: 14-15). It may not be excused with an intention to arrange a deeper and fairer internal market.

The determination of equal conditions (a "level-playing field") for both local and cross-border entrepreneurs should consist in the introduction of objective rules allowing entrepreneurs from all of the EU Member States to enjoy the same access to the EU internal market. Such a tendency has been presented so far by the EU institutions (Case C-55/94, Gebhard, 2016).

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ECLI:EU:C:1995:411). The question as to how these entrepreneurs cope with certain objective competitiveness factors (such as differences in economic growth of respective Member States, leading, among the other things, to the differences in the social costs to be incurred in a particular member state) should depend on these entrepreneurs. This applies especially where interference into this matter is not a side-effect of trying to protect the justified interests, such as the interests of the workers (Snell, 2016: 20). As mentioned before, in this case there is no as much care about the posted workers as for the domestic entrepreneurs incurring higher social costs of their activity.

Obviously the above-mentioned approach is subject to the restriction that any operation on the internal market constituting a breach or circumvention of the EU law or an abuse of the granted internal market freedoms should not be accepted (Kwasiborski, chapter no. 4 of this volume). The Commission, however, does not refer in its proposal to any such situations – its desire is to deprive cross-border entrepreneurs from the competitive advantage related to the social costs in general, even in case of the fair use of the treaty-based freedoms, with the observance of the currently binding provisions of the EU law. The same may have been also observed in the political standpoints of the old EU Member States supporting the amendment during the legislation process. This approach raises also an issue as to whether the proposal in questions meets the proportionality principle binding in the EU.

As mentioned before, this amendment could deserve more understanding if the necessity of ensuring a greater protection of the posted workers' social interests would become its overriding aim. However, in this respect the requirement to pay the minimum wage rate established in the hosting EU Member States along with the requirements regarding the working time, holiday, equal treatment and health and safety provisions, is already in place anyway. It was always an institution of the minimum wage which was assigned to perform a protective function for the workers (Kwasiborski, 2016a: 16, and Eyraud et al., 2005: 40). Imposing under the Posted Workers Directive the application of only the established host-state minimum wage rate requirements to the cross-borders workers means that it was simply to guarantee that the posted workers will have the financial resources required for existence in a given member state on a level appropriate to the need of protecting human dignity. The PWD, therefore, did not aim at matching the life standards of the posted workers to those of the local ones.
Such an approach is also reflected in the European Parliament's Resolution where it combines a need to ensure the wage allowing the workers to have a decent life with the recommendation to introduce and apply the minimum wage rates (point 22 of the Resolution). This argument should be stressed, especially that the life situation of the posted workers significantly differs from the situation of the local workers – the posted workers generally reside in the host Member States only temporarily and need to support their families still residing in the home Member States. They do not need to incur the same living costs in the host Member States as do the local workers as, in addition to their remuneration, they are also reimbursed by their employers with the accommodation, nourishment and transport costs (van Hoek et al., 2012: 446). That is why the Commission's above-mentioned point on the "unfairness" of the different remuneration rules applying to the local and the posted workers cannot be accepted. The situation of the local and posted workers is different, therefore the remuneration rules applying to them may also differ without the infringement of the equal treatment principle.

If it turns out that the established minimum wage has ceased to ensure the dignified living conditions in a given member state, e.g. through the increase of living costs, such a member state may still raise the binding rate of minimum wage (Kwasiborski, 2016a: 16, and Eyraud et al., 2005: 10). Accordingly, if a given member state has not as yet recognised a need to introduce, due to such concerns, a minimum wage rate (even through the generally applicable collective bargaining agreements), there are no reasons why these concerns should be raised with respect to the situation of the posted workers whose employers are obliged by their origin-state law to take care of the accommodation, nourishment and transport costs anyway.

This approach is also in line with the legal framework introduced by the current provisions of the Posted Workers Directive, in particular Article 3 item 7 in the meaning interpreted by the CJEU. This provision generally accepts imposing provisions more favourable for the posted workers, but in Laval and Rüffert (Case C-346/06, Rüffert, ECLI:EU:C:2008:189) the CJEU limited this option only to the provisions of the home Member States or the agreements to which the employer voluntarily acceded (Paragraph 80 of Laval and paragraphs 33-34 of Rüffert). As regards the extended protection granted by the host Member States, the CJEU classified it as unnecessary and unjustified (as going beyond the minimum, manda-
tory and sufficient level of protection of the posted workers to be granted in the host state) from the perspective of the PWD's objectives.

The CJEU has therefore clarified that, currently, the Posted Workers Directive introduces in fact at the same time both the minimum and maximum standards to be implemented through national laws, at least in the context of the clash of the Posted Workers Directive’s provisions with the treaty freedoms (Deakin, 2008: 1). This is caused by the fact that this directive should not be interpreted as allowing particular Member States to freely increase regulations above the set of established minimum requirements. Its interpretation confirmed in *Laval* is completely contrary to such an approach and is consistent with the interpretation of other EU laws adopted in the field of social policy which do not provide any uniform laws or a level-playing field, but create only a floor of rights which must be ensured by host Member States with a space for competition above this level (Deakin, 2008: 14, also Deakin, 1994: 289). Therefore under such an understanding of this directive's terms, cross-border entrepreneurs should be exempted from the application of the host-state rules and standards exceeding the threshold already established in Article 3 item 1 of the PWD.

In the view of the above, the amendment of posted workers' remuneration provisions raises also the concerns as to whether it is in line with the EU principle of proportionality. As stated in the Commission's proposal, it is said to comply with the proportionality requirement since it does not provide the harmonisation of the labour costs in the EU and is limited to what is necessary to guarantee conditions adapted to living costs and standards of the host member state for the duration of posting the worker (Page 5 of the proposal). The ultimate question is, however, whether the guarantee of the conditions adapted to the standards of the host Member States is truly necessary, in the view of the protective function of currently required minimum rate of wage (Kwasiborski, 2016a: 16) and the CJEU’s approach in *Laval* and *Rüffert* regarding the imposition of the host member state's provisions which are more favourable for the posted workers.

The Posted Workers Directive introduced the minimum requirements regarding the wage rate and working conditions binding in the host Member States, which must be applied to the posted workers from another Member States just as to the local ones. The introduction of minimum requirements to be applied to both these groups is completely reasonable – the purpose, at the moment of the adoption of the Posted Workers Directive was to assure at least the accepted minimum standard of existence for the posted workers in the host Member States (Reci, 2016: 46). Once such
a standard is acknowledged by law, it may be reasonably considered as a sufficient level of protection for these workers (the minimum legal level should correspond to the basic social life requirements in the host Member States, appropriate to the need of protecting the dignity of human beings, and this is a responsibility of the host Member States to make sure that the established level is adequate). Therefore if the scope of the Posted Workers Directive has been tailored to the required proportionality level in its current wording, with the obligation to impose only the minimum wage rate required for living in the host Member States and nothing more, it is difficult to agree that the increase of the required payments above the minimum level will now be also proportionate in its strict meaning. The proposed measures strongly interfere with the interests of the particular group of internal market participants, when it seemed that their interests have been already limited to the legitimate extent by the imposition of the minimum wage rate requirement for the sake of the appropriate interest of the posted workers.

It must be expressly emphasised that the adjustment of the remunerations to the living costs and standards of the host Member States was not an objective of introducing the Posted Workers Directive as the extent of workers’ social protection was combined with the economic objectives (Evju, 2010: 153-154). The purpose was to provide the posted workers’ with the minimum protection level, given the specific type of their work and character of their residence in the host member state, compared to the local workers. Due to such a specific character (including e.g. the lack of the posted workers’ need to provide financial support to their entire family on the territory of the host member state) it does not seem to be proportionate to grant these workers the higher standards than are currently required. Moreover, such an explanation for meeting the proportionality principle is totally inaccurate if we confront it with the main objective of the new legislation which is not related to giving the response to the actual posted workers’ needs but to the problem of ensuring fair competition among the entrepreneurs acting on the EU internal market.

One should also note that the minimum requirements clearly enforced by the Posted Workers Directive refer only to the social life and local laws of the particular host Member State. Therefore it should not matter from which EU Member States the workers are posted to a given host member state – any social policy or employment costs differences between these Member States are balanced exactly by the obligation to apply the established scope of the hosting Member State’s regulations. In consequence,
the provisions of the Posted Workers Directive (actually of the local laws implementing its provisions) should be consequently applied in a host Member State to all EU transnational service providers, regardless of their Member State of origin. It contributes to ensuring a legal certainty on the market. This comes to a conclusion that the 2004 and further EU enlargements and the impact they had on the EU internal market should by no means constitute an argument on changing the legal framework regarding the Posted Workers Directive.

Therefore it is reasonable to believe that the calls for changing this legal framework for the purpose of protecting the posted workers and combating the social dumping are only a political instrument to eliminate the competitive advantage gained by the social providers from the new EU Member States on the internal market and reinstate the dominant position of the entrepreneurs from the old EU Member States.

The legal dimension of the new Posted Workers Directive's wording

Regardless of the concerns regarding the objectives of the proposed amendment, the manner of its implementation by replacing the term "minimum wage" with the sole term of "remuneration" in Article 3 item 1 of the Posted Workers Directive may be questioned. In addition to this replacement the new wording of the PWD is going to elaborate that the "remuneration" shall mean all components of the remuneration required under the national (statutory, executive and administrative) provisions of law, as well as under the provisions of respective collective agreements or arbitrary judgments. The Council, which has processed this proposal under the ordinary legislative procedure, wishes also to add that such remuneration may be set out, not only by the national law, but also by the national practice of a given host member state⁹. Such a correction only deepens the concerns about the legal certainty of the introduced provisions.

First of all, the mere replacement of "minimum wage" with the "remuneration" significantly widens the scope of the host Member States' rights in respect to imposing the remuneration requirements on the cross-border entrepreneurs, by freely deciding which remuneration components (including additional allowances) will be applicable to the posted workers (Kwasiborski, 2016a: 18-19). It challenges the CJEU's assessment of the host Member States' discretion in setting up such rules (Case C-341/02, Commission v. Germany, ECLI:EU:C:2005:220) where the CJEU stated that there is a specific method to be applied in deciding which allowances should be included as the components of the minimum wage by the host Member States checking the proper payments to the posted workers (Paragraph 27 of this judgment). The CJEU has also emphasised that the remuneration allowances which lead to the change of the balance between the posted workers' work and the consideration received by them from the employer in exchange, may not be, under the grounds of the Posted Workers Directive, treated as the components of the minimum wage (Paragraph 39 of this judgment; also Case C-522/12, Isbir, ECLI:EU:C:2013:711). There is no reason why, in view of the said objectives of the Posted Workers Directive and the motives of its adoption (Kwasiborski, 2016a: 18), such an approach should not be appropriately applied to the remuneration as a whole, replacing the requirement to ensure only minimum wage rate. This will, however, be one of the issues which will have to be reassessed by the CJEU once the amendment is in force, since probably the host Member States will tend to use their new empowerment in excess of the "ancient" (in their opinion) restrictions provided by the CJEU judgments.

Additionally the potential role of the CJEU will be to eliminate the legal uncertainty resulting from the interaction between the final wording of Article 3 item 1 and Article 3 item 7 of the Posted Workers Directive which initially, upon the Commission's proposal, was not subject to any modification corresponding to the one presumed for Article item 1. According to the current wording of this provision, modified during the legislation process by the Council, not all allowances related to posting workers should be considered as a part of the remuneration (the allowances paid strictly due to the reimbursement of actual expenses of posting, such
as the travel, board and lodging costs, should be excluded)\textsuperscript{10}. In the light of the amendment of Article 3 item 1, this provision should be also reinterpreted in a way that it will keep restrictions on the host Member States in imposing requirements regarding the remuneration payments. Otherwise there would be a material legal uncertainty as to how the particular remuneration components should be treated towards the workers posted to the host EU Member State.

Initially the Commission did not adjust in its proposal the wording of Article 3 item 7 to the new wording of Article 3 item 1. This omission could have resulted with a material clash between the applicability of both provisions due to the inconsistency between the phrases "minimum wage" and "remuneration". Although at a further legislation stage the Council introduced the correction of this issue by matching these provisions trough replacing the phrase "minimum wage" with the "remuneration" also in item 7 (page 15 of the Council's general approach document), this correction does not solve the question of legal uncertainty entirely. This is caused by the fact that even after such an update the "allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging". Again it is not clear how these allowances should be compared to the components of remunerations applicable in the host Member States and seeming to reflect the same purpose and nature, in order to avoid doubling the same costs by the cross-border entrepreneurs. The new wording proposed by the Council will therefore create some disarray in the cross-border performance of services with the used of the posted workers anyway.

Furthermore, the Council's proposal to additionally enforce a provision that the remuneration for posted workers may be established not only on the basis of the national law but also of the national practice in the host Member State only widens the field of the legal uncertainty as to the actual requirements the cross-border entrepreneurs would have to meet. A "practice" is a very ambiguous term, leaving a space for abuses of the host Member States' rights in establishing the burdens for the inflow of foreign workers.

service providers on the domestic markets. One should also admit that basing any requirements on a "practice" instead of the legal measures adopted as a result of the binding legislation process not only lacks the comprehensive legitimacy from the perspective of good governance standards related to the transparency (Supernat, 2009; 644-649) but is completely contrary to the standards imposed by the rule of law principle and Rechtsstaat doctrine widely recognised in the EU since a political decision regarding the establishment of general requirements would be based on an ambiguous factor instead of being made in a form of law (von der Pfordten, 2014: 16).

Therefore this entire material uncertainty will have to be resolved by the CJEU. Regrettably the release of first CJEU judgments in this respect is a matter of years away and until that time the legal uncertainty will exist. Therefore there is a risk that until then cross-border entrepreneurs will be incurring higher costs than they actually should due to the necessity to observe the excessive national restrictions or to bear the consequences resulting from their enforcement by the host Member States. The current provisions of the Posted Workers Directive, referring only to the minimum wage rate, are more concrete and therefore there is less space for discretionary decisions of the host Member States. In consequence, with the support of the current CJEU jurisprudence it is easier to assess whether a current requirement actually falls into or outside the scope of allowed legal measures. After introducing the amendment it will be relatively easy for the host Member States to shuffle their local regulations regarding the remuneration payments applicable also to the posted workers and the cross-border entrepreneurs will suffer from such legal instability. In consequence, the cross-border entrepreneurs will be subject to permanent risk that they do not meet the most up-to-date requirements of the local laws. The obligation of publishing all regulations in this regard on a website, which follows the other amendments proposed by the Commission, does not materially mitigate this risk. It does not prevent the host Member States from quick modifications of the remuneration regulations so as to make the use of posted workers more difficult, especially in respect of the additional burdens imposed on cross-border employers as a result of 2014/67/EU directive.

The scope of the 2014/67/EU directive covers, among the other things, the measures aiming at eliminating the ambiguities related to the definition of posting (proposed criteria to determine whether there is posting or not), also the new obligations for Member States on publishing informa-
tion on local laws for posting employers and posted workers, as well as the rules of cooperation and exchange of information between the particular Member States. This directive additionally introduces several control measures and the rules of their application. The implementation deadline for this directive passed on 18 June 2016 but not all Member States met it (Kwasiborski, chapter no. 4 of this volume). It is therefore difficult to assess now whether in practice this directive will contribute to effectively enforce the provisions of the Posted Workers Directive which would mean that no further institutional changes will be needed. A chance to this directive should, however, be truly given before deciding to completely overturn the objectives of the Posted Workers Directive.

Apart from the above, the proposed changes will open a way for the host Member States to introduce such remuneration requirements under local laws (or, if it becomes possible, under local "practice") which make the performance of cross-border services with the use of the posted workers totally unprofitable. The only chance to block such practices will be to claim before the CJEU that they are discriminatory or do not meet the proportionality requirements. It may, however, take a lot of time to review these issues by the CJEU and until that time the institution of posting workers may be successfully marginalised by the host Member States in order to protect domestic entrepreneurs with the effect of annihilation of the entities from the new EU Member States trying to base their business on the operation on the EU internal market.

The Impact of the EU integration crisis

The on-going Posted Workers Directive amendment seems to be a clear consequence of the growing EU integration concerns among the societies of the EU Member States and the expectations they have towards their governments in this respect. This appears to be true, since this amendment is an object of a huge fight between the limited number of old EU Member States and the other Member States.

For a couple of years, especially after the economic crisis, questions about the future of the EU have been constantly repeated in the European

public discussion. The support for further European integration is vanishing. Such doubts, in the sense of the current form of the common integration, are caused by the fact that it is difficult for ordinary EU citizens to understand the complex EU governance system\textsuperscript{12}. This complicated structure of the decision-making process at the EU level created an impression that the democracy factor is marginalised in the EU and the interests of the citizens have been ignored for the purpose of ensuring a deeper level of mutual connections between much differentiated Member States (Hall, 2016: 50). As long as there was prosperity across the EU societies, such EU governance was acceptable. Once it is ended, the cross-border liberalisation resulting from such integration process became a one of the first factors to be blamed for the sufferings of the local markets.

It has been identified that the continuing progress in the EU economic integration in previous years was based on the willingness of national governments to make compromises for the sake of greater interests. Such compromises were possible since the local societies were keen on deepening the integration between particular European countries in order to get the advantage from the open markets (Frieden, 2015: 2). However in recent years the economic crisis has affected the positive attitude of citizens of particular EU Member States, wishing to protect their domestic interests instead of accepting the assembly in one large European community. Such a community became for them a threat in the tough times of crisis due to the potential inflow of additional competitors through the internal market.

That is why the current contentions regarding the rules of operation of the internal market may be treated as evidence of the increase of the EU anti-integration tendencies. Since, as a result of the enforceability of internal market freedoms, such citizens are forced to compete with the foreigners having the same possibility to develop on their local market (Verschueren, 2015: 133-134, 150), one may notice that they automatically link the occurrence of negative effects in their financial and social life with such competition. In a broader perspective, this leads to the EU integration crisis, since the national governments elected by such citizens are obliged to seek for the rearrangement of the already established rules of cooperation, whereas the national governments of the other Member

States, enjoying the competition rules set out before, must strive for maintenance of the status quo. In consequence, the conflict of interests between particular Member States is inevitable. Such a tendency may be also identified in the field of performing cross-border services on the EU internal market with the use of the posted workers.

The Posted Workers Directive in its current wording was adopted in 1996 with the purpose of combating the "social dumping" on the EU internal market (Barnard, 2000: 11). The same argumentation is now brought back for the calls for revolutionising the institution of posting workers by the introduction of the rule of the same pay for the same work in the same location. Therefore the current use of the internal market by the companies from the new EU Member States in accordance with the current regulations of the Posting Workers Directive (in the version binding even before the 2004 enlargement) resulting with gaining the competitive advantage by them constitutes, in the opinion of the old EU Member States, a reason why the regulations governing this directive should now be changed in a way which is clearly detrimental only for such companies from such new EU Member States. The mutual cooperation within one community should not look like that.

Without any doubt, the ineffectiveness of the currently binding regulations in combating the social dumping may constitute a reason for amending the particular provisions of the Posted Workers Directive. However, such ineffectiveness must be comprehensively assessed from the position of all original objectives in order to ensure that the new measures will meet the proportionality principle. If, by today, the Posted Workers Directive included several objectives balancing the interests of particular stakeholders, the new regulations should most of all care about increasing the effectiveness with the maintenance, not the sacrifice, of such balance. The balance is obviously deteriorating once an advantage to one particular interest is officially granted, especially when the legal uncertainty as to the meaning of the social dumping still exists and too little time has passed to assess the practical impact of the 2014/67/EU directive on the improvement of the Posted Workers Directive's enforcement. Sacrificing the balance of interests proves that there is no longer a willingness to facilitate the integration of all differentiated EU-state economies and instead the tendencies aiming at strongly protecting only national interests are in place.

For sure, the social dumping cannot be identified only with the pure use of the internal market freedoms in accordance with currently binding pro-
visions of EU law (Kwasiborski, chapter no. 4 of this volume). Although the Commission's proposal does not expressly refer to the term of the "social dumping", it aims at eliminating the competitive advantage gained by the use of the cheaper labour forces, which reflects the current understanding of the social dumping by the old EU Member States. The Commission was, however, completely silent that in many cases such advantage was achieved with the observance of the binding regulations of the Directive. It should be further explained by the Commission why activities which are legal and based on the fundamental aspects of the EU economic integration should now be blocked simultaneously with the practices which are illegal or include the circumvention or abuse of rights resulting from EU law. The same applies to the old EU member states mentioning about the "social dumping" practices while calling for PWD revision. It is a huge issue for the question of this proposal's legitimacy.

The above argumentation eliminates any doubts that the only purpose of the said amendment is ensuring a protection of the economic interests of only a particular group of the EU Member States. Moreover, the Commission's justification and impact assessment prepared in addition to this proposal clearly admit such state of facts through indicating that the Commission agrees on worsening the economic situation on the EU internal market of the entrepreneurs from the Member States imposing less restrictive social and wage regulations.

From this perspective, the fact that the Commission's proposal was submitted at the request of a particular group of the EU Member States, despite the express protests of the other Member States (some of them were also consequently voting in the Council against the adoption of the amendments\textsuperscript{13}), must be understood as an aftermath of the integration crisis described above and a demonstration of the reversal tendency of the EU integration process. Such a strong call for fragmentation of the internal market through the artificial limitation of the competitiveness of the entrepreneurs from specific Member States (characterised by the lower social costs) shows an attempt to renationalise (reverse) the integration processes in the EU. Renationalisation in this respect will be evidenced by the actual (and facilitated by the propitious rearrangement of the respective legal framework) closure of the old EU Member States' domestic markets before the

inflow of the entrepreneurs from the new EU Member States, who will not be able to afford to meet the new rules applying to them when posting the workers within the performance of the cross-border services.

**Good governance aspect**

The submission of this proposal by the Commission also raises certain concerns in respect of the observance of the good governance standards by the Commission. It refers in particular to the rule of participation, which is a factor of the democratisation issue being one of the most important good governance aspects. Under this rule, the entities to be impacted by the application of certain legal measures should participate in the law-making process resulting in the adoption of such measures (Karpen, 2010: 22-23).

The actual adherence to the rule of participation requires that all the interested stakeholders have equal influence in the decision-making process. This may be an issue when the conflict of interests occurs between such parties, being one of the most serious challenges to the good governance system in general (Karpen, 2010: 25). In order to mitigate it, the contrary interests should be balanced with each other and neither of them should enjoy preference towards the other. The balance entails that the justified interests of each group are respected to the largest possible extent (Kwasi-borski, 2016c: 178).

The above matter is something the Commission actually failed to do when it yielded to the pressure of a group of the old EU Member States, including Belgium, Germany and France\(^\text{14}\). By following the lobby of these Member States, aiming at overturning the settled legal framework governing the institution of posting workers, the Commission decided to grant them a preference over the new EU Member States. The argumentation of the proposal and impact assessment prepared by the Commission clearly admits it. It stated expressly therein, that the proposed change aims at eliminating one specific factor of competitiveness (actually attributable only to the "new EU" Member States) whereas the other ones remain unchanged. At the same time the Commission accepted as fact, without any concerns, that this elimination, a deep interference into the rules governing

the internal market, will be detrimental to entrepreneurs from the new EU Member States (Page 3 of the Commission Staff Working Document Executive Summary). One should admit that it is difficult to identify the coherence with the true participation rule in this Commission’s action. This is not an attitude which should be practiced by any decision-making entity and especially if such an entity already operates in a system which constantly faces accusations of lacking the sufficient democracy aspect (Hall, 2016: 49-50).

Given such unpopularity of the EU due to its technocratic structure, the Commission acting as the treaty guardian, should consequently adhere to the true participation rule when it faces the conflict of interests between particular Member States. It is a crucial point, especially in the time of the general EU integration crisis. One must realise, that eliminating by legal measures only one of the competitive factors (strictly related to only a certain group of the market participants), whilst protecting all the remaining ones attributable to an adverse group of interests, does not follow the participation rule at all.

What is even more important is that the reservations to the proposal have not been raised only by the affected new EU Member States. Also a group of the NGOs shared, during the social dialogue, the point that introducing the proposed rule of the same pay for the same work in the same location would constitute an excessive encroachment into the social partners' discretion in setting up the remuneration levels. They also argued that the equal rules of operating the business activity within the competitive internal market are already ensured by other EU laws regarding many different labour law aspects (as mentioned on page 6 of the proposal).

That is why it was not surprising that 11 Member States wanted to challenge the proposal with the legal measures available to them at this stage. They decided to impose the triggering of the procedure of the, so called, "yellow card", described in article 7(2) of Protocol no. 2 to the treaties. Generally, the purpose of this procedure is to oblige the Commission to review its legislation proposal once again in the context of the compliance with subsidiarity principle. The problem of meeting the subsidiarity requirements was, however, not adequate here. It was beyond doubt that the EU Member States may not individually solve the issues regarding the posting of workers on the internal market within the performance of cross-border services. Otherwise no initial Posted Workers Directive could be even adopted. That is why it is completely understandable that, after the reconsideration of its project, the Commission assessed that it does not
breach the subsidiarity principle. There are, rather, other aspects which require deeper investigation in the view of presented proposal, such as the problem of proportionality mentioned above. It was, however, the sole option for the opposing Member States to put their true reservations in the formal dimension and make them visible in the political discourse at the EU level.

At this point it must be emphasised that the above reservations regarding the Commission’s attitude refer to the mere introduction of the proposal in the presented wording and the interference into the internal market it decided to pursue in favour of the old EU Member States. It must be appreciated, however, that at least the Commission answered the reservations raised by the 11 Member States within this "yellow card" procedure, even though they did not relate to the subsidiarity issue\(^{15}\). By providing the additional explanations in this respect, the Commission partially remedied its good governance shortcomings identified at the moment of submitting the proposal. Still, it is meaningful that the Commission decided to reply in a bit more in detail to these concerns, only once the formal procedure questioning the Commission’s proposal was initiated. That is why the delayed reaction did not let the Commission avoid the allegations of failing to obey the true participation rule and take into account the justified interests of both sides of the conflict. In consequence, the proposal may still be questioned as lacking sufficient legitimacy, being another crucial good governance aspect.

Conclusions

The amendment of the Posted Workers Directive raises several controversies, especially with regard to the new posted workers' remuneration rules. It also shows the way the EU seems to currently follow in terms of the cooperation between the old and the new EU Member States on the single EU internal market.

First of all, the entry into force of the amendment will undermine the current sense of the operation of this act, aiming at providing a necessary balance between cross-border entrepreneurs, posted workers and the inter-


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ests of the entrepreneurs based in the host Member States. The current framework of objectives will be overruled by one aiming at assuring the "fair and competitive" internal market understood as a field where no advantage may be enjoyed by cross-border entrepreneurs due to the lower social costs of their business activity. The enforceability of the rule of the same pay for the same work in the same location is said to be an overriding principle governing this project.

However, a deeper review of this case indicates that the amendment leads to the significant increase of the protection of the host Member States’ interests (which are mainly the old EU Member States) on the internal market, when comparing to the situation of cross-border entrepreneurs trying to legally perform cross-border services under the current rules of the Posted Workers Directive. This will be caused in particular by the interference into the rules governing the free internal market, through eliminating the one competitive factor (lower social costs of business activity), attributable only to the new EU Member States. The amendment could meet more legitimacy and understanding, if its true overriding objective would be an increase of protection of the posted workers’ interests. Still, this is not the case.

Given the above there is no doubt that said amendment will limit the competition on the EU internal market. It will undermine the current rules of the operation of a free internal market, governed by the competitive factors and facilitated by the treaty-based freedoms. These rules and freedoms, adopted years ago, constitute a core fundament of the EU economic integration.

Apart from the above-mentioned concerns regarding the reasoning of the proposal and the new primary objective it introduces, the legal measures included in this legislation project in order to implement such idea may also be questioned. A brief change in the legal framework from the "minimum wage" requirements to the "remuneration" requirements will cause more legal uncertainty in comparison with the currently established rules. This will be to the detriment of cross-border entrepreneurs and for the benefit of the host Member States gaining greater discretion in affecting the situation of cross-border entrepreneurs and their workers on the own territory. One should expect that the new legal solutions will become an object of a number of legal enquiries which to be resolved by the CJEU. Until that time, however, the introduced legal uncertainty may stifle the operation of the cross-border services requiring the use of the posted workers.
The fact that the Commission’s proposal was submitted due to a lobby of a particular group of the EU Member States sharing the same interests in limiting the use of the institution of posted workers, and despite the express protests of the Member States having conflicting interests (wishing to promote the use of posted workers and therefore the cross-border services), must be understood as a side-effect of the EU integration crisis. Additionally, the amendment does not seem to correspond to the true threats for the posted workers and the competition on the EU internal market related to the real acts of breaching or circumventing the current EU legal framework in this respect, or the abuse of rights resulting therefrom. Instead, it is going to enforce provisions which will generally impede the entire sector of services performed with the use of posted workers while these threats will still remain.

That is why the Commission’s decision to yield to the pressure imposed by the old EU Member States should be also criticised from the perspective of good governance standards. These standards should be met especially at the level of the EU decision-making process, suffering from the accusations of lacking the sufficient democratisation aspect.

It is also obvious that before changing the current wording and framework of adopted regulations, a true attempt of increasing their enforceability should be made and here the implementation of 2014/67/EU may play its role. The EU legislators are however reluctant to wait with any further modifications in the structure of the posted workers institutions until it would be able to provide any objective impact assessment with respect to this additional legal act, even though the European Parliament emphasised how crucial such an assessment is in order to recognise the actual impact of this directive on the combat with the abusive practices involving the use of the posted workers (point T of the Resolution).

The Commission’s reluctance in this respect only increases concerns as to its true care about the situation of the posted workers where it, at the same time, decides to pursue the complete rearrangement of the current rules regarding their remuneration for the sake of better competitiveness of the entrepreneurs from the host Member States. One must realise that no proposal truly aiming at eliminating only the actual practices of breaching or circumventing the PWD (or abusing the rights resulting therefrom) would face the protests of entrepreneurs from the new EU Member States trying to participate in the fair competition on the internal market. It would be also in their interests to eliminate blameworthy practices as they would
finally get rid of the unfair competition on the market. The problem is, however, that this legislation does not go along with such expectations.

All the concerns presented above lead to the conclusion that in the time of the EU integration crisis the EU law evolves, by the political decisions adopted at the level preceding the legislation procedure, towards the fragmentation of the EU internal market and renationalisation of the EU integration processes.

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Chapter 5: Posted Workers Directive under revision


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Chapter 6: Interpretation of the concepts of ‘integration conditions’ and ‘integration measures’ – renationalisation of the status of third-country nationals?

Magdalena Gniadzik

Key words: third-country nationals, integration, Court of Justice of the European Union

Different status categories of third-country nationals in the European Union

The legal status of non-nationals of the EU, i.e. third-country nationals who reside legally on the territory of EU Member States, varies widely under Union law. On the one hand, there are nationals of the European Economic Area countries, i.e. Norway, Liechtenstein and Iceland, and citizens of Switzerland, whose status is closest in nature to that of EU nationals. Nevertheless, it should be emphasised that nationals of those countries are not entitled to EU citizenship or to the right to free movement. In simple terms, they only enjoy entitlements which make up the freedom of movement understood as a freedom of the internal market (more on this point and on the main differences between the EEA and Switzerland Agreements: Rennuy, van Elsuwege, 2014: 946-953; Burke, Hannesson, 2015: 1111-1112 and 1115-1118, Jay, 2012: 77-115). Furthermore, the European Union has concluded international agreements with dozens of countries enabling their citizens to legally take up work in EU Member States and extending to them – to a greater or lesser extent – the prohibition of discrimination on grounds of nationality. The citizens of

1 Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3–522.
2 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114, 30.4.2002, p. 6–72.
Turkey have a special status in that regard (more on this point in Carrera, Wiesbrock, 2010: 346-353).

Pursuant to Article 79(1) TFEU, the aim of the common Union policy on integration is to ensure, at all stages, the efficient management of migration flows and the fair treatment of third-country nationals residing legally in Member States, as well as the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. Hence, managing legal migration forms an essential part of EU immigration policy. The competence in this area is shared between the Union and Member States. The most important pieces of legislation governing the status of third-country migrants are: Directive 2003/109 concerning the status of third-country nationals who are long-term residents, Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, and Directive 2003/86 on the right to family reunification.

Directives 2009/50 and 2016/801 lay down conditions for entry and residence of third-country nationals for the purpose of, respectively, highly qualified employment (the so-called EU Blue Card holders) and for the


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purpose of research, studies, training or voluntary service in the European Voluntary Service (and where Member States so decide, pupil exchange schemes or educational projects, voluntary service other than the European Voluntary Service or au pairing). These directives set up a specific intra-EU mobility scheme whereby a third-country national who holds an authorisation issued by the first Member State is entitled to enter and stay in one or several second Member States in accordance with the specific provisions. In the case of EU Blue Card holders, a necessary condition is, in principle, to have legally stayed in the first Member State for the period of 18 months.

The premise underlying the creation of long-term resident status is the recognition that a person who has resided legally in a Member State for a long period of time should be granted, in that state, a set of uniform rights which are as close as possible to those enjoyed by citizens of the European Union. Pursuant to Article 4 of Directive 2003/109, that status may only be granted to individuals who have resided legally and continuously within the territory of a given Member State for five years. Long-term resident status applicants need to provide evidence that they have, for themselves and for dependent family members, stable and regular resources which are sufficient to maintain themselves and the members of their family, without recourse to the social assistance system of a given Member State, and that they have comprehensive sickness insurance in that state (Article 5 of Directive 2003/109). Furthermore, pursuant to Article 6 of the directive, Member States may refuse to grant long-term resident status on grounds of public policy or public security. Long-term residents acquire the right to reside in the territory of the Member States other than the one which granted them the long-term residence status, for a period exceeding three months, on the grounds of exercising of an economic activity in an employed or self-employed capacity, pursuing of studies or vocational training or other purposes, provided that the conditions set out in specific provisions are met.

Another legal instrument regarding the status of third-country nationals in EU Member States is Directive 2003/86, which aims at establishing the right to family reunification for third-country citizens, i.e. the right for family members of a third-country national (called ‘sponsor’) who is lawfully resident in a Member State to join him/her. Pursuant to Article 8 of Directive 2003/86, Member States may require the sponsor to have stayed in their territory for a period of two years before having his/her family members join him/her and may provide for a waiting period of no more
than three years between submission of the application for family reunification and the issue of a residence permit to the family members. The right to reunification with the sponsor is granted to his/her spouse, their minor children as well as minor children of the sponsor or his/her spouse provided that they are dependent on and in the care of the sponsor. Member States are free to extend this right to other family members. In line with Directive 2003/86, Member States may require the sponsor to have accommodation regarded as normal for a comparable family in the same region, comprehensive sickness insurance coverage for himself/herself and his/her family members as well as stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Not later than after five years of residence, the spouse or unmarried partner and a child who has reached the age of majority acquire the right to an autonomous residence permit, independent of that of the sponsor. Member States may reject a family reunification application as well as withdraw or refuse to renew a family member’s residence permit on grounds of public policy, public security or public health.

Adopting these rules was aimed at reinforcing the status of third-country nationals and facilitating their intra-EU mobility through granting them part of the rights arising from the rights and freedoms which previously had been granted exclusively to EU citizens (Carrera, Wiesbrock, 2010: 339-342 and 357-359). It should be noted that legal scholars have long called for an extension of EU citizenship to those third-country nationals who are long-term legal residents of a Member State, with some of them suggesting that such individuals should be granted the full political rights enjoyed by EU citizens (Castro Oliveira, 1988: 198). Some authors have called for providing third-country nationals with at least the majority of rights that EU citizens enjoy under the freedom of movement, without formally granting them EU citizenship (Peers, 1996: 48-50, Sánchez, 2014: 83-85). This would be aimed at increasing the social cohesion of the EU, facilitating the full integration of third-country nationals and ensuring them certainty regarding their legal situation. Also the nature of EU citizenship itself would change as it would no longer depend on being a national of a Member State and the participation in the community, but on the place of residence and the participation in the European society. As a consequence, the problem of the democratic deficit in the EU would be solved (Bradshaw, 2013: 211-213 and the authors indicated therein). An interesting concept of a legal status distinct from EU citizenship and based
on the principle of mutual recognition has been formulated by F. Strumia (Strumia 2013: 452-458). She claims that the periods of residence, education and professional activity as well as cultural and social bonds between a given third-country national and a Member State should be automatically taken into account in other Member States, both for the purpose of the acquiring of rights under EU secondary legislation and for the purpose of the acquisition of nationality. That claim is based on the assumption that if an individual has already met the requirements of immigration law of a given state, has proved his/her willingness to integrate and to live in line with the fundamental European values, as well as has learned the language, history and culture of a given state, this should also be recognised in the remaining Member States.

At the beginning, one could indeed have the impression that the Court intended to increase the scope of the protection of third-country nationals. In this context, attention should be paid to the Chakroun case (Case C-578/08, Chakroun, ECLI:EU:C:2010:117) regarding a refusal by the Netherlands authorities of an application of a Moroccan national for family reunification with her husband who was lawfully resident in the Netherlands. He had stable and regular resources to meet general subsistence costs but, given the level of such resources, was nevertheless entitled to claim special assistance. Hence, the national court asked for an interpretation of the criterion “without recourse to the social assistance system” under Article 7(1)(c) of Directive 2003/86 and asked whether the directive allowed for drawing a distinction according to whether the family relationship arose before or after the date of the sponsor’s entry into the host Member State.

The Court held that the phrase “recourse to the social assistance system” in Article 7(1)(c) of Directive 2003/86 must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, but who, given the level of his/her resources, would nevertheless be entitled to claim special assistance. Member States may indicate a certain sum as a reference amount, but they may not impose a minimum income level below which all family reunifications would be refused, irrespective of an actual examination of the situation of each applicant. Furthermore, it would be contrary to Directive 2003/86, interpreted in the light of the right to respect for family life, to draw a distinction according to whether the family
relationship arose before or after the sponsor entered the territory of the host Member State in calculating the required level of income. According to the Court, family reunification encompasses both establishing and preserving a family.

Legal scholars have pointed to the fact that the Court interpreted Directive 2003/86 in line with its earlier judgments in *Eind* (Case C-291/05, *Eind*, ECLI:EU:C:2007:771) and *Metock* (Case C-127/08, *Metock*, ECLI:EU:C:2008:449) regarding third-country nationals who are members of families of EU citizens (Carrera, Wiesbrock, 2010: 353-354; Hilbrink, 2012: 147). The judgments in those cases were aimed at ensuring that the Treaty freedom of movement is fully effective. In that sense, the status of third-country nationals has been partially approximated to EU citizenship (see also Wiesbrock 2010:469-470 and 473-474). This thesis is confirmed by the fact that the judgment in Chakroun was referred to in cases regarding only citizens of the EU, such as *Brey* (Case C-140/12, *Brey*, ECLI:EU:C:2013:565).

The possibility of applying integration conditions and integration measures to third-country nationals

One of the most fundamental differences between the status of EU and third-country nationals is the fact that the so-called integration conditions and integration measures apply only to the latter (Jesse, 2011: 172-173). Integration conditions and measures are obligations imposed on third-country nationals regarding, for instance, having language skills in the official language of a given state and a knowledge of its history, culture and basic legislation as well as participating in courses in these topics. Their aim is to enable a given person to achieve a true integration with the society of the host Member State. It should be noted that in some Member States conditions of a similar nature must be met to acquire national citizenship.

Article 5 of Directive 2003/109 enables Member States to require third-country nationals applying for long-term resident status to comply with integration conditions in accordance with national law. Furthermore, pursuant to Article 15(3) of Directive 2003/109, Member States may require third-country nationals to comply with integration measures in accordance with national law. However, this condition shall not apply where the third-country nationals concerned have been required to comply with integra-
tion conditions in order to be granted long-term resident status, in accordance with the provisions of Article 5(2). In any case the persons concerned may be required to attend language courses (as regards the progress of legislative work concerning these two articles cf. Carrera 2009, 175-181).

As to the implementation of Article 5(2) of the directive, D. Acosta Arcarazo divided Member States into three groups (Acosta Arcarazo, 2011: 176-185). The first group, which requires compliance with integration conditions before applying for long-term resident status, includes France, Holland, Luxemburg, Germany, Italy, Austria (according to the author, Austria is somewhere between the first and second group) as well as Denmark, which is not bound by the directive. The members of the second group of countries (Czech Republic, Estonia, Greece, Lithuania, Latvia, Portugal, Romania, Slovakia and the United Kingdom, which is not bound by the directive) impose integration conditions on third-country nationals when they apply for a long-term resident’s residence permit. The countries belonging to the third group either impose no integration conditions or offer language courses with no obligation to pass exams. This group includes: Belgium, Bulgaria, Cyprus, Finland, Spain, Malta, Poland, Slovenia, Sweden, Hungary and Ireland, which is not bound by the directive. According to the author, the countries with integration requirements of various kinds – the majority of 14 Member States and the two countries that are not bound by the directive – introduced them into their legal orders for the first time in the period between 2003 and 2009, which is not only the consequence of the need to implement the directive but also the result of broader debates on identity and nationalism taking place there (Acosta Arcarazo, 2011: 187). The trend towards tightening immigration policy in some Member States has also been referred to by F. Strumia (Strumia, 2013: 451-452).

As regards family reunification, Article 7(2) of Directive 2003/86 provides that Member States may require third country nationals to comply with integration measures, in accordance with national law (with regard to refugees and family members of refugees, integration measures can only be applied once the persons concerned have been granted family reunification). Therefore, the wording of that provision indicates that those measures may be applied even prior to the arrival of a family member in the host Member State (Carrera, 2009: 169). Furthermore, Article 4(1)(7) of Directive 2003/86 provides for an exception to the right to family reunification for children of third-country nationals: where a child is aged over
12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this directive.

Article 15(3) of Directive 2009/50 introduces an exception to Directive 2003/86, indicating that the integration conditions and measures can only be applied after the persons concerned have been granted family reunification. Similarly, as regards the exercise of the right to family reunification by beneficiaries of Directive 2016/801, integration conditions and measures may only be applied after the persons concerned have been granted a residence permit (Article 26(3)).

Interpretation of the concepts of integration conditions and integration measures in the case-law of the Court

The admissibility of applying integration conditions to minor third-country nationals was challenged by the European Parliament in the case European Parliament v Council of the European Union (Case C-540/03, European Parliament v Council of the European Union, ECLI:EU:C:2006:429). The application for annulment concerned, inter alia, Article 4(1)(7) of Directive 2003/86 laying down an exception to the right to family reunification with respect to minor children. It states that “where a child is aged over 12 and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this directive”. According to the European Parliament, one of the most important means of successfully integrating a minor child is reunification with his or her family. Hence, imposing a condition for integration before the child joins the sponsor would render the right to family reunification unachievable. Also, the objective of integration may be achieved by less radical means, such as measures for the minors’ integration after they have been allowed to enter the host Member State. The Parliament also indicated that since the concept of integration is not defined in the directive, Member States are authorised to restrict appreciably the right to family reunification.
However, the Court held that the possibility of applying integration conditions is not, in itself, contrary to the right to respect for family life, which does not encompass the absolute individual right to family reunification. Furthermore, the discretion granted to Member States does not differ from that allowed for in the case-law of the European Court of Human Rights. Pursuant to recitals 5 and 17 of the directive, Member States are obliged to take into account the interest of the child, the solidity of the family relationships and the cultural and social ties of a given person both with the host state and the country of origin. According to the Court, the European Union legislature assumed that the objective of integration cannot be achieved so easily above the age limit of 12, which justifies why Member States may take account of a minimum level of integration ability when authorising entry and residence under Directive 2003/86.

It should be noted that the provision contested by the European Parliament was not included in the first proposal for a directive submitted by the Commission.\(^8\) It was added at a later stage in order to mitigate the opposition of some Member States to adopting the directive (Bulterman, 2008, 251-252, Carrera 2009, 166-169). Therefore, the Court’s judgment allowed for maintaining the compromise agreed between the representatives of Member States. Importantly, in the light of the Court’s position, applying integration conditions should allow the state to evaluate the integration capacity of a given third-country national. Nevertheless, Member States were obliged to assess each case individually and examine it in line with the right to respect for family life and the obligation to take into consideration the interest of the child (see also Bulterman, 2008: 253).

Another attempt to define integration measures and integration conditions was made by Advocate General Mengozzi in his opinion in the Doğan case (ECLI:EU:C:2014:287) regarding the German provisions requiring evidence of basic linguistic knowledge with regard to spouses of Turkish nationals wishing to enter the national territory for the purposes of family reunification. The Advocate General referred to the concepts of integration measures and conditions set forth in Directive 2003/109. He indicated that in the course of legislative work representatives of certain countries proposed replacing the term ‘measures’ in Article 15 with the term ‘conditions’. However, the majority of members of the Council were

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opposed to that proposal and the final wording retained the term ‘integration measures’. By contrast, Article 5(2) of Directive 2003/109 allows Member States to make the acquisition of long-term residence status conditional on ‘integration conditions’ which, if complied with, preclude the subsequent imposition of ‘integration measures’ as provided for in Article 15. According to the Advocate General, the concepts of ‘integration measures’ and ‘integration conditions’ must be therefore regarded as being separate.

The Advocate pointed out that although no clear indications are given in either Directive 2003/86 or Directive 2003/109, it is none the less clear that integration measures must be regarded as less restrictive than integration conditions. Under Directive 2003/86, integration measures cannot pursue the aim of selecting the persons who may exercise the right of reunification, as such selection is the aim of the criteria and conditions set forth in Article 7(1). On the contrary – according to the Advocate – integration measures referred to in Article 7(2) must essentially be intended to facilitate integration in Member States.

The Advocate General also indicated that the notion of integration measures must also be distinguished from a ‘condition for integration’ within the meaning of Article 4(1) of Directive 2003/86. According to the Advocate, even though the directive does not define the scope of that ‘condition’, it is clear that we are dealing with a notion which connotes the idea of a prerequisite which must be proven by the interested party, although it differs from the prerequisites set out in Article 7(1).

However, in the opinion of the Advocate General, this does not mean that integration measures, when they are intended to apply before the arrival of the interested persons in the Member State concerned, can only impose obligations to use best endeavours. The notion of ‘integration measures’ is sufficiently broad to encompass obligations to achieve a certain result as well, provided that they are proportionate to the objectives of integration laid down in Article 7(2) of Directive 2003/86 and that the effectiveness of the directive is not undermined.

As a consequence, while, as a general rule, it is for the national legislature to establish detailed procedures enabling the carrying out of an evaluation of the possible material or personal difficulties which the person concerned may encounter in order to comply with the integration measures imposed, that legislature must nevertheless ensure that the objective and effectiveness of Directive 2003/86 are not undermined. A national provision precluding the possibility of those difficulties being taken into...
account or assessed on an individual basis in the light of all relevant circumstances would be contrary to that directive. Therefore, conceding the possibility of making admission into a Member State conditional on passing a test for which it is not actually possible to prepare, for instance due to the lack of any form of support or instruction organised by that Member State in the state of residence of the interested party or because the materials are unavailable or inaccessible, in particular in terms of price, would, in practice, make it impossible to exercise the right to reunification provided for in the directive. Likewise, a provision which does not allow for the taking into account of difficulties, even of a temporary nature, relating to the health of the family member concerned or his/her personal circumstances, such as age, illiteracy, disability and level of education, would undermine the effectiveness of that directive.

However, the judgment of the Court of Justice in that case (Case C-138/13, Dogan, ECLI:EU:C:2014:2066) was based on different arguments. According to the Court, the association agreement with Turkey, and its annexes, should be interpreted as meaning that the ‘standstill’ clause (prohibiting the introduction of any new measures having the object or effect of making the exercise by Turkish nationals of the freedom of establishment or the freedom to provide services subject to stricter conditions) precludes any measure imposing on spouses of Turkish nationals residing in the Member State concerned, who wish to enter the territory of that state for the purpose of family reunification, the condition of demonstrating beforehand that they have acquired basic knowledge of the official language of that Member State. The Court stressed that the right to family reunification constitutes an important way of making it possible for Turkish workers who belong to the labour force of the Member States to exercise their right to family life, and contributes both to improving the quality of their stay and to their integration in those Member States. The decision of a Turkish national to settle in the Member State concerned in order to exercise a stable economic activity there could be negatively affected where the legislation of that state makes family reunification difficult or impossible so that the national concerned could find himself or herself obliged to choose between the activity in the Member State concerned and family life in Turkey. The Court held that although the aim of preventing forced marriages and promoting integration can constitute overriding reasons of public interest, justifying a restriction of the exercise of the freedom of establishment by Turkish nationals, the German provisions went beyond what was necessary to achieve the objective pursued as the ab-

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sence of evidence of sufficient linguistic skills automatically led to the dismissal of the application for family reunification, without taking account of the specific circumstances of each case.

The next case – *P and S* (Case C-579/13, *P and S*, ECLI:EU:C:2015:369) – regards third-country nationals who are long-term residents. The Netherlands court referred the matter to the CJEU with a view to establishing whether the objective and logic of Directive 2003/109, or Article 5(2) and Article 11(1) of that directive, preclude national legislation imposing on third-country nationals who had acquired long-term resident status before the national law in question was adopted, the obligation to pass a civic integration examination covering language and knowledge of Dutch society, under pain of a fine.

In the same manner as Advocate General Mengozzi in the opinion in the *Dogan* case, Advocate General Maciej Szpunar in his opinion (ECLI:EU:C:2015:39) made a distinction between the concepts of integration conditions and integration measures. In his opinion, the former give grounds for acquiring or maintaining long-term resident status or enjoying the rights attached to that status and would be contrary to Directive 2003/109, except the requirements for acquiring that status explicitly allowed by Article 5(2) of the directive. Integration measures, on the other hand, are intended solely to contribute towards the integration of the long-term resident into the economic and social life of the host state. According to the Advocate General, the directive does not preclude national measures – which could also include the Netherlands requirement of passing an exam – provided that they are not a “de jure or a de facto instrument for the selection of persons or for the control of migration.” In particular, such national legislation is not contrary to the principle of equal treatment because, as regards the integration obligation, third-country nationals are not in a situation comparable to that of nationals of a particular Member State or that of other Union citizens.

Nevertheless, such national legislation will be subject to assessment concerning its compliance with EU law, in particular with the principle of proportionality and the fundamental rights since – according to the Advocate – the provisions establishing the requirement of integration for individuals holding long-term resident status are within the scope of application of EU law, irrespective of whether the individual concerned has exercised his or her right to reside in another Member State. The duty to integrate imposed on long-term residents must not make it excessively difficult to exercise the rights attaching to their status or constitute an obstacle.
to the exercise of the right to employment, to conduct business activity, to education and to vocational training. Account should also be taken of access to evening courses, the cost of such trainings and access to a system of financial assistance. The Advocate General also emphasised that the requirements for long-term residents should be less stringent (or in any event may not be more stringent) than those governing the acquisition of citizenship via naturalisation.

When reviewing the Netherlands legislation, the Advocate General also pointed out that the obligation to pass an exam covering the Dutch language and knowledge of Netherlands society is disproportionate to the purpose of facilitating that person’s further integration into the society, especially as – in the case of individuals who already have long-term resident status – it regards persons who have been legally resident in a particular state for a long period and, as a result, have a certain network of ties with that society. That integration measure does not allow for taking into account other factual circumstances indicating that the individual concerned has created a network of integrating ties through marriage or family, living with neighbours, work, hobbies and activities in non-governmental organisations, and, consequently, is disproportionate. The Advocate stressed that this does not mean that integration measures may not impose any obligations on long-term residents. However, they should not involve the need to demonstrate a specific level of knowledge of the society or language skills by means of a qualifying exam or test.

Maciej Szpunar also referred to the possibility of imposing penalties for failure to comply with the integration obligation. In his opinion, imposing penalties on long-term residents with the purpose of forcing them to take part in integration activities is difficult to justify in the light of Directive 2003/109 as it involves a considerable level of interference by the state in the situation of individuals, thus blurring the boundary between an integration condition and integration measure. However, he found that apart from the obligation to reimburse the costs incurred in organising integration measures, Member States may impose a fine on a person who persistently refuses to fulfil the obligations imposed on him/her as part of integration measures. Nevertheless, the penalty should be proportionate to the offence, limited in time, apply only to repeat offences and its amount should take account of the fact that the financial status of immigrants is often lower than the average in a given state. As a consequence, the Advocate General critically evaluated the proportionality of the sanctions imposed under Netherlands law due to the fact that the level of fine was high and
that there was no limit to its reimposition in the event of further failures to pass or take the exam. He indicated that, for some individuals, the threat of a penalty could be grounds for leaving the territory of a given state, which would clearly undermine the long-term resident status deriving from Directive 2003/109.

For the most part, the Court followed the opinion of Advocate General Szpunar; however, his position is less favourable to long-term residents. The Court concurred with the Advocate General in considering that Article 5(2) of Directive 2003/109 does not preclude the application by Member States of an integration measure such as the requirement to pass an exam in the Netherlands as it is not a criterion for maintaining the status of long-term resident. Likewise, the principle of equal treatment – according to the Court – is not applicable to that case since there is no comparability of the situation. It can be presumed that the nationals of a given Member State have knowledge of its society and language, which is not the case for third-country nationals.

The Court held that the requirement to pass an exam covering knowledge of the society of a given state and its language in itself does not jeopardise the attainment of the objectives of Directive 2003/109. On the contrary, it may contribute to achieving these goals as the knowledge of both the language and the society significantly facilitates communication between third-country nationals and citizens of the host state, as well as fosters mutual interaction and the development of social relations between them and simplifies access to the labour market and vocational training. The Court also noted that the principle of implementation of that requirement should not undermine those objectives, in particular given the level of knowledge required to pass the exam, the accessibility of the courses and training material, the amount of registration fees and the consideration of individual circumstances such as age, illiteracy or level of education. The Court also found that the system of fines does not, by itself, jeopardise the achievement of the objectives laid down in Directive 2003/109 and does not deprive it of its effectiveness, but it is for the national court to determine whether this is also the case for the Netherlands system, taking into account the amount of the fine, the possibility of its reimposition and the fact that third-country nationals bear expenses related to the exam itself which are not reimbursed if they do not sit the exam. Thus, the Court held that EU law, as a rule, does not preclude national legislation imposing on third-country nationals who already possess long-term resident status the obligation to pass a civic integration exam.
Attention should also be paid to the *K and A* case (Case C-153/14, K and A, ECLI:EU:C:2015:453) regarding the Netherlands legislation requiring third-country nationals to pass a civic integration exam to assess skills in Dutch at A1 level and the basic knowledge of Netherlands society in order to enter a Member State for the purpose of family reunification.

In her opinion, Advocate General Juliane Kokott (ECLI:EU:C:2015:186), based on the wording of Article 7(2) of Directive 2003/86, held that the directive permits application of integration measures to third-country nationals, other than refugees, and highly-skilled workers (Article 15(3) of Directive 2009/50) before having their family members join them. As EU law does not define the concept of an integration measure, it should be considered that – at least for the purposes of interpretation of Article 7(2) of Directive 2003/86 – it includes a requirement to pass a civic integration exam. Nevertheless, its application should be in line with the principle of equal treatment and must not run counter to the effectiveness of Directive 2003/86. In that regard, the Advocate stated that the Netherlands provisions are appropriate for achieving the objective of improving the situation of the persons coming to join their family in the Netherlands and support their integration with the host society as learning the language of a given state is an essential prerequisite for integration. Language skills not only improve the prospects of third-country citizens in the labour market, but also enable them to seek help in the host country independently in emergencies. Furthermore, basic knowledge of a country makes it possible to understand fundamental rules of social co-existence, which can also help to avoid misunderstandings and breaches of the law.

However, according to the Advocate General, the Netherlands legislation was not proportionate as – in practice – it prevented taking account of personal circumstances which make it difficult to prepare for and pass the exam other than physical or intellectual disability (the equity clause provided for by the Netherlands legislation which made it possible to take into account a family reunification application with no exam passed could only be relied on when, as a result of very special circumstances, the person concerned was permanently unable to pass the examination). Furthermore, in the opinion of the Advocate General, failure to pass a civic integration examination should not automatically lead to family reunification being refused if there are grounds on which it should be granted in a particular case.

The Court widely shared the assessment of Advocate General Kokott, claiming that in the case of family reunification other than that concerning...
refugees and their family members, Article 7(2) of Directive 2003/86 does not preclude Member States from making the grant of entry, and stay in, their territory to family members of a sponsor subject to prior fulfilment of certain integration measures. Yet, such measures can be accepted only if they facilitate integration of the family members of a sponsor and do not aim at the selection of persons who can exercise the right to family reunification. The requirement to pass a civic integration examination on a basic level enables third-country nationals to acquire knowledge which turns out to be undoubtedly useful to establish ties with the host state. The Court held that if the application of that obligation automatically led to the family members of a sponsor who would demonstrate their willingness to take the exam and their endeavours to that end being refused the permission to join him/her, it would run counter to the principle of proportionality as it would go beyond what is necessary to achieve the objective. Also, there should be a possibility of an exemption from the requirement to pass such an exam where the individual circumstances such as age, the level of education, financial situation or state of health of the individuals concerned do not allow for taking or passing such an exam.

Renationalisation of third-country citizens’ status in the European Union?

It should be noted that the interpretation adopted by the Court to a significant extent equated the concepts of integration conditions and integration measures (see also Jesse, 2016: 1077). In both cases, Member States are allowed to require third-country citizens to achieve a certain result, for instance to pass an exam covering language skills and the knowledge of the culture, history and society of a given state. Also, failure to fulfil such an obligation may be subject to sanctions such as fines. The Court stressed that the application of integration measures, and in particular imposing fines for failure to meet the requirements, have to be in line with the principle of proportionality. However, it should be pointed out that Member States have to comply with the same obligation when they require nationals to fulfil certain obligations under integration conditions. As a consequence, Member States can impose on migrants the same kind of obligations, whether under integration measures or integration conditions; hence, they have quite a wide discretion. Furthermore, the Court assessed the proportionality of national legislation in a quite superficial manner (for a different opinion see Jesse, 2016: 1086), which indicates a willingness to
safeguard the powers attributed to the national authorities. However, it should be noted that the Court maintained the requirement of performing an individual assessment of the situation of a given person.

Thus, the only difference between those two categories is their objective. According to the Court, integration measures cannot be an instrument for the selection of persons who will be granted the right to join the sponsor (with the exception referred to in Article 4(1)(7) of Directive 2003/86). Also maintaining the status of long-term resident cannot be made subject to integration measures. The Court stressed that integration measures aim at facilitating the integration of third-country nationals. A contrario, being granted entry into or residence in a given state or the status of long-term resident of that state can be made subject to meeting certain obligations under integration conditions.

Such interpretation of Directive 2003/1009 and Directive 2003/86 is, however, contrary to their general scheme. In accordance with the assumption of the rationality of the legislator, the fact that two different terms are used indicates the intention to refer to two different concepts (see also Jesse, 2016: 1079). As a result, integration measures should be interpreted as being of a different nature and having different consequences for the persons they refer to than integration conditions (see also Acosta Arcazzo, 2015: 209). The Court correctly identified the aim of integration measures, i.e. facilitating integration of third-country nationals. However, it should be pointed out that legislation requiring to pass an exam and providing for a fine if that obligation is not met seems to pursue a different aim. It does not really facilitate the integration of migrants, which would be achieved if they were provided with the possibility of participating in language courses or in courses covering knowledge of a given state and its society, but forces them to integrate. Moreover, the wording of the Netherlands legislation at issue in the P and S as well as K and A cases clearly indicates that the obligation to pass an exam is, as a rule, supposed to be a condition for being granted or for maintaining particular rights by third-country nationals, and thus should be regarded as imposing integration conditions rather than measures.

The judgments analysed constitute evidence of a change in the way of defining the concept of integration itself. In their light, integration is no longer perceived as a process of establishing and strengthening social, family, cultural, economic and other kinds of bonds during the period of residence in a given country but as a precondition for arriving and residing in a given state or obtaining the status of long-term resident (see also Car-
Therefore, the concept of integration achieved through the rights granted (Acosta Arcazzo, 2015: 209) no longer applies to third-country nationals. Another consequence of the paradigm shift concerning integration of immigrants is the admissibility of applying measures forcing them to take specific actions. Integration has become an obligation of third-country nationals who legally reside, or would like to settle, in the territory of Member States.

Thus, the Court’s position meets the expectations of a large part of Member States who impose integration obligations on third-country nationals. It should be noted that the fact that the number of countries who impose such requirements on third-country nationals is growing (Acosta Arcarazo, 2011: 176-185; Gross, 2005: 152) undoubtedly results from the changes taking place in the societies of those states. For the general public, immigration is a significant concern which requires action to be taken not only at the national level but also at the level of the EU (Beutin, Canoy, Horvath, Hubert, Lerais, Sochacki, 2007: 391-393). The debates on immigrants and their integration, which have been held in Member States for a long time, have shown the governments that integration is an important factor for internal stability and must be placed on political agenda (Gross, 2005: 145). The immigration crisis in Europe since 2015 has deepened the negative attitude towards all immigrants. It cannot be expected that the judges of the Court will not be influenced in any way by that social and political situation. In this context, the Court’s judgments can be regarded as a reasonable compromise between the expectations of Member States and their societies on the one hand and the need to protect individuals on the other.

Nevertheless, the judgments discussed may encourage other Member States to require third-country citizens who reside or would like to reside in their territory to meet various obligations under integration measures. Although the Court stressed that integration measures cannot be aimed at the selection of immigrants, allowing Member States to require third-country nationals to achieve a certain result on pain of a fine can, in practice, have that effect. A wide discretion granted to the national authorities entails a risk that – through measures theoretically aimed at facilitating the integration of third-country nationals – they will limit the group of persons with the right to reside in the Union, the right to family reunification or the right to maintain the status of long-term residents, thus reducing the effectiveness of EU directives (for a different view see Jesse, 2016: 1081). The mere existence of penalties for failure to comply with such measures may
discourage legal migration into the Union. Such a scenario will lead to the phenomenon that may be called renationalisation of EU immigration policy and of the legal status of third-country nationals in the EU as protection for third-country nationals under EU law has been significantly reduced.

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Chapter 7: Between fundamental status and benefit tourism – the changing notion of Union citizenship in the light of CJEU’s judgments

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Key words: citizenship of the European Union, Court of Justice of the European Union, equal treatment, right to reside, real link test

The role of the Court of Justice in the development of the rights attached to EU citizenship

The concept of EU citizenship has been developed thanks mostly to the proactive attitude of the Court of Justice, which – in the period from the judgment in Martinez Sala (Case C-85/96 Martinez Sala, ECLI:EU:C:1998:217) until the entry into force of Directive 2004/38 – consistently extended the legal entitlements of EU migrant citizens and their family members. According to the judgment in Grzelczyk (Case C-184/99, Grzelczyk, ECLI:EU:C:2001:458), EU citizenship is destined to be “the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for” (section 31).

Importantly, the CJEU derived the rights attached to Union citizenship directly from the Treaties. It consistently interpreted secondary law provisions in the light of the present Articles 21 and 18 TFEU, emphasising that domestic regulations (and, indirectly, also EU secondary legislation) need to conform to the provisions of the Treaties. At the same time, the Court

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stressed that a distinction needs to be made between the existence and the exercise of a subjective right. The conditions and limitations laid down by domestic provisions or EU secondary legislation could influence the exercise of the right to free movement but not the existence of that right as such, which results directly from the Treaty. As a consequence, they had to be in line with the principle of proportionality, which was usually reviewed by the Court in a quite restrictive way. The CJEU adopted a model of specific, rather than abstract, proportionality testing which applies not only to a given provision itself but also to its application in a specific case (Spaventa, 2010: 147-157). The principle of proportionality has therefore become the most important guarantee of the protection of the rights of EU migrant citizens.

The proactive approach of the Court culminated in the creation of a concept (test) of a real link under which Member States may restrict the granting of different kinds of benefits only to those citizens of other Member States who are sufficiently integrated into the society of the host country thanks to the existence of a real link. On the one hand, this gave sufficiently well-integrated EU migrant citizens the right to equal treatment with nationals of the host state as regards access to different kinds of social benefits. On the other hand, the test enabled Member States to reduce the number of recipients of those benefits so that the support for EU migrant citizens would not become an unreasonable burden on their social assistance systems. Therefore, the real link test aimed at extending the scope of rights granted to EU citizens and, at the same time, preventing the so-called benefit tourism, i.e. cases where individuals move to another country solely to exploit a more generous social assistance system than the one in their home Member State (see also: Verschueren, 2007: 333; Golynder, 2005: 117).

Such a proactive approach of the Court was, however, strongly criticised by some legal scholars. Especially the absence of appropriate methodology and convincing justification for extending the rights of EU citizens was emphasised. Furthermore, secondary legislation provisions were interpreted by the Court in a manner which was not consistent with the intentions that had led to their adoption. In cases where it was impossible to derive an entitlement from the provisions of residence directives, the Court concluded that they could be derived directly from the provisions of the Treaty. As a consequence, it was claimed that the CJEU was ignoring the wording of secondary legislation provisions or even rewriting them (Hailbronner, 2005: 1251-1258). Those controversies regarded the
wider issue of the role and scope of competencies of the Court, as well as the mutual relations of primary and secondary law (on this point, see: Sørensen, 2011: 339-361; Syrpis, 2015: 461-488). As those matters concern not only the case-law regarding EU citizenship, the Court was criticised on a number of occasions for its judicial activism, introducing its own integration policy agenda, assuming the role of legislator and ignoring the role of Member States and EU institutions in fundamental political and social decision-making (Dougan 2013: 128-133).

Growing concerns over benefit tourism

It should be noted that concerns over benefit tourism of EU migrant citizens, especially those who are economically inactive, are not new and were voiced by some Member States and their societies even before the introduction of Union citizenship. Yet, they have increased as a result of the economic crisis that has affected the EU Member States since 2007 (see also: Giubboni, 2015: 7-8; Sadl, Madsen, 2016: 40-60). At a meeting of the Employment, Social Policy, Health and Consumer Affairs Council (EU) on 17 June 2011, 13 Member States adopted a common position calling upon the Commission to give priority to the issue of differences in defining the place of residence under Regulation 883/2004 and Directive 2004/38. As a result of those discrepancies, it could be concluded that it is the host country that is responsible for granting certain social security benefits and the so-called special non-contributory social security benefits, even if a given person does not have the right of residence in that country pursuant to Directive 2004/38. In the light of the results of the studies commissioned by the EC regarding the exercise of the right of EU citizens and members of their families to move freely, the Commission has failed to take any action. According to the data presented by the EC in the Communication Free movement of EU citizens and their families: Five actions to make a difference, at the end of 2012, 14.1 million EU citizens resided in another Member State, which is 2.8% of the total population of the EU Member States. The percentage of third country citizens living in the EU

stood at 4.0%. The rate of employment among mobile Union citizens was 67.7%, an increase compared to 2005. For comparison, those who lived in their own Member State showed employment rates of 64.6%. Furthermore, 79% of unemployed mobile EU citizens lived in one household with an employed person and 64% had worked in the country of origin in the past. According to the Commission, EU migrant workers did not receive more social benefits than the citizens of host states. Among the thirteen countries examined, in six they accounted for less than 1% of beneficiaries of non-contributory social benefits (who are EU citizens), in five countries – 1 to 5%, and in the remaining two countries – 5% and 15%. What is more, in the majority of Member States EU migrant citizens paid statistically significantly more taxes and contributions than they received in the form of social benefits (hence being net contributors). The Commission also found no link between the generosity of social protection and the exercise of the right to free movement by EU citizens.4

Nevertheless, the aggravating financial crisis has led to an increased number of claims for a reduction of the scope of legal entitlements of EU migrant citizens, in particular those who are economically inactive, in host Member States. Those issues were also one of the main subjects of the negotiations between the United Kingdom and the remaining Member States with respect to the Brexit referendum. The compromise reached was intended to discourage British citizens from voting Leave. In accordance with a declaration of the heads of state and government attached to the conclusions of the European Council of 18-19 February 2016,5 Great Britain was no longer committed to further political integration within the European Union. As regards specific provisions on the right of EU citizens to move freely, the conclusions stated that the Member States have the right to define the fundamental principles of their social protection systems and that they enjoy a broad margin of discretion to define and implement their social and employment policies, including laying down the conditions for access to social benefits. It was stressed that the free movement of EU citizens should be exercised subject to the limitations and condi-

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Free movement of EU citizens and their families: Five actions to make a difference COM (2013) 837.
tions established in the Treaties and in the measures adopted to give them effect. The conclusions also quoted the judgments of the Court of Justice restricting the access to welfare benefits, and included an undertaking by the Commission to propose amendments to Regulation 883/2004 allowing for the indexation of child benefits in a different Member State in order to adapt them to the conditions in the state of residence of a given child. Furthermore, an alert and safeguard mechanism was to be established to be used in situations of the inflow of workers from other Member States. With the agreement of the Council, the host state could, to the extent necessary, restrict access to non-contributory in-work benefits for recently arrived workers for a total period of up to four years from the commencement of employment. In view of the fact that the majority of British citizens who took part in the referendum of 23 June 2016 voted to leave the EU, the agreement was not implemented. However, it seems that the concerns about benefit tourism and the claims for a reduction of the freedom of movement of economically inactive EU citizens as well as workers had a determining influence on the case-law of the Court of Justice after 2013.

Recent case-law of the Court of Justice

Case C-140/12 Brey

The Court’s judgment in *Brey* (Case C-140/12, *Brey*, ECLI:EU:C:2013:565) should be regarded as a turning point in the case-law of the CJEU regarding the rights of EU migrant citizens in host Member States. The judgment is twofold. On the one hand, the Court stressed the obligation to perform an individual assessment of each factual situation by national authorities, thus referring to its earlier case-law. On the other hand, the CJEU defined the notion of social assistance within the meaning of Article 24(2) of Directive 2004/38 in a different manner to that under provisions on the coordination of social security systems, in particular Regulation 883/2004, which had a significant impact on the legal entitlements of EU migrant citizens and members of their families.

According to the Court, social assistance should be interpreted as relating to “all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden
on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State” (section 61).

This definition is very broad and covers all the benefits paid by central and local authorities of a Member State, whether in cash or in kind (such as social housing), as long as they are not funded by contributions but from budgetary resources (Thym, 2015: 23). The adoption of such a broad definition is also contrary to the earlier approach developed in the Vatsouras case (Case C-23/08, Vatsouras, ECLI:EU:C:2009:344), where the notion of social assistance was significantly narrowed down as a result of the interpretation by the Court of Article 24(2) in the light of the Treaty provisions, and in the Commission v Austria case (Case C-75/11, Commission v Austria, ECLI:EU:C:2012:605). Legal scholars indicated that the criterion allowing for the identification of benefits facilitating access to employment on the labour market in the Vatsouras judgment constituted an objective that the benefits concerned were supposed to meet. The definition of social assistance benefits in the Brey judgment is, in turn, based on the characteristics of their beneficiaries as persons who do not have resources to meet their own basic needs (O’Brien, 2016: 947).

The fact that such a definition of social assistance was adopted means that it also covers the so-called special non-contributory cash benefits within the meaning of Regulation 883/2004. Pursuant to Article 70(1), such benefits “are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation and of social assistance”. Special non-contributory cash benefits are listed in Annex X to Regulation 883/2004 and include, for instance, unemployment, old-age and disability benefits.

Such benefits are provided exclusively in the Member State which is the habitual residence of a given person, in accordance with its legislation. This means that those benefits are not bound by the principle of exportability of entitlement to benefits in the case of a change of the country of residence (which results in a ban on the export of those benefits to a different country). However, it should be pointed out that they are bound by the principle of non-discrimination, one of the general principles of the coordination of social assistance systems. Pursuant to Article 4 of Regulation 883/2004, “unless otherwise provided for by this Regulation, persons to whom the Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the
nationals thereof”. The use of the term “unless otherwise provided for by this Regulation” means that the exceptions to the principle of equal treatment must be expressly mentioned in the provisions of that regulation (Majkowska-Szulc, Tomaszewska, Zieleniecki, 2012: XX-109). This principle gives rise to the prohibition of discrimination, whether direct or indirect, on grounds of nationality.

Hence, some doubts might be expressed as to the judgment in Brey. The inclusion of special non-contributory cash benefits in social assistance under Article 24(2) of Directive 2004/38 results in them being covered by the provisions of Directive 2004/38. As a consequence, the host countries are not obliged to provide them for the first three months of residence of the person concerned. Secondly, they may no longer be paid out if delivering those benefits becomes an unreasonable burden on the social assistance system of the host state. However, under Regulation 883/2004, the lack of the possibility to export those benefits was linked to the obligation to grant them by the state of habitual residence. The Court, however, created additional conditions based on the right of residence and unreasonable burden tests pursuant to Directive 2004/38. This may result in a given EU citizen being not entitled to those benefits in both the host state and the country of origin (Verschueren, 2014: 159-164, for earlier concepts of resolving secondary law conflicts see Verschueren, 2011: 296-299; Verschueren 2007: 324-328).

Another important element of the judgment in Brey regards the obligation to assess whether the person concerned may become an unreasonable burden on the social assistance system of a given state in the light of the principle of proportionality and individual circumstances. In the Court’s opinion, Member States may indicate the reference amount that allows for meeting the requirement of having sufficient means but they cannot impose any minimum income below which it would be presumed that the person concerned does not have sufficient financial resources. Also the personal situation of a given person must be taken into consideration. The Court noted that “such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b)
and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned” (section 77).

Therefore, the unreasonable burden would be assessed with regard to the entire social assistance system of a given state. The Court agreed with a remark made by the Commission during the hearing that it would be useful to determine the proportion of beneficiaries of a given benefit who are nationals of other Member States. It should be noted that, given the current scale of migration, as a result of the need to assess the influence of granting a particular benefit to a given category of EU migrant citizens on the entire social assistance system of the host state, it would be really difficult to demonstrate the risk of an unreasonable burden (see Shuibhne, 2015: 907; O’Brien, 2016: 946). Moreover, the Court stressed that the margin of discretion conferred on Member States’ authorities cannot be contrary to the objective of Directive 2004/38, i.e. the support for the freedom of movement of citizens of the Union. It seems that those statements concern not only special non-contributory cash benefits, but any kind of non-contributory social benefits (see also Werschlerem, 2014: 174).

In this respect the judgment represented a return to the case-law from the period prior to the adoption of Directive 2004/38, which mainly regards the obligation to assess the individual situation of the person concerned and respect for the principle of proportionality (see also: Shuibhne, 2015: 906). On the other hand, it seems justified to claim that the judgment has increased legal uncertainty rather than reduced it (Verschueren, 2014: 169-177). It should be noted that when pointing to the circumstances which need to be taken into consideration, the Court indicated only those regarding the envisaged cost of granting a particular benefit to a given person, not taking into account the circumstances indicating the link between that person and the society of the host state, which is remarkable (see also Verschueren, 2014: 172; Neuvonen, 2016: 80-81). This seems to confirm that following the entry into force of Directive 2004/38, the link has been assessed only from the perspective of the duration of stay in the host state. Thus, it will never be sufficiently strong prior to the acquisition of the permanent right of residence.

Attention should also be paid to the analogy of the situation of Mr. and Mrs. Brey and the facts that gave rise to the judgment in Trojani (Case C-456/02, Trojani, ECLI:EU:C:2004:488). In the latter case it was stated...
that as long as a Member State does not curtail the right of residence of a given person on its territory, that person may also benefit from the principle of equal treatment as regards access to welfare benefits. In the case of the Brey judgment, according to the Court, the issue of a residence card implying that Mr. and Mrs. Brey have the right of residence in Austria (on the basis of Directive 2004/38) is only one of the conditions that a national court should take into account when assessing whether the grant of a benefit could place an unreasonable burden on the social assistance scheme. Thus, a legal stay in another Member State is no longer sufficient to benefit from the principle of equal treatment, which the Court confirmed explicitly in the next judgment.

Case C-333/13 Dano

The judgment in Dano (Case C-333/13, Dano, ECLI:EU:C:2014:2358) was undoubtedly an attempt to strike a balance between the right of Union citizens, also the ones who are economically inactive, to move freely granted by the Court and the concerns of Member States about the protection of their social assistance systems from “uninvited guests” (see Verschueren, 2015 II: 30; Shuibhne, 2015: 907-908). The Court found that Article 24(1) of Directive 2004/38/EC and Article 4 of Regulation No 883/2004 do not preclude legislation of a Member State under which the citizens of other Member States are excluded from entitlement to certain special non-contributory cash benefits, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have the right of residence under Directive 2004/38 in the host Member State (section 84). According to the CJEU, both Article 7(1)(b) and recital 10 of Directive 2004/38 seek to prevent economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence. Therefore, a Member State must have the possibility to refuse to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State’s social assistance although they do not have sufficient resources to claim the right of residence. Otherwise, persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically through the grant of benefits in that country. Therefore, Union citizens can claim equal treat-
ment with nationals of the host Member State regarding access to the benefits concerned as long as their stay in the host Member State fulfils the conditions laid down in Directive 2004/38 (sections 73-81). It should be recalled that the *Dano* judgment was delivered by the Grand Chamber, which was interpreted as a signal that the Court wanted to attach particular importance to that ruling (Verschueren, 2015: 369).

Compared with the judgment in *Brey*, one might ask why there is no reference whatsoever to the need to assess the burden a given person may become on the social assistance system of a given Member State in the light of the principle of proportionality. It seems, therefore, that in the Court’s opinion, in each case where welfare benefits are granted to a person who does not have sufficient means of subsistence, that person becomes an unreasonable burden. This corresponds with the fact that the Court stressed that the aim of the directive is to prevent EU migrant citizens from becoming an unreasonable burden on the social assistance system of the host Member State. However, the Court was silent on the objective of facilitating the exercise of the right to free movement, which the *Brey* judgment points to. As it has been rightly remarked, the Court also disregarded its earlier claims that the provisions regarding the right to move freely should be interpreted broadly, while the limitations to that right should be interpreted in a restrictive way and in the light of primary law. Therefore, the judgment shows that the Court has changed its position, stressing the interests of Member States and disregarding equivalent constitutional arguments that could justify a different solution (Thym, 2015: 25; Düsterhaus, 2015: 136-138). Nevertheless, it is also possible to take a different view and emphasise that it follows from the mere wording or Articles 20 and 21 TFEU that the rights of Union citizens are not absolute and are subject to limitations imposed by secondary legislation. The judgment “reinforced the emphasis which had already been placed on the interests of Member States, reflecting the transnational rather than supranational nature of Union citizenship” (Wróbel, 2014: 35-37, and 42).

Another controversial thesis is the view that the principle of equal treatment, which was given specific expression in Article 24(1) of the directive, applies only to persons who meet the conditions for granting them the right of residence pursuant to that directive. Therefore, this constitutes yet another case where the Court identifies a legal stay on the territory of the host state with a stay complying with the requirements of the directive. It should be, however, noted that the source of the principle of equal treatment is Article 18 TFEU, which means that any restriction on the principle
should stand the proportionality test. The judgment confirms also the claim that EU citizenship as such is not an element linking an individual with the scope of application of Union law, so legal entitlements resulting from Union citizenship arise only in conjunction with another, more specific provision of EU legislation (Thym, 2015: 24).

Also noteworthy is the fact that the Court took account of the assumed intentions behind the arrival of Mrs. Dano in Germany, i.e. enjoyment of welfare benefits. Thus, the Court for the first time recognised that the intentions behind the exercise of the right to move freely by a Union citizen can be taken into consideration when assessing the right of residence or access to social benefits of that person. In the past, the Court had always maintained that such intentions are devoid of relevance (see Verschueren, 2015: 374; Shuibhne, 2015: 911-912; Neuvonen, 2016: 56).

As Herwig Verschueren noted, both a narrow and a broad interpretation of the judgment in *Dano* is possible. According to the latter, it is possible to exclude the right to equal treatment under Article 24(1) of Directive 2004/38 solely in relation to EU migrant citizens who are known from the outset to have moved only to benefit from social welfare assistance of the host state and have no intention to try to integrate into the society of that state, for instance through seeking employment. In such a case, it is not necessary to do the real link and proportionality principle testing, which would explain why the Court made no mention whatsoever of that principle. In relation to the remaining EU citizens, the measures taken by the state need to be compatible with those conditions. Under such an interpretation, benefits tourism is limited to migration solely for the purpose of claiming welfare benefits. It is also more consistent with the Court’s earlier definition of the right to free movement as a fundamental right of Union citizens. Nevertheless, the Court did not explicitly indicate the relevance of the reasons for arriving in a Member State, which already at that point could argue for a broader interpretation of the judgment in *Dano* (Verschueren, 2015: 370-376).

The other interpretation leads to the conclusion that Member States can refuse to grant not only social assistance benefits but also any kind of social benefits to all economically inactive Union citizens with no right of residence due to the absence of adequate means of subsistence. The author indicates the risk that certain Member States will follow such an interpretation. This, however, raises the question about the influence of that judgment on the possibility of the expulsion of such an EU citizen. Pursuant to Article 14(3) and earlier case-law of the Court, expulsion should not be
the automatic consequence of a Union citizen’s recourse to social assistance. The question thus arises whether the possibility of the expulsion of a Union citizen is still conditional upon standing the proportionality test, and, if so, what if a given person cannot be removed from the territory of the host state and, at the same time, is not entitled to social benefits (see: Verschueren, 2015 II: 26-27; Verschueren, 2015: 377-381; Düsterhaus, 2015: 132-135)?

Case C-67/14 Alimanovic

In a further decision in Alimanovic (Case C-67/14, Alimanovic, ECLI:EU:C:2015:597), the Court had to deal with the question whether the nationals of other Member States who are not or are no longer economically active can be excluded from entitlement to a non-contributory benefit to cover subsistence costs. The Court referred to the legal basis of the Alimanovic family’s residence in Germany and indicated that, even assuming that they might rely on Article (14)(b) of Directive 2004/38 to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of that directive, the host Member State might rely on the derogation in Article 24(2) of that directive in order not to grant them the social assistance sought. Importantly, the Court held that no individual assessment of the situation of persons such as the Alimanovic family is necessary as “Directive 2004/38, establishing a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity” (section 60). The Court also commented on the issue of an unreasonable burden indicating that “as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, it must be observed that the assistance awarded to a single applicant can scarcely be described as an ‘unreasonable burden’ for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so” (section 62).
That ruling seems to go even further than the judgments in Brey and Dano. While the theses of the judgment in Dano could be interpreted as providing Member States with the tools to prevent the abuse of free movement rights and to fight benefit tourism, the Alimanovic family at least made an attempt to find employment in the host state. It should be also noted that children of Mrs. Alimanovic were born in Germany and the family lived there for a certain length of time. Therefore, it is difficult to regard their case as benefits tourism.

Surprisingly, the Court disregarded the arguments of Advocate General Wathelet (ECLI:EU:C:2015:210), who distinguished between the situation of nationals seeking their first job in the territory of the host Member State and that of those who have already worked there. The Advocate indicated that, as opposed to the former, the citizens of the Union who have already worked in the host Member State cannot be automatically excluded from the right to equal treatment as regards access to social benefits under EU law. The ones who would be able to demonstrate the existence of a genuine link with the host Member State should be granted such benefits. Thus, the Advocate sought to bring the theses of the judgment in Dano in line with the previous judgments in Collins (Case C-138/02, Collins, ECLI:EU:C:2004:172), Vatsouras and Prete (Case C-367/11, Prete, ECLI:EU:C:2012:668). The Court decided, however, to ensure equality between those who seek employment for the first time and those who have already worked in the host Member State. This is irreconcilable with the purpose to increase the scope of rights of EU citizens as their integration into the society of the host state moves forward, all the more so since former workers have already contributed to a certain extent to the financing of that state. This marks the end of the concept of a genuine link within the scope of Directive 2004/38. Legal scholars point to the fact that they do not really understand why the Court emphasised the difference between workers and those who have not acquired the status of workers or have lost it as regards the right to claim social assistance benefits if the concept of worker covers also those who exercise minor employment or are low paid, which makes them dependent on the social assistance system of the host Member State (Ilipoulou-Penot, 2016: 1021).

On the other hand, it is true that Directive 2004/38 introduces a certain degree of protection for those Union citizens who have worked in the host Member State and have lost their job or become unable to work. Pursuant to Article 7(3)(c) of the directive, those who have become unemployed after less than a year retain the status of worker for six months. Therefore,
the loss of work does not automatically result in the loss of entitlements attached to the status of worker. Although the period of six months may not be sufficient to find a new job, particularly in times of economic downturn, compared to the short period of previous employment it constitutes a certain compromise.\textsuperscript{6} In this context, the Court’s decision is to a certain extent reasonable and justified.

Yet, interpretation of Directive 2004/38 in the direction suggested by Advocate General Wathelet is also possible (Peers, 2015), all the more so as one year earlier the Court itself adopted an expanded interpretation of cases concerning retention of the status of worker in \textit{Saint Prix} (Case C-507/12, \textit{Saint Prix} ECLI:EU:C:2014:2007). In that judgment, the Court admitted that Article 45 TFEU can be a direct legal basis for the retention of the status of worker by a woman who temporarily stopped working due to advanced pregnancy and the post-natal period provided that she returns to work or finds another one within a reasonable period after confinement. The Court stressed that codification of the EU acquis in Directive 2004/38 “serves explicitly to facilitate the exercise of the right of citizens of the Union to move freely and reside within the territory of Member States;” hence, Article 7(3) cannot reduce the scope of the concept of worker within the meaning of the Treaty. In view of that judgment, it is evident that Directive 2004/38 does not cover all the entitlements granted to Union citizens directly on the basis of the Treaty (see also S. Peers (2015); Ilipoulou-Penot, 2016: 1018-1019).

When we compare the judgment in \textit{Alimanovic} (and in \textit{Dano}) with the judgment in \textit{Saint Prix} and the earlier case-law of the Court based on Directive 2004/38, what is striking is the redefinition of its objectives and of its relation to primary law. The Court again pointed out that the aim of Directive 2004/38 is to prevent nationals of other Member States from becoming an unreasonable burden on the host Member State’s social assistance system. However, it ignored the fact that the directive also aims to facilitate, and not to restrict, the exercise of the right to free movement and to enhance that right, which in the past justified a restrictive interpretation

\textsuperscript{6} In this context, attention should be given to the ongoing case C-442/16 Gusa, in which the Irish court referred the matter to the Court for a preliminary ruling concerning the retention of the status of worker, the right of residence and the right to receive unemployment benefits for persons who were self-employed in the host Member State for approximately four years and ceased that activity due to the lack of work.
of exceptions to the principle of equal treatment. The reasoning of the Court seems to be based on the assumption that Directive 2004/38 exhaustively establishes the entitlements of EU migrant citizens, thus defining the scope of protection under Articles 21 and 18 TFEU (see also Ilipoulou-Penot, 2016: 1016-1017). As noted, that time the Court failed to recognise the fundamental status of Member States’ nationals resulting from EU citizenship, which it had almost always referred to before (Ilipoulou-Penot, 2016: 1016). This is the most explicit reflection of a change in the approach of the Court.

The most far-reaching consequences follow, however, from the fact that the Court explicitly held that the refusal to grant welfare benefits to the Alimanovic family does not have to be assessed in the light of the principle of proportionality. That claim may be easily extended to the entire Directive 2004/38 as it introduces a gradual system of the earning of rights by Union citizens in the host Member State. In that regard, the judgments in Alimanovic and Dano complement the judgment in Förster (Case C-158/07, Förster, ECLI:EU:C:2008:630), where the Court in abstracto recognised proportionality of Article 24(2) as regards access to grants and loans to cover maintenance costs during studies. At the same time, those judgments seem to be irreconcilable with the judgment in Brey, in which the Court highlighted the need to assess individual circumstances in the light of the requirements of proportionality. It should be considered that the Court erred in its approach as it did not uncouple the adoption of the directive from the manner in which it was implemented, which should not be excluded from the scope of application of the principle of proportionality (see also Ilipoulou-Penot, 2016: 1023-1025).

Furthermore, the Court indicated that the concept of unreasonable burden should not be interpreted in the light of the amount of aid that is to be provided to a particular Union citizen, but as a total cost of accommodating all such potential requests. The Court is obviously right to indicate that the support provided individually to a particular person cannot in itself constitute an unreasonable burden on the public finances of the host Member State. Yet, the Court’s interpretation resulting in the recognition that any support provided to an economically inactive Union citizen prior to the acquisition of the permanent right of residence constitutes an unreasonable burden is not compatible with the judgments in Grzeczyk and Bidar (Case C-209/03, Bidar, ECLI:EU:C:2005:169) as well as with the general scheme of Directive 2004/38 itself. Indeed, the unreasonable nature of burden does not mean that the support granted threatens the liquidi-
ty of public finances of the host Member State but that the individual situation of a particular Union citizen makes it unreasonable to conclude that the society of that state should demonstrate financial solidarity with that person. Thus, the unreasonable burden does not result from the value of possible benefits granted *in abstracto* but from the absence of a sufficient link of that person with the host state that would justify the requirement to show that solidarity. It should be noted that recital 16 of the preamble of the directive explicitly requires, inter alia, to take account of the fact that financial difficulties of a Member State national may be temporary.

One might also ask why the Court disregarded Advocate General Wathelet’s suggestion that the Alimanovic family could enjoy the right of residence in Germany pursuant to Article 10 of Regulation 492/2011, which grants the right to education and, as a consequence, to reside in the host Member State to children of Member States’ nationals who have been employed in the territory of that state. As a consequence, the parent who is the carer of such a child is granted a derived right of residence. According to the case-law of the Court, that right of residence is not subject to the requirement of having sufficient resources under Article 7 of Directive 2004/38 (see Case C-413/99, *Baumbast*, ECLI:EU:C:2002:493, Case C-480/08, *Teixeira*, ECLI:EU:C:2010:83; Case C-310/08, *Ibrahim*). A lack of any reference to that issue by the Court could result from the fact that it had already fully clarified the interpretation of Article 10 of Regulation 492/2011 or from the absence of a precise question from the national court. Nevertheless, the possibility that the Court for some reason found that the provision was inapplicable in that case cannot be excluded, which would mean that the scope of rights arising therefrom is likely to be restricted in the future.

In should be pointed out further in this connection that the theses of the judgment in *Alimanovic* were confirmed in the judgment in *Garcia-Nieto* (Case C-299/14, *Garcia-Nieto*, ECLI:EU:C:2016:114) in relation to Union citizens who exercise their right of residence in the host state under Article 6(1) of Directive 2004/38 and are searching for work in that country.

Case C-233/14 Commission v Netherlands

The subject-matter of the dispute between the Commission and the Kingdom of the Netherlands in the *Commission v Netherlands* case (Case C-233/14, *Commission v Netherlands*, ECLI:EU:C:2016:396) were do-
mestic provisions restricting access to fares at preferential rates on public transport for students who are registered with a private or public educational establishments in the Netherlands, have Netherlands nationality, are economically active or have obtained the right of permanent residence. The Kingdom of the Netherlands claimed that the benefit at issue is part of the basic grant, which, in turn, is part of the funding provided for studies and is awarded in the form of a conditional loan that has to be repaid with interest if the student fails to complete his or her studies within a ten year period. The Court considered the question of direct discrimination resulting from the Netherlands rules because the Commission’s allegation of indirect discrimination was rejected as inadmissible on formal grounds. The Court reiterated the arguments from the judgment in Commission v Austria that, although financial support for travel costs constitutes maintenance aid for students, it is only maintenance aid consisting in student grants or student loans that falls within the scope of derogation from the principle of equal treatment under Article 24(2) of Directive 2004/38. Thus, it becomes crucial to assess the nature of the Netherlands benefit at issue, which, according to the Court, has features in common with either a student grant or a student loan, depending on whether the student concerned completes his or her studies within the period of ten years, while the fact that the support was provided in the form of a ticket (in kind rather than in cash) had no relevance.

That judgment is yet more proof that the Court has changed its position regarding interpretation of Directive 2004/38 and balancing the interests of EU migrant citizens and host Member States. The Court once again disregarded the previous principle that the limitations to the right of free movement should be interpreted in a restrictive way. The decision of the Court seems not to be fully compatible with the judgment in Commission v Austria, with the only difference between the Austrian and Netherlands discounted fares on public transport being their formal qualification. Pursuant to the Austrian regulations, that benefit was related to family benefits granted to the parents of students. Nevertheless, it seems that this was insignificant for the reasoning of the Court in the case against Austria. It should also be indicated that extending the notion of assistance to cover maintenance costs in the form of grants or loans leads to the conclusion that any support, whether in cash or in kind, provided to students may fall within the concept of assistance as such benefits help students – directly or indirectly – to cover the costs of their maintenance. In the light of that judgment, the Member States providing students with benefits that could
raise some concerns as to whether they take the form of a grant or a loan
could consider changing the rules for their awarding so that they may be
exempted from Article 24(2) of Directive 2004/38.

Case C-308/14 Commission v United Kingdom

In the case Commission v United Kingdom (Case C-308/14, Commission v United Kingdom, ECLI:EU:C:2016:436), according to the Commission, the United Kingdom violated Union law by granting family allowances and tax credit for children only to the nationals of other Member States with legal right of residence. As regards the Commission’s plea in law, namely an infringement of Article 11(3)(e) of Regulation 883/2004, the Court held that the provision constitutes only a conflict rule which aims at determining the applicable domestic law and does not establish material conditions for the existence of the entitlement to social security benefits. Generally, it is for the legislation of each Member State to lay down those conditions. As regards the indirect discrimination of Union citizens, the Court found that the domestic provisions are justified by the need to protect public finances. It indicated that the verification of the legality of a stay must comply with Article 14(2)(2) of Directive 2004/38, but it also found that the control exercised by British authorities is not carried out systematically but only in case of doubts and, therefore, is not contrary to the requirements laid down in the directive.

That judgment might appear justifiable as it cannot be reasonably required of the Member States to grant welfare benefits to persons who reside illegally on their territory. However, a closer look at the reasoning of the Court might give rise to serious concerns. In the first place, they regard the correctness of the interaction between Regulation 883/2004 and Directive 2004/38 established by the Court. The reasoning it adopted is self-contradictory. On the one hand, in the Brey judgment, the Court recognised that the notion of social assistance adopted under the directive may be different from that under the provisions on the coordination of social security systems as these two are separate acts covering different issues. On the other hand, in the light of the analysed judgment, the concept of residence under Regulation 883/2004 can be subject to the conditions of legal residence under the directive, though the Court did not point to that explicitly (see also O’Brien, 2015: 218 and 221). Thus, these acts are not
distinct and equivalent as Regulation 883/2004 was, in a sense, made subject to the rules of Directive 2004/38.

Also the extension of the reasoning adopted in the judgments in Brey and Dano concerning the admissibility of the obligation of legal residence with respect to all welfare benefits, including regular social security benefits, may raise doubts. The Court did not justify that change in any way. And, while the exceptional nature of special non-contributory cash social assistance benefits lies in the fact that they contain features of both social security and social assistance benefits, which to a certain extent allows for discussion on the validity of their inclusion in the scope of social assistance under 24(2) of Directive 2004/38, the same cannot be said for regular social security benefits.

It should be noted that both Directive 2004/38 and Regulation 883/2004 were adopted on the same date. Had the EU legislator wanted to include benefits other than social assistance benefits in the scope of Article 24(2) or to make the concept of residence in the light of the regulation subject to the conditions of legal residence under the directive, it could have easily done that. Therefore, the argument put forward by the Court that Regulation 883/2004 provides only rules of conflict of law indicating which Member State law is applicable in a given situation but laying down no material conditions of access to those benefits cannot be fully accepted (see also O’Brien, 2015: 221-223). If this were true, there would be no need to introduce Article 4 laying down the principle of equal treatment. It must be reitered that the requirement of legal residence automatically means that persons who do not meet that condition are as a rule deprived of access to those benefits, which, according to the system of coordination, should be granted by the state of residence. It cannot be said in the light of Article 1(j) of the regulation that they reside in their state of origin if they are not physically present there. That effect contradicts the objective of the system of coordination between the national security schemes, i.e. preventing situations where a given category of person is not entitled to benefits in any of the Member States.

Also the manner in which the Court assessed whether the British regulations do not violate the prohibition of systematic verification of the conditions attached to the right of residence enshrined in Article 14(2) of Directive 2004/38 may be considered as controversial. The Court limited itself to recognising a declaration of the British government that the verification is conducted only where there is doubt. Yet, it follows from the practice of the UK authorities that the verification might be performed in a
systematic manner (O’Brien, 2015: 229-230) as it is highly likely that if a claim is made for a benefit, there will be an attempt to verify the legality of stay of the applicant. The exceptionally reserved proportionality assessment of national provisions does not comply with the assumption that the Member States which introduce an exception from the principle of non-discrimination on the grounds of nationality should prove that the measures that they adopt are not only appropriate but also necessary to achieve the goal. However, it was not even attempted by the British government to provide evidence that the aim of safeguarding public finances could not have been fulfilled by other means. The Court reversed the burden of proof onto the Commission although it is Member States that have evidence to indicate whether the verification was of a systematic nature or not (O’Brien, 2015: 231).

In this context, it should also be pointed out that following a more in-depth analysis those rules could have been considered as constituting not only indirect but also direct discrimination. Since British nationals automatically enjoyed the right to reside legally in that country, the rules blatantly discriminated against nationals of other Member States, even if, formally speaking, it was legal residence and not the nationality of the applicant that was the criterion for exclusion from access to benefits. Yet, satisfying that criterion was inseparably linked to being a British citizen (see also O’Brien, 2015: 225-226). In such a case, the only way to justify the provisions would be to rely on public policy, public security of public health issues, which would be difficult. Therefore, the Court de facto adopted the fiction that a domestic measure constitutes indirect discrimination in order to enable the United Kingdom to rely on the need to safeguard its finances. It should also be noted that the qualification of domestic provisions as indirect discrimination in the Bressol case gave rise to similar controversy (Case C-73/08, Bressol, ECLI:EU:C:2010:181). In that case, Belgian nationals, due to having the right of permanent residence in that country, automatically fulfilled the requirements to access third-level education. Legal scholars claims that that judgment highlighted the unwillingness of the Court to consider national provisions as direct discrimination in sensitive areas (Hoogenboom, 2010: 325-326). As a result of the fact that the judgment in Commission v United Kingdom was delivered eight days before the referendum on Brexit, it was assessed as an attempt to sacrifice Union citizenship in order to persuade British nationals to vote to remain in the EU (O’Brien, 2015: 209 and 240-241). If the
judges indeed had had that in mind, it should be considered that they have chosen wrongly as it was Leave that won the majority of votes.

Incidentally, it should also be pointed out that the Court held that the need to safeguard the financial interest of Member States (which is a strictly economic issue) might be considered as an objective justifying the restriction of rights of Union nationals under the Treaty. In the past, such objectives were put forward by the Member States and the Court in a more hidden fashion, i.e. as the avoidance of an unnecessary burden that could impact the total aid that can be provided by a given state. This did not highlight the importance of economic welfare but the need to ensure that the state is able to perform one of its fundamental functions, i.e. to provide its citizens with social protection. Furthermore, a certain level of burden was acceptable as long as it was not excessive. This corresponded to the Court’s claim that the Member States are obliged to demonstrate a certain degree of financial solidarity with the nationals of other Member States. However, the aim of protecting the public finances of a Member State seems to presuppose that any burden imposed by nationals of other Member States is contrary to the public interest.

**Effects on the status of Union citizens**

In the judgments in *Dano, Alimanovic, Garcia-Nieto and Commission v United Kingdom*, the Court consistently confirmed that the right to equal treatment with the nationals of the host Member State covers only those Union citizens who satisfy the conditions for the exercising of the right of residence as laid down in Directive 2004/38. Thus, the right to reside under the directive is a *sine qua non* condition for relying on the prohibition of discrimination on the grounds of nationality (see also: Thym, 2015: 23-24; Shuibhne, 2015: 927). This is certainly a major shift compared to the previous case-law. Since the judgment in *Martínez Sala and Trojani*, the Court stressed that Union citizens were covered by the prohibition of discrimination merely due to their status linked to Union citizenship, and the condition of legal residence in the host Member State was not only about residence under secondary legislation. On the contrary: residence under domestic provisions or even resulting from the possession of a residence card was also sufficient for EU migrant citizens to rely on the present Article 18 TFEU (see also: Shuibhne, 2015: 915 and 930). Yet, in the light of the most recent case-law it seems that residence resulting from
Union acts other than Directive 2004/38 (such as Article 10 of Regulation 492/2011) is not sufficient. It seems that for the Court the right to equal treatment stems only from Article 24 of the directive. Yet, it is clear from the wording of that provision itself that it relates only to persons falling within the scope of the directive and thus is not equivalent to Article 18 TFEU. Moreover, it was indicated that, unlike Article 24(1) of Directive 2004/38, Article 18 TFEU does not state that the prohibition of discrimination on grounds of nationality is subject to specific provisions of the Treaty and secondary law (Shuibhne, 2015: 910).

It is also of paramount importance that the Court fully exempted Member States from the requirement to perform an individual assessment of the situation of a given EU migrant citizen and his or her family members as regards access to all welfare benefits. To justify that, the Court stated that Directive 2004/38 results in the gradual accumulation of rights of Union citizens in the host Member State. Thus, the Court challenged the relevance of the principle of proportionality as a general principle of EU law under which not only the text of the provisions but also the manner of their application should be assessed. Lifting the need for an individual assessment of the situation is also contrary to the fundamental principles upon which the Court had based the status of an EU citizen for a number of years. The Court consistently distinguished between the subjective right to equal treatment or free movement and the exercising of that right. This allowed for the evaluation of its conditions and limitations in the light of general principles of EU law, including the principle of proportionality, irrespective as to whether they stem from national provisions or secondary law. That judgment can be regarded as the ultimate denial of the entire case-law of the Court as regards the genuine link. The principle of equal treatment, which also applies to social benefits, was excluded with respect to those EU nationals who had not yet acquired the right of permanent residence in the host state, regardless of the degree of the real link with the society of that state. This remains in effect even if the envisaged benefit duration is relatively short, which could not impose an unreasonable burden on the national welfare system. Thus, the Court reversed the assumption underlying its earlier case-law that EU citizens who try integrate into the society can expect a certain level of solidarity from that state. It should be noted that as a consequence of that judgment, integration in purely economic terms is again placed at the forefront. This is difficult to reconcile with the fundamental status which was supposed to be attached to Union citizenship. Despite the fact that the concept of real link was related to a
certain burden for domestic authorities, it allowed for the balancing of the interests of Member States and EU migrant citizens (Shuibhne, 2015: 913).

Consideration shall be given to the fact that in those judgments the Court did not use the provisions of the Treaties as a direct source of EU citizens’ entitlements. It based itself solely on Directive 2004/38 as secondary legislation and, as has been noted by legal scholars, in a restrictive interpretation (Ilipoulou-Penot, 2016: 1016). The Court also did not take into account the assumption it had repeatedly made in the past that the exceptions and limitations to the right to freedom of movement should be interpreted in a restrictive way. Although that trend had been apparent in the past, for instance in the judgments regarding the periods that should be taken into account in calculating the length of residence for the purposes of the acquisition of the right of permanent residence (see Case C-162/09, Lassal, ECLI:EU:C:2010:592, Case C-325/09, Dias, ECLI:EU:C:2011:498, Case C-424/10 and C-425/10, Ziółkowski, ECLI:EU:C:2011:866, Case C-529/11, Alarape, ECLI:EU:C:2013:290), there is no doubt that in the judgments discussed the Court took one step further. Directive 2004/38 is not seen as an attempt to facilitate the exercise of the right to freedom of movement by Union citizens but as an attempt to prevent Union citizens from becoming an excessive burden on national welfare systems. Thus, the right to free movement is no longer seen as a fundamental right of Union nationals and is no longer protected by the EU legal order but it is perceived as a threat to Member States. Therefore, it would be fair to speak of a paradigm shift of the Court of Justice (see also Thym, 2015: 25).

In the context of the change of position of the Court, it is important what actions Member States can take with respect to Union citizens staying on their territory who do not satisfy the conditions governing the right of residence under Directive 2004/38. It should be stressed that the same consequences will affect those Union citizens who have not fulfilled the requirement of having sufficient means from the very beginning and those who have legally stayed in the host state, even for a longer period of time, but who no longer meet the conditions of legal residence (for instance following the loss of their status as worker). Such persons are not covered by material guarantees under Articles 27 and 28 of Directive 2004/38 since their expulsion would not be a case of hampering their right to free movement and residence on grounds of public policy, public security or public health (Thym, 2015 II: 259). Pursuant to Article 15(1), such Union citi-
zens are entitled to benefit from procedural guarantees set out in Articles 30 and 31, but in fact the guarantees are limited to the right to receive a reasoned decision and the right to appeal against it. The instances of expulsion were to be curbed by Article 14(3), which stated that expulsion measures should not be the automatic consequence of a Union citizen’s recourse to the social assistance system of the host Member State. That article required that Member States conduct an individual assessment whether a given person constitutes an unreasonable burden on the social assistance system. In the case of persons exercising their right of residence for up to three months, Article 14(1) directly indicated that they retain that right as long as they do not become an unreasonable burden. Such an interpretation was in line with recital 16 of the directive indicating that as long as the beneficiaries of the right of residence do not become an unreasonable burden, they should not be expelled. In order to determine whether a beneficiary has become an unreasonable burden, the host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted. Thus, all these provisions were based on the premise that persons who do not meet the requirement of having sufficient funds retain their right of residence and are entitled to a certain level of financial support from the host Member State as long as that support does not become an unreasonable burden in the light of the circumstances of the case.

Yet, in the light of the most recent case-law of the Court, there are doubts in this regard. Economically inactive Union citizens who do not meet the requirement of having sufficient financial means automatically lose their right of residence in the host Member State (or do not acquire it at all) and are no longer covered by Articles 18 and 21 TFEU. Thus, they are no longer covered by recital 16 in its literal meaning as they do not enjoy the right to residence in the host Member State. As a result, there is no need for an individual assessment of whether they constitute an unreasonable burden. In addition, it seems that in its judgment in *Alimanovic* the Court completely rejected the need to perform such an individual assessment in the light of the principle of proportionality, taking the view that the gradual system of allocating entitlements to Union citizens under Directive 2004/38 itself fulfils the requirements of proportionality. Moreover, according to that judgment, each recourse to the social assistance system (and, following the judgment in *Commission v. United Kingdom*, each type of benefit) constitutes an unreasonable burden which is a result

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of the accumulation of all the potential claims and not the claim of an individual person. Where such assistance is requested, host Member States will verify the right of residence of economically inactive Union citizens and if it is established that they are not entitled to that right, the state will be entitled to expel them without evaluating the individual circumstances. This is, however, contrary to Article 14(3) of the directive (see also: Peers, 2015).

Theoretically, the Court’s position can be understood as meaning that there is no need for an individual assessment of whether a given person constitutes an unreasonable burden only at the stage when it is being determined whether he or she is entitled to claim welfare benefits in the host Member State, while it is necessary to perform such an assessment when issuing a decision on expulsion (Peers, 2014). However, there is an inherent contradiction in such reasoning as those Union citizens who do not or no longer fulfil the requirement of having sufficient funds in practice cannot become an unreasonable burden as they are deprived of the right to claim any benefits. Thus, they cannot be expelled.

It can also be concluded that the Union nationals who do not have sufficient financial means, in consequence of a loss of the right of residence in the host Member State, no longer fall within the scope of application of Union law, including all the limitations concerning their expulsion. This, however, would be manifestly incompatible with the judgment of the Court of Justice in Commission v Netherlands (Case C-50/06 Commission v Netherlands, ECLI:EU:C:2007:325), which held that the material and procedural guarantees regarding the expulsion from a Member State laid down in Union law apply also to the Union citizens who are staying illegally in that state. It should be emphasised that the Court’s conclusion regarded not only procedural but also material safeguards (differently on this point Thym, 2015 II: 259).

Legal scholars claimed that the Union citizens who thus lost their right of residence would form a specific group of illegal immigrants. Due to the possibility of immediate return, Member States would not expel them but would wait hoping that, without access to welfare benefits, they decide to leave themselves (Thym, 2015 II: 259-260; Shuibhne, 2015: 933-934). In this context it should be noted that if they returned after expulsion, they would again have the right to three months of legal residence in the host Member State (though without access to any social benefits). Whatever practice is adopted by the Member States’ authorities, the status of Union citizens will be worthless for those persons. Despite exercising the right of
free movement, they will be deprived of any protection stemming from Union law, including the fundamental rights guaranteed under the legal order of the European Union.

Taking a broader view, all the recent judgments of the Court regarding the rights of Union citizens have provided more protection of the interests of Member States than in the past. They are beginning to override the individual interest of EU citizens. Both the acceptance of making access to various kinds of benefits conditional upon legal residence under Directive 2004/38 and revision of the criterion of an unreasonable burden clearly aimed to alleviate pressure exerted by EU migrant citizens on the national social assistance systems, i.e. the protection of the financial interests of host Member States. It seems, however, that the ruling practice in the period from the judgment in Brey to the judgment in Commission v United Kingdom is well-established. Therefore, a return to the extensive interpretation of the rights of EU migrant citizens and their family members in the host Member State by the Court of Justice seems unlikely without a qualitative shift of social attitudes and the resulting change in the positions of Member States. Union citizens have, in a way, fallen victim of the financial crisis and of the opposition of a large part of the public to the processes taking place in the modern world, especially globalisation (Thym, 2015: 20).

Nevertheless, it should be noted that a reduction of the level of solidarity expected from the host states (and societies) under the current set-up considerably shifts this obligation onto the states of origin. Making the possibility of claiming different kinds of welfare benefits subject to meeting the conditions of legal residence under Directive 2004/38 will exert pressure to change the adopted system of coordination between the national social security schemes. It seems that it will be necessary to rethink the appropriateness of the ban on the export of some benefits, in particular special non-contributory social security benefits. This will, however, lead to an additional financial burden on those states whose citizens have often exercised their right to free movement so far.

Furthermore, in line with the existing case-law of the Court (see for example Case C-192/05, Tas-Hagen, ECLI:EU:C:2006:676 Case C-503/09 Stewart, ECLI:EU:C:2011:500, Case C-11/06 and C-12/06 Morgan, ECLI:EU:C:2007:626, Case C-523/11 and C-585/11 Prinz, ECLI:EU:C:2013:524, Case C-359/13 Martens, ECLI:EU:C:2015:118) based on a quite restrictive control of proportionality of the national provisions, countries of origin cannot introduce criteria for access to various benefits.
kinds of social benefits on the basis of the criterion of place or period of residence. The reason is that this does not allow for taking into account other circumstances which are essential in order to determine the existence of a real link of the applicant with a given state. Thus, Member States cannot refuse to grant a benefit to somebody solely because that person moved to another Member State in order to settle there permanently. Therefore, although having citizenship of a given state is only one of the circumstances that the Court orders to take into account when examining the real link, in the light of all the case-law, it is again taking on decisive importance.

The question also arises as to the influence of the new position of the Court on the free movement of workers (or the freedom of establishment). On the one hand, it is possible that the Court will choose an extensive interpretation of the conditions for retaining the status of worker and, as a result, extend the protection attached to that status, as the judgment in *Saint Prix* suggests. It is essential that the Court found that Article 7(3) of Directive 2004/38 is not the sole source of rights of Union citizens in this area as they may also result directly from Article 45 TFEU. This approach is completely opposite to the one the Court developed as regards economically inactive EU migrant citizens. The conclusion that Ms. Saint Prix retained the status of worker was possible due to the assumption taken that a person who is not actually present in the labour market for several months does not lose the status of worker, provided that she returns to work or finds another job within a reasonable period after the birth of her child. This concept may be applied not only to women who stop working due to advanced pregnancy, but also to other persons who, for important reasons, stop working for a specified period of time, with a view to return to work in the future.

On the other hand, the Court allowed the application of the real link test to frontier workers and their family members, thus putting them on a similar footing with economically inactive Union citizens (see Case C-542/09, *Commission v Netherlands*, ECLI:EU:C:2012:346, Case C-20/12, *Giersch*, ECLI:EU:C:2013:411, Case C-238/15 *Bragança*, ECLI:EU:C:2016:949). Therefore, the assumption that the mere participation in the labour market of the host state means that they are sufficiently integrated into the society of that state and, as a consequence, entitled to have equal access to welfare benefits, has been challenged. Yet, it cannot be ruled out that in the future it will also be possible to apply that test to migrant workers who live in the host Member State. The European Coun-
council conclusions of 18-19 February concerning the terms of the agreement with the United Kingdom before the referendum on Brexit allowed for limiting certain benefits due to migrant workers by indexation of child benefits in the case of children staying in another Member State, and by the so-called alert and safeguard mechanism regarding non-contributory in-work benefits. Due to the negative outcome of the referendum the agreement was not implemented, but the United Kingdom is not the only state which would be interested in introducing such limitations. As a consequence, it is not only the future of the right to freedom of movement but also the freedom of movement of workers that is uncertain.

The shift in the case-law of the Court can also be seen as an attempt at redefining the mutual relations of the Court with the EU employer and the Member States regarding development of the status attached to Union citizenship. The Court has limited its role, which means that the elements of the status will be defined increasingly by the remaining participants of the EU political process in the future (Ilipoulou-Penot, 2016: 1030). Undoubtedly, it would not be reasonable to expect from the Court to constantly extend the scope of rights of Union citizens in the face of opposition from the vast majority of the Member States, increasing concerns about benefits tourism and doubts as to the future shape of European integration. Nevertheless, it may be doubted whether it was indeed necessary to disregard some of the previous case-law of the Court.

References


Chapter 7: Between fundamental status and benefit tourism


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