THE CONSEQUENCES
OF
MEMBERSHIP IN THE EU
FOR NEW MEMBER STATES
– STRUCTURAL, POLITICAL AND ECONOMIC CHANGES

Barbara Mielnik (ed.)

Wrocław 2017
The Consequences of Membership in the EU for new Member States – structural, political and economic changes
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Introduction

On the 1st May 2004, ten new Member States acceded to the European Union. This process was called the biggest enlargement of the EU; in the end, it concluded in 2007, when Romania and Bulgaria joined the organisation. From then on, the European Union had included 27 Member States which constituted a remarkably diverse group in terms of their economic development. It was the first enlargement of the organisation which concerned the so-called ‘States of young democracies’, which revived at the beginning of the 90’s after years of USSR domination. The project commenced in 1951 by six States acquired a new dimension, extending its scope to the States of Eastern and Central Europe, which were behind the Iron Curtain since the end of the war.

The accession of new Member States to the European Union was preceded by years-long preparations which were made in accordance with the guidelines contained in the Association Agreements and, later on, in the Accession Treaties. All contracting parties have put particular emphasis on the need to introduce amendments to the law that was in force and make changes in order to adjust current standards to the ones existing in the European Union. Entirely different political and economic structure has imposed the need of reforms on the new Members, reforms which were not concluded with the moment of their accession to the EU.

After ten years of membership in the European Union, one might be tempted to make some assessments. Certainly, it can be already stated that States of Eastern and Central Europe have benefited from the membership in a big political and economic association. However, after the initial euphoria in these States some opposition against the form of integration proposed by the ‘old’ Members may be observed.
The ‘dream house’, which for many was the European Union, has proved to be a demanding partner which forced new Members to make endless adjustments. This caused problems in terms of legislation, as well as deep changes in mentality.

The citizens of new Member States have become citizens of European Union. It allowed them the enjoyment of political and economic rights vested in natural persons in the European Union. Nevertheless, the opening of borders for a significant number of employees from the new Member States resulted in tensions between new and old Member States. The end of transitional periods with regard to free choice of place of employment and opening of borders within the Schengen area caused, on one hand, satisfaction – due to new possibilities of development, but – on the other hand – it contributed to the growth of mistrust and fears for loss of employment. The European Union and its Member States attempted to fight these factors through common projects aimed at building trust. Nevertheless, this does not change the fact that some of the actions contributed to growing dissatisfaction instead of integrating.

The legal system of new Members had to face new challenges concerning the conditions of creation of union law as well as its absorption into domestic legal orders. Legislative problems, in particular unpreparedness of particular institutions to the new conditions have become visible early, which could be seen on the number of directives implemented by new Member States. Application of EU law by new Member States has also caused problems for the courts of these states.

All those issues which arose with the accession of new Members to the EU should not overshadow the specific benefits that new Member States have acquired. First of all, they have achieved access to the single market, where they can compete with other subjects on equal terms. Agricultural production in new States has been aided significantly, EU’s means from various funds have reinforced both state-wide
and local infrastructure, while at the same time contributing to the extension of road network and improvement of living conditions, as well as to creation of new jobs.

This publication is aimed at showing some of the consequences of European integration for the new States. It is a result of a seminar dedicated to these issues, which was jointly organised by the Faculty of Law, Administration and Economics of the University of Wroclaw and Konrad Adenauer Stiftung. The publication has cross-cutting character since it analyses changes occurring in the European Union itself as well as in the new Member States. Undoubtedly, the majority of publications consider reforms occurring in the domestic law under the influence of EU’s regulations. However, there is a growing awareness of membership in the European Union as a community and the necessity to conform to the changes. This need of compliance with the EU law along with simultaneous participation in its creation contributes to building the new structure but also to the feeling of common goals and values which was expressed in the Treaty of Lisbon.

Barbara Mielnik
1. The Constitution of Poland belongs to the group of rigid constitutions which require a more stringent procedure for its amendment than those applied to ordinary laws. This procedure is one of the formal guarantees of the supreme legal force of the Constitution.

According to Article 235 thereof, a bill to amend the Constitution may be submitted by at least one-fifth of the statutory number of deputies, the Senate or the President of the Republic. Amendments to the Constitution are made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.

A bill to amend the Constitution should be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators. The adoption by the Sejm of a bill amending the provisions of Chapters I (the fundamental principles of the Republic), II (the freedoms, rights and obligations of persons and citizens) or XII (the procedure of amending) of the Constitution may take place no sooner than 60 days after the first reading of the bill.

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If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects authorized to submit the bill may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects should make application in that matter to the Marshal of the Sejm, who should order the holding of a referendum within 60 days from the day of receipt of the application. The amendment to the Constitution is deemed accepted if the majority of those voting express support for such amendment.

After conclusion of the procedures the President of the Republic signs the statute and orders its promulgation in the Journal of Laws of the Republic of Poland.

2. The President of the Republic, before ratifying the Accession (of Poland to EU) Treaty, had not referred it to the Constitutional Tribunal with a request to adjudicate upon its conformity to the Constitution although he was authorized to do so by Article 133(2). Only after the ratification and entry into force of the Accession Treaty groups of deputies to the Sejm initiated the procedure of review, which ended with the decision of the Constitutional Tribunal declaring conformity of the Treaty with the Constitution.

Before ratification took place, there were suggestions made by the doctrine that in order to make the legal situation clear, several provisions of the Constitution, allegedly in conflict with the EU Treaties, had to be amended.

Particularly interesting was the question of conformity of the voting rights of EU citizens with Article 62(1) of the Constitution which guarantees Polish citizens the right to elect, *inter alia*, their representatives to organs of local self-government².

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² According to Article 62 (1) of the Constitution: “If, no later than on the day of vote, he has attained 18 years of age, Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local self-government”.
Let us remind that Article 19(1) of the Treaty establishing the European Community (as it were in force at the time of the accession of Poland) stipulated that “Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State”.

Several Member States adjusted electoral rules in their constitutions to this provision of the EEC/EU Treaty.

Article 88-3 was inserted to the French Constitution of October 4, 1958 according to which: “Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article”.

Article 15(5) of the Constitution of Portugal was amended and now it stipulates that: “Subject to reciprocity, the law may also grant citizens of European Union Member States who reside in Portugal the right to vote for and stand for election as Members of the European Parliament”.

Also according to Section 13 (2) of the amended Constitution of Spain: “Only Spaniards shall have the rights recognized in section 23, except in cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity”.

Interpretation a contrario of Article 62(1) of the Polish Constitution would suggest that persons not holding Polish citizenship could not vote in elections in Poland, including local elections.
The Constitutional Tribunal adopted different view in the judgment K 18/04 of 11\textsuperscript{th} May, 2005. The Tribunal ruled that “granting foreign EU citizens the right to vote and to stand as a candidate at local elections does not contradict Article 62(1) of the Constitution, which guarantees Polish citizens the right to elect their representatives to organs of local self-government. The aforementioned constitutional right – explained the Tribunal – is not of an exclusive character, in the sense that, should the Constitution grant it directly to Polish citizens, it might not also be vested in the citizens of other States”.

In the view of the Tribunal “the right to vote and to stand as a candidate at local elections vested in EU citizens who, although not holding Polish citizenship, are resident in Poland (Article 19(1) of the EC Treaty) does not constitute a threat to the Republic of Poland as a common good of all Polish citizens (Article 1 of the Constitution) nor to its national independence. The local self-governing community participates in exercising public authority of a local nature, and decisions or initiatives regarding the State as a whole may not be adopted within local self-government (cf. Article 16 of the Constitution)”.

3. Less EU-friendly approach was adopted by the Constitutional Tribunal in the judgment P 1/05 of 27 April 2005 concerning the European Arrest Warrant. The Tribunal made its ruling in order to respond to the legal question lodged by the Regional Court in Gdańsk, requesting to consider the conformity of: Article 607t § 1 of the Act dated 6 June 1997 – the Code of Penal Procedure allowing the surrender of a Polish citizen to a Member State of the European Union subject to the European Arrest Warrant, with the then Article 55(1) of the Constitution. According to the latter, extradition of a Polish citizen was prohibited.

It should be noted that the Constitutional Tribunal formulated the principle of interpreting domestic law in a manner “sympathetic to European law” in its jurisprudence, but at the same time it set limits
to that principle. The Tribunal stated that if an irreconcilable inconsistency appears between a constitutional norm and a EU norm, such a collision may in no event be resolved by assuming the supremacy of a EU norm over a constitutional norm. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on amending the Constitution, causing modifications within EU provisions or, ultimately, on Poland’s withdrawal from the European Union. The Constitutional Tribunal took the position that the right of the individual anchored in Article 55(1) of the Constitution is an absolute one and it cannot be limited by any ordinary legislative acts. The Tribunal explained that this interpretation is substantiated both by the categorical wording of that constitutional provision and by the very nature of the institution regulated therein. Therefore, in the Tribunal’s view, one cannot rule out the appropriate amendment of Article 55(1) of the Constitution, so as to provide that this provision would foresee the exception from the prohibition of extradition of Polish citizens allowing for their surrender on the basis of the EAW to other Member States of the European Union. In the case of amendment of the Constitution, the bringing of national law to conformity with the requirements of the Union would also require the restitution by the legislator of the provisions concerning the EAW, which as a result of the judgment of the Constitutional Tribunal would have been eliminated from the legal order.

For the above reasons, and taking into account the complexity of the subject matter and severe qualitative requirements (including those concerning time constraints) placed on the constitutional procedure of adapting the Code of Penal Procedure to the Constitution, the Tribunal decided to defer the time when the provision considered should lose its binding force with respect to the scope, which has been challenged in the legal question and recognised as being incompatible with the Constitution.
As a result, Article 55 of the Constitution was amended and now it reads: (1) The extradition of a Polish citizen shall be prohibited, except in cases specified in paragraphs 2 and 3. (2) Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by the Republic of Poland or from a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request. (3) Compliance with the conditions specified in para. 2 subparagraphs 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body. (4) The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens. (5) The courts shall adjudicate on the admissibility of extradition”.

The amendment of Article 55 of the Constitution rendered the change of the relevant provision of the Code of Penal Procedure needless and since then Poland has been actively cooperating with other Member States within the framework of the European Arrest Warrant procedure.

4. Another possible need to amend the Constitution may occur in connection with Article 11 of the Constitution which stipulates that
“The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means”.

Rights of non-citizens seem to be restricted in explicit way by Article 2 (1) of the Polish Act of 27th June 1997 on political parties, according to which: “Citizens of the Republic of Poland, who have attained the age of 18 years, may be members of political parties”.

The attitude of the European Commission to this question does not leave any doubts. In the Report of 15 February, 2008 the Commission warned Member States that: “to ensure that Union citizens are able to exercise their electoral rights in their Member State of residence in municipal and European elections, under the same conditions as nationals, the Commission is assessing the legislation of those Member States whose national legislation does not allow non-national Union citizens to become Members of political parties and/or to found political parties. The exclusion of Union citizens from founding or becoming Members of, a political party in their Member State of residence could obstruct them in the effective exercise of their right to stand as a candidate. The Commission will request the Member States concerned to eliminate such restrictions and will, where necessary, use its powers under Article 226 EC (now Article 258 TFEU)”.

The Commission returned to this problem in the Report of 12 October, 2010 on the election of Members of the European Parliament [...] pointing out that exercise of the right to stand as a candidate in the elections is strongly linked to membership of political parties. According to Commission: “The candidates, in most cases, run on the lists that are put forward by political parties and made up of their respective

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Members. Member State laws restricting membership of political parties to their own nationals prevent other EU citizens from running in the European elections as Members of political parties. Consequently, non-national EU citizens are only able to run in the elections as independents or as candidates put forward by organisations other than political parties, in line with the national arrangements in place. Such legislation means that conditions for the exercise of this right are not the same for non-nationals as for nationals. Furthermore, if non-national EU citizens do not have the right to found political parties but can only join existing ones, they are denied the chance of representing platforms not represented by the existing parties”

Assessing in its Report of 9 March 2012 the compliance of legal provisions and practices in the Member States with the principles of participatory democracy the Commission reminded the priorities set out in the Stockholm Plan of 20 April 2010, where it was underlined that “facilitating and encouraging citizens’ participation in the democratic life of the Union is crucial for bringing the citizens to the European project”.

It is not surprising then that the Commission addressed a letter of 16 April 2012 to Polish authorities, urging them to allow non-national EU citizens to found or become Members of political parties.

The possible counterargument may rely on the division of competences between the EU and Members States. It is according to Article 5 (2) of the Treaty on European Union (TEU) that, “under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred

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upon the Union in the Treaties remain with the Member States”. Neither TEU nor Treaty on the Functioning of the European Union (TFEU) where categories and areas of Union competence are enumerated, confers on the Union the competence to define principles of the functioning, structure or aims of political parties existing in the Member States. It should also be added that Article 4 (2) TEU imposes on the Union the obligation to respect national identities of the Member States, inherent in their fundamental structures, political and constitutional.

On the other hand, the Commission’s interpretation may find support in the ECJ’s jurisprudence clarifying consequences of EU citizenship in the light of Article 18 TFEU, which stipulates that: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”.

In *Rudy Grzelczyk* case (C-184/99) the ECJ ruled that Union 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. In the *Zambrano* case (C-34/09) ECJ pointed out that Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. When exercising their powers in the sphere of nationality, the Member States, underlined the ECJ in *Rottman* case (C-135/08), must have due regard to European Union law.

The interpretation presented by the European Commission and confirmed, as we could see, by the ECJ in its case-law, should be taken seriously in the light of Article 17 (1) TEU, according to which: “[The Commission] shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the
application of Union law under the control of the Court of Justice of the European Union”.

That is why the revision of Article 2(1) of the Polish Act on political parties, restricting rights of non-citizens, seems to be inevitable. On the other hand, the amendment of article 11 of the Polish Constitution is not so evident if the EU-friendly interpretation is applied. Following the reasoning adopted by the Constitutional Court in case no. K 18/04 in connection with Article 62(1) of the Constitution, one could argue that freedom for the creation and the membership in political parties “is not of an exclusive character”. If the Constitution founds this freedom upon the equality of Polish citizens, it does not mean that non-national EU citizens are barred from enjoying this freedom.

* * *

Although the participation of Poland in the European Union did not require the extended revision of the Constitution, the modernization of EU-related constitutional provisions seems to be advisable. The most proper form of it could be the inclusion of the special “EU chapter” in the text of the Constitution. First steps in this direction were already taken\(^5\) but main political forces are not yet ready for launching the complicated procedure in order to amend the Constitution.

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Mobility Partnership: an effective instrument of cooperation between the European Union and Neighbouring Countries in the area of mobility?

Globalisation, demographic change and societal transformation are affecting the European Union, its Member States and countries around the world. According to United Nations assessments, there are 214 million international migrants worldwide and another 740 million internal migrants. There are 44 million forcibly displaced people. An estimated 50 million people are living and working abroad with irregular status. Dialogue at global level can address some of the shared challenges and concerns. However, it is at regional, national and local levels that each individual and each stakeholder will seize the opportunities brought by migration and by mobility.

1. Introduction

Globalisation, demographic change and societal transformation are affecting the European Union (EU), its Member States and countries

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around the world. According to United Nations assessments, there are 214 million international migrants worldwide and another 740 million internal migrants. There are 44 million forcibly displaced people. An estimated 50 million people are living and working abroad with irregular status. Dialogue at global level can address some of the shared challenges and concerns. However, it is at regional, national and local levels that each individual and each stakeholder will seize the opportunities brought by migration and by mobility. Migration is now firmly at the top of the European Union’s political agenda. The Arab spring and events in the Southern Mediterranean in 2011 further highlighted the need for a coherent and comprehensive migration policy for the EU. The European Commission has already presented a range of policy proposals and operational measures on migration, mobility, integration and international protection in its Communications of 4 and 24 May 2011⁴. Those proposals were fully endorsed by the European Council in June this year, and since then, the EU has taken immediate action by launching dialogues on migration, mobility and security with Tunisia and Morocco in early October and making the necessary preparations to start the dialogue with Egypt. Similar dialogues will follow with other countries in the Southern Mediterranean region, as soon as the political situation permits. The dialogues allow the EU and the Partner countries to discuss all aspects of their possible cooperation in managing migration flows and circulation of persons in a comprehensive manner, with a view to establishing Mobility Partnerships. In its Communication of 4 May 2011, the European Commission highlighted the need for the EU to strengthen its external migration policy by setting up partnerships

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A dialogue for migration, mobility and security with the southern Mediterranean countries*, COM(2011) 292.
with non-EU countries that address issues related to migration and mobility in a way that makes cooperation mutually beneficial.

The main objectives of this paper are: 1) to analyse the main assumptions of current EU’s migration and mobility policy; 2) to present the objectives and scope of Mobility Partnerships as a key tool of the EU’s Global Approach to Migration and Mobility and 3) to assess their usefulness as the main instruments in the area of prevention of irregular immigration.

2. Global Approach to Migration and Mobility - the EU’s newest initiative in the area of migration and mobility

In the last decade, the EU has made a lot of significant steps towards building a comprehensive migration policy, based on common political principles and solidarity. The Global Approach to Migration and Mobility (GAMM) is, since 2005, the overarching framework of the EU external migration and asylum policy. This framework defines how this organization conducts its policy dialogues and cooperation with non-EU countries based on clearly defined priorities, principles and on genuine partnership with non-EU countries. The GAMM should respond to the opportunities and challenges that the EU migration policy faces and at the same time supporting partners to establish their own migration and mobility priorities, within appropriate regional and international context. The GAMM should establish a comprehensive framework to manage migration and mobility with partner countries in a coherent and mutually beneficial way especially through policy dialogue.

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5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Communication on migration, COM(2011) 248.
6 COM(2011) 743, pp. 3-5.
and close practical cooperation that is why the agenda should be migrant-centred. The GAMM is driven by Migration and Mobility Dialogues which constitute the fundamental process by which EU migration policy is transposed into the EU’s external relations. They aim to exchange information, identify shared interests and build trust and commitment as a basis for operational cooperation for the mutual benefit of the EU and its partner(s). The GAMM is jointly implemented by the European Commission, the European External Action Service, including the EU Delegations, and the EU Member States, in accordance with the respective institutional competences. The GAMM is thus an example of international cooperation between the EU and neighbouring countries in the area of migration and mobility. This agenda is balanced and comprehensive, based on four equally important objectives: 1) better organizing legal migration, and fostering well-managed mobility; 2) preventing and combating irregular migration, and eradicating trafficking in human beings maximizing the development impact of migration and mobility; 3) promoting international protection, and 4) enhancing the external dimension of asylum. The framework and methodology of the GAMM are being applied globally with relevant non-EU countries. This allows to develop appropriate priorities and to tailor the EU engagement with partner countries appropriately, in accordance with existing European Foreign Policy goals especially with asylum and migration priorities. Priority is given to southern and eastern neighbourhood, because of migratory routes and, what is more important, due to the fact that they are the countries of origin and transit of illegal migrants. At the regional level, priority is given to the Africa-EU Partnership on Migration, Mobility and Employment; the Eastern Partnership Panel on Migration and Asylum; the migration dialogue with Latin America and dialogue with the countries along the Silk Road.

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7 Ibidem, p. 5.
The bilateral cooperation frameworks under the GAMM most elaborated upon are the Mobility Partnerships and the Common Agendas for Migration and Mobility. They both offer a political framework for comprehensive, enhanced and tailor-made dialogue and cooperation with partner countries, including a set of targets and commitments, technical and financial assistance offered by the EU and interested Member States. Both address mobility issues, including, where appropriate, visa and readmission issues. However, there are two particular differences: establishing the MP would include the negotiation of visa facilitation and readmission agreements, whereas the CAMM would not, and the MP is mainly used for neighbouring countries, whereas the CAMM are used for other third countries.

3. Main objectives and scope of cooperation between the European Union and Neighbouring Partner Countries

People’s mobility is a basic condition for fostering trade and investment, cultural exchanges and social and economic development in modern society that is why the EU has signed a number of agreements with neighbours making mobility and access to Schengen visas easier, quicker and cheaper. The European Neighbourhood Policy (ENP) aims are to develop a mutually beneficial approach where economic development in partner countries and in the EU, well-managed legal migration, capacity-building on border management, asylum and effective law-enforcement co-operation. This approach is in line with the three pillars of the GAMM: better organizing legal migration, maximising the positive impact of migration on development, enhancing capacity-building in border and migration management. However, the mobility of persons

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Adriana Kalicka-Mikołajczyk is one of the most sensitive aspects of the ENP and all Action Plans contain a lot of migratory issues: provisions and priorities related to legal and irregular migration, readmission, visa, border control and asylum. The renewed ENP adopted on 24 May 2011 put a strong focus on the promotion of deep and sustainable democracy accompanied by inclusive economic development and stressed the role of civil society in bringing about such deep and sustainable democracy. According to provisions of this document, in the area of migration and mobility the EU will: pursue the process of visa facilitation for selected ENP partners and visa liberalisation for those most advanced; develop existing Mobility Partnerships and establish new ones and support the full use by Member States of opportunities offered by the EU Visa Code.

3.a Cooperation with Eastern Partner Countries

Helping citizens to move around Europe in a secure environment is a key component of the Eastern Partnership (EaP), which promotes the mobility of the citizens of the EU Eastern partner countries through visa facilitation, and provides rules for managing the return of irregular migrants through readmission agreements. In October 2013, at the first EU-EaP Justice and Home Affairs Ministerial Meeting the participants confirmed their commitment to enhanced dialogue and cooperation on migration and mobility but also focused on fight against corruption and fight against organized and transnational crime. This commitment was reconfirmed at the EaP Summit on 28-29 November 2013 in Vilnius, where the declaration highlighted the importance of mobility and referred to the Panel on Migration and Asylum.

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10 Ibidem, p. 11.
The dialogue on migration and mobility takes place in the context of the Panel on Migration and Asylum which was established in 2011. The Eastern Partnership Panel on Migration and Asylum supports cooperation by providing a forum where all migration and asylum related aspects can be openly discussed amongst the Eastern partners and between them and the EU\textsuperscript{12}. Managed by the European Commission with the assistance of the Swedish Migration Board, it encompasses all 6 EaP countries (Ukraine, Moldova, Belarus, Azerbaijan, Armenia and Georgia) and is open to all Member States. The Panel meets four times a year, both in Member States and in the EaP countries. In addition, the EaP panel produces a compilation of up-to-date information on the policy discussed in each Panel meeting. In 2013, such compilation was provided on trafficking on human beings, on irregular migration, on integration of migrants, on internally displaced persons and on statelessness\textsuperscript{13}. It features several points of strength, especially in its methodology and organisation. First, it has a varied composition that includes representatives of EU institutions and governmental authorities, academia and NGOs. Second, its informal nature allows for fruitfull exchanges and confidence-building among participating states.

### 3.b Cooperation with the Southern Partner Countries

Events in the Southern Mediterranean Neighbour Partner countries since the end of 2010, known as the „Arab Spring“, provided a unique opportunity for citizens of these countries to express their desire for democracy, human rights and fundamental freedoms. These events also led to significant population movements, mainly from these countries towards their immediate neighbours as well as towards the EU

\textsuperscript{12} http://eapmigrationpanel.org/page39964.html.  
\textsuperscript{13} http://eapmigrationpanel.org/page43486.html.
and caused a very serious and on a very large scale migration crisis in Europe. That is why both the EU and its officials and all Member States must understand that cooperation with the Southern Mediterranean Partner countries should be enhanced to effectively address the challenge of creating jobs and improving living conditions throughout the region. Cooperation should particularly target the specific regions and categories of persons that are the most affected by the lack of employment opportunities; especially young people should be treated as a priority target.

Relations with the Southern Mediterranean countries on migration-related issues are strategic, aimed at facilitating mobility but discouraging irregular migration. On 24 May 2011 the EU established structured dialogue for migration, mobility and security to the Southern Mediterranean countries which the overall aim is to support and encourage reforms – aimed at improving security – that the partner countries may engage in, giving their citizens a possibility of enhanced mobility towards the EU Member States14. Additionally, this Dialogue will be part of a much wider engagement with and assistance for the countries of North-Africa in the framework of the renewed European Neighbourhood Policy. In order to achieve this very important aim, the European Commission intends to make full use of the existing tool available as part of the EU Global Approach to Migration – the Mobility Partnership, which has proved to be an effective tool for furthering dialogue and operational cooperation with third countries. This Dialogue will be conducted in accordance with the following principles: 1) differentiation: the Dialogue will be offered and developed based on the individual merit of the respective partner country (country-by-country approach), and take into account the extent to which progress is made and reflected in national practices and policy implementation;

2) bilateralism: the Dialogue will be agreed between the EU and its Member States and each partner country separately; 3) conditionality: the expected outcomes of the Dialogue would depend on the efforts and progress made in all areas (migration, mobility and security), and will take into account also progress made in governance-related areas and 4) monitoring: the partners would agree to establish an efficient mechanism for monitoring the concrete implementation of the Partnership. EU and Member States’ experts would be associated to such a mechanism\textsuperscript{15}. Until now the EU has finalised Dialogues on Migration, Mobility and Securities with Morocco, Tunisia and Jordan. More Dialogues with other Southern Mediterranean countries are under consideration. These Dialogues allowed the EU to conclude a Mobility Partnerships with Morocco, Tunisia and Jordan.

4. Mobility Partnership as a tool of the Global Approach to Migration and Mobility

The Mobility Partnership is an umbrella under which partners can implement not only cooperation initiatives (e.g. training of practitioners or institutional support), but also can negotiate and conclude bilateral agreements (such as agreements on social security of migrant workers). Thus, partnerships benefit from a variety of competences of the actors involved\textsuperscript{16}.

The Mobility Partnership (MP) provides the comprehensive framework to ensure that movements of persons between the EU and a partner country are well governed. Moreover, they bring together all the measures to ensure that migration and mobility are mutually beneficial

\textsuperscript{15} Ibidem, p. 8.

for the EU and its partners\textsuperscript{17}. The MP is tailor-made to the shared interests and concerns of the Partner country and EU participants\textsuperscript{18}. MPs are used to build cooperation framework with third countries in the field of migration that is why they encompass a broad range of issues ranging from development aid to temporary entry visa facilitation, circular migration programs, the fight against unauthorized migration and cooperation on readmission\textsuperscript{19}. The preferential aspects of the MP on legal migration could take two main forms: 1) a consolidated offer by several Member States to facilitate access to their labour markets to the nationals of the third- neighbouring country. These national offers could for example take the form of labour quotas reserved for the nationals of the third country, or practical instruments to help match job offers in the Member State with job seekers in the third partner country or; 2) a more favourable treatment of the nationals of the neighbouring country as far as the conditions for admission of certain categories of migrants are concerned\textsuperscript{20}.

The main objective of the MP is to identify new approaches to improve the management of legal movements of people between the EU and third countries. The MP is differentiated to the partner country, its relations with the EU, and the level of its commitment towards tackling illegal migration and facilitating reintegration of returnees, including efforts to provide returnees with employment


\textsuperscript{18} Ibidem, pp. 6-8.


\textsuperscript{20} Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, \textit{On circular migration and mobility partnerships between the European Union and third countries}, COM( 2007) 248, p. 5.
opportunities\textsuperscript{21}. That is why it is impossible to list all the possible components of the MP, because they all will depend on the specific situation of each partner countries. To those countries which are willing to make significant efforts to fight illegal migration, agree to readmit their own and third country nationals, and facilitate the reintegration of returnees, the MP’s offer assistance in the fields of combating illegal migration, promoting legal migration and strengthening the positive contribution of migration to development. Assistance could take the form of: assistance to help develop their capacity to manage legal migration flows; improved opportunities for legal migration for their nationals; measures to address the risk of brain drain and to promote circular migration or return migration and improvement and/or easing of the procedures for issuing short-stay visas to their nationals and assistance to facilitate the return and reintegration of migrants\textsuperscript{22}. In this context, one particular feature of each MP should be stress on- reciprocity, which means that during the process of its negotiations both Parties take account their individual internal situation.

The European Commission initially focused on Africa and the Mediterranean, but in 2007 the GAMM was extended to the eastern and south-eastern regions neighbouring the EU. The European Commission’s evaluation of the MP’s in 2009 states that the following criteria have been applied in selecting partner countries: geographical balance between Eastern Europe and Africa; importance of migration flows from/through the country to the EU; readiness to cooperate on readmission and the fight against illegal migration; interest of EU Member


States to cooperate with the country and interest of the partner country to enter into a Mobility Partnership\textsuperscript{23}.

MPs constitute only political frameworks for a cooperation. They are not legally binding because they take the form of joint declarations of intentions, signed by the EU, the Presidency of the EU, interested Member States and interested Partner country, however they are developed on existing legally binding agreements such as Partnership and Cooperation Agreements and Association Agreements\textsuperscript{24}. That is why they are very flexible tools of cooperation between the EU and Partner countries, which can be adapted according to current needs and can be amendment according to current situation. Very often they lead to specific initiatives among partner countries including hard law instruments – visa facilitation and re-admission agreements; technical and operational cooperation – border control and passport security; and the promotion of normative standards – human rights and refugee law\textsuperscript{25}. Negotiation of any MP are based on political guidelines from the Council, on the basis of a recommendation from the European Commission. The negotiation process with Partner country is chaired jointly by the European Commission and the Presidency, but the European

\textsuperscript{23} Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union, COM(2007) 247.

\textsuperscript{24} Armenian Partnership was signed by: Belgium, Bulgaria, the Czech Republic, Germany, French, Italy, Netherlands, Poland, Romania and Sweden; Azerbaijani Partnership was signed by: Bulgaria, the Czech Republic, French, Lithuania, Netherlands, Poland, Slovenia and Slovakia; Georgian Partnership was signed by: Belgium, Cyprus, the Czech Republic, Denmark, Germany, Estonia, Greece, France, Italy, Latvia, Lithuania, Netherlands, Poland, Romania, Sweden and United Kingdom; and finally Moldovan Partnership was signed by: Bulgaria, Cyprus, the Czech Republic, France, Greece, Slovakia, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden.

\textsuperscript{25} SEC( 2009) 1240, p. 4.
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Commission has a coordinating role\textsuperscript{26}. Member States would be able to indicate which countries they would be interested in cooperating with, and the European Commission holds exploratory talks in order to establish whether there is also an interest on the side of the partner country. The European Commission also coordinates the implementation of the MPs. For each MP, one Member State takes the lead in implementing the flagship initiative. For the Mobility Partnership with Moldova this is Sweden, for Georgia it is the Czech Republic, for Armenia is the Republic of Bulgaria and for Azerbaijan is the French Republic. The process of implementation of the MPs should include opening negotiations on an agreement for facilitating the issuing of Schengen visas for certain groups of people, particularly students, researchers and business professionals. Sufficient safeguards must be in place for the lifting of mobility restrictions to work. Partners must ensure that they take every possible measure to prevent irregular migration and to this end, agree to conclude a readmission agreement allowing for the return of citizens who do not have the right to stay in Europe. According to the European Commission assessment, the MPs are in the long term process of trust building and need time and engagement to evolve. They reflect the broad range of objectives and tools of the GAMM; they offer a framework for coordinating migration issues, joint planning and synergies; and the existing partnerships have accommodated the priorities of both partner countries and the EU. They are a long term process of trust building and all issues included in the MPs need time and engagement to evolve into concrete initiatives and results. These innovative cooperation frameworks could benefit from a more sound selection and preparation process in order to fit with expectations of all partners. MPs are a particular exercise of shared competence and responsibilities, which heavily relies on the

long-term commitment of the European institutions, Member States and Partner countries. Once concluded, MP will ensure that: 1) mobility and legal migration between the EU and the Southern Mediterranean countries is well managed, for instance better information on employment, education and training opportunities available in the EU; 2) cooperation is increased to prevent irregular migration and trafficking in human beings; 3) the impact of migration on development is maximized, for example through assistance for returned migrants who want to help build up their home country and 4) the capacity of Partner countries in the field of asylum and international protection is increased.

Four MPs have been signed so far with Eastern Partner countries: on 21 May 2008 with the Republic of Moldova, on 20 November 2009 with Georgia, on 6 October 2011 with the Republic of Armenia, and on 15 December 2013 with the Republic of Azerbaijan. Ukraine has not yet expressed an interest in establishing a MP with the EU and during the Vilnius Eastern Partnership Summit in 2013, Belarus indicated that it is willing to start negotiations on visa facilitation and readmission agreements. Despite the complex political relations with the EU the European Parliament in a recommendation of 12 September 2013 on the EU policy towards Belarus, encouraged the launch of the MP between

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EU and Belarus. Three Mobility Partnerships have been signed so far with the Southern Partner countries: with Morocco on 7 June 2013\textsuperscript{32}, with Tunisia on 3 March 2014\textsuperscript{33} and with Jordan on 9 October 2014\textsuperscript{34}.

Each MP consists of a political declaration and an annex of proposed projects. The Joint Declarations of Intentions are structured around three main issues: 1) mobility, legal migration and integration; 2) migration and development; and 3) border management, identity and travel documents, fight against illegal migration and trafficking in human beings\textsuperscript{35}. Within the first issue Parties agreed to take the following actions: to promote a better framework for legal and labour mobility, including through the facilitation of temporary and circular migration, informing potential migrants about ways of legal migration to the European Union and legal employment in the Member States, as well as about the risks of irregular migration; to implement pre-departure training; to promote student and professional exchanges; recognition of academic and professional qualifications and exchange of information on European Qualification Framework and national qualification legislation; and to social protection of regular migrants. Within the second issue Parties put focus on: strengthening capacity to management capacities to manage labour and return migration; promote the positive synergies between migration and development; preventing, reducing and counteracting the negative effects of the brain drain and brain waste; facilitating the smooth reintegration into national’s labour market of citizens returning home and the recognition of skills and qualifications acquired abroad for their own benefit. Finally, within the third

\begin{itemize}
\item \textsuperscript{32} \url{http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130607_declaration_conjointe-maroc_eu_version_3_6_13_en.pdf}.
\item \textsuperscript{33} \url{http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/declaration_conjointe_tunisia_eu_mobility_fr.pdf}.
\item \textsuperscript{34} \url{http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20141009_joint_declaration_establishing_the_eu-jordan_mobility_partnership_en.pdf}.
\item \textsuperscript{35} H. Jelen, \textit{op. cit.}, pp. 393-410; J.P. Cassarino, \textit{op. cit.}, p. 8.
\end{itemize}
issue Parties agreed to: develop effective mechanisms and concrete initiatives for preventing and combating irregular immigration, effectively implement readmission procedures, enhance the security of identity documents and improve border surveillance and border management capacities and strengthen the capacity of Partner counties governments to implement an asylum policy and provide international protection according to best international standards.

Projects are proposed by Member States, the European Commission, or the partner country, or a combination of these participants. The projects so far proposed within the framework of the MPs have been divided into the following categories: monitoring migration flows consolidation of the partner country’s national migration management system; employment, management and facilitation of legal migration and integration; information on legal migration and assistance for returning migrants; labour migration schemes; voluntary return and reintegration schemes; mobility and short-stay visas; visa and readmission; links between migration and development, diasporas, money transfers, co-development; asylum and immigration; cooperation on border management, identity and travel documents and the fight against illegal migration and trafficking in human beings; social protection of migrants and their families and development of the labour market of the partner country

The MP with Moldova includes 34 proposed projects. Examples of such projects include: a proposal from Greece to organise a technical training workshop on residence permit and work permit legislation for civil servants from Moldova; a proposal by the European Commission to provide assistance on biometric passports; a proposal by Moldova to considers strengthening the activities of the information centres for Moldovan migrants in the Moldovan diplomatic missions; a proposal

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from Poland to develop seminar and study visits on detention and reception of foreigners and on illegal migration/trafficking in human beings and proposal from Italy and Sweden to implement project providing support to their labour market. The majority of projects proposed by the EU and Member States relate to the area of legal migration.

The MP with Georgia contains 17 proposed projects. These include: a proposal by France to offer circular migration for students and young professionals; a proposal by Bulgaria for a bilateral agreement on social security; a proposal by Belgium to support the reintegration of vulnerable groups of migrants and proposal by Bulgaria, Denmark, Poland, Germany and Greece to cooperate in providing information on routes for legal migration to the EU and legal employment. In this case, all projects also relate to the area of mobility and legal migration.

The MP with Armenia includes 16 proposed projects. Examples of such projects include: proposal by Bulgaria, France, the Netherlands, Romania and Sweden to strengthen the administrative capacity of Armenia for the management of the migration processes; proposal by France to promote circular mobility of young professionals and students; proposal by Italy, Poland and Sweden to share information on possibilities of migration through legal channels, including circular migration; proposal by Romania to inform potential migrant workers from Armenia on legal migration opportunities and risks related to irregular immigration; proposal by France to support measures aiming at fully using migrants’ skills and professional qualifications acquired abroad for the benefit of Armenia’s development; proposal by Germany to continue to promote well informed and cost-effective remittances’

channels with the aim of better contributing to the development of migrants’ country of origin and proposal by Belgium and Poland to share knowledge and best practices on enhancing administrative competences and structures in combating trafficking in human beings\textsuperscript{39}. In this case, also the majority of projects relate to mobility and legal migration, however two of them relate to asylum and fight against irregular immigration and trafficking in human beings.

The MP with Azerbaijan contains 25 proposed projects. These include: improving the Azerbaijani database on migration; Monitoring migration flows from Azerbaijan to the European Union; Exchanging information on opportunities for legal migration, including circular migration; Facilitation of circular migration of students and researchers; Strengthening of capabilities in detection of forged and falsified documents; Promoting of best practices on management of return and readmission; Promoting of best practices in the field of combating trafficking in human beings; Cooperating on activities in the field of border security, including in the framework of Integrated Border Management; Developing sustainable programmes aimed at reintegration of returning migrants, including support to migrant entrepreneurs and creation of micro business and learning the experiences of European Union Member States on asylum procedures, including interviewing of asylum seekers and quality assessment of interviews, country of origin information, decision making and criteria on granting asylum and methodology for assessment the quality of decisions, with particular emphasis for the needs of vulnerable persons\textsuperscript{40}. In this case, we can noticed, that all projects equally are concerned with three areas: migration


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management; mobility and legal migration; fight against irregular migration and trafficking in human beings and asylum and international protection.

The MP with Morocco contains 37 proposed projects. Examples of such projects include: better inform Moroccan citizens about the options for legal immigration to the EU, including the entry conditions and the rights and duties arising from these; to cooperate closely in order to facilitate mutual recognition of vocational and academic qualifications; to help Moroccan migrants residing legally in the EU to acquire vocational or academic skills which will enable them to develop viable economic activities and improve their employability on their return to Morocco; to better inform Moroccan citizens about the options for legal immigration to the EU, including the entry conditions and the rights and duties arising from these; to cooperate closely in order to facilitate mutual recognition of vocational and academic qualifications; to strengthen cooperation between Morocco and the EU and its Member States in support of the socio-economic development of regions with high migration potential by implementing targeted policies and encouraging investment, including investment by Moroccans resident abroad, in order to generate employment. In this case, most projects relate to three areas: mobility, legal immigration and integration; preventing and combating illegal immigration, people-smuggling and border management and international protection.

We can also noticed, that all concluded MPs differ in their content and scope of application. In the case of Eastern Partner countries, the objectives in the field of mobility, legal migration and asylum are broadly the same in all MPs and they include obligation to: promote

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42 In the case of Jordan and Tunisia the lists of common projects have not been published yet.
a better framework for legal and labour mobility; to strengthen institutional capacity to manage migration; to inform potential migrants on ways of legal migration to the EU; to implement pre-departure training and to deepen the dialogue on visa issues. As regards migration and development area, all partnerships include also very similar objectives: to prevent, reduce and counteract the negative effects of the brain drain and brain waste; to promote and support voluntary return and sustainable reintegration of returning migrants and to enhance cooperation with migrant communities abroad, and to promote circular migration schemes. In terms of border control, the objectives contained in all MPs differ to a certain extent. The MPs with Armenia, Georgia and Moldova envisage the possibility of cooperation in the field of irregular immigration and trafficking in human beings; to develop effective mechanisms and initiatives for preventing and combating illegal immigration; to enhance the security of travel documents and to improving the joint fight against irregular immigration and related cross border crime. In contrast, the MP with Azerbaijan sets out more objectives directed at asylum and international protection. In the case of Southern Partner countries, the objectives in the field of mobility, legal migration and asylum are broadly the same in all MPs and they include obligation to: improve aspects of the conditions of consular services and procedures for the issuing of Schengen visas; to cooperate on simplifying the procedures for access and legal systems; to better inform the citizens about the options for legal immigration to the EU; to cooperate in order to facilitate mutual recognition of vocational and academic qualifications; to improve synergies between policies promoting mobility and other areas of sectoral cooperation and to support nationals who are legally resident in the EU in their efforts to integrate. In the area of mobility and development all MPs include also very similar objectives: to strengthen cooperation between the Parties in support of the socio-economic development of regions with higher
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...migration; to promote integration of legal migrants; to facilitate the social reintegration of migrants voluntarily returning; to encourage migrants to invest productively and to implement policies to prevent and manage the brain drain. As regards to border control area, the objectives contained in all MPs differ to a certain extent. The MP with Morocco and Tunisia focus on preventing and combating illegal immigration and people smuggling issues, whereas the MP with Jordan focuses on promoting border management, preventing and combating irregular migration.

5. Summary

The Global Approach to Migration and Mobility can be defined as the external dimension of the European Union’s migration policy. It is based on partnership with third countries, is fully integrated into the EU’s other external policies, and addresses all migration and asylum issues in a comprehensive and balanced manner. Adopted in 2005, it illustrates the ambition of the European Union to establish an intersectoral framework to manage migration in a coherent way through political dialogue and close practical cooperation with third countries. As the European Commission explained in its December 2006 Communication, mobility of persons is of the utmost importance for ENP partners and also for the EU, in order to fully deliver on this foreign policy priority43. That is why MPs provide the comprehensive frameworks to ensure that the movement of persons between the EU and a third country is well-managed and help to create a common external dimension of European immigration policy. These Partnerships bring together all the measures which ensure that mobility is mutually beneficial. They

provide for better access to legal migration channels and to strengthen capacities for border management and handle irregular migration. They can include initiatives to assist partner countries to establish or improve labour migration management, including recruitment, vocational and language training, development and recognition of skills, and return and reintegration of migrants. A coherent mobility policy must address external and internal policy goals: fostering contacts and exchanges, projecting EU values and approaches, promoting economic development, security, responding to gaps in national labour markets. Since these internal and external dimensions tend to fall under the responsibility of different parts of the Member States’ and EU administrations it will be important to ensure coherence and consistency in their approaches.

There is no question that MPs have acquired great political importance. As stated in an October 2008 European Commission Communication, mobility partnerships are expected to mark a paradigmatic “shift from a primarily security-centered approach focused on reducing migratory pressures to a more transparent and balanced approach”. However, if the EU, Member States and Neighbouring Partner countries want them to be effective and successful tools aiming to facilitate and organise the legal mobility, should them supplement by additional projects and initiatives which will focus primarily on the following issues: promoting legal migration and mobility; managing irregular migration and promoting readmission and return.\footnote{T. Maorukis, A. Triandafyllidou, \textit{op. cit.}, p. 6.}
Bianca Dabu

Working Place Bullying Legislation – A European vs. Romanian Approach

Introduction

“Dialogue, discussions and disagreements form a regular part of the interactions in many work environments. As a result, most workers and managers are confronted with personal, work-related and client/customer challenges on a daily basis, including the anxieties and frustration of co-workers, personality clashes, organizational and production difficulties, diminished resources, increasing production/output demands, aggressive intruders from outside the business, and problematic relations with clients and members of the public. Despite this, dialogue usually prevails over confrontation, and most people manage to organize efficient and productive activities within the workplace. There are cases, however, where dialogue fails to develop in a positive way, relationships between workers, managers, clients or the public deteriorate, and the objectives of working efficiently and achieving productive results are negatively affected. Thus violence may emerge in work environments and turn a previously benign environment into a hostile and hazardous setting”

Workplace bullying has been recognized explicitly as a negative, deviant and counterproductive behaviour that has destructive effects on both employees and organizations as well as on the society as a whole. It has also been realized that bullying is a complex phenomenon and many causes and antecedents tend to be attached to this behaviour.

1 Associate Professor at the University of Pitesti, Romania.
In line with this argument, some of leadership styles, such as laissez-faire, tyrannical and autocratic styles of leadership are assumed to create conditions that may lead to bullying at workplace\(^3\).

Cowie emphasizes that in many countries, trade unions, professional organizations, and human resources (HR) departments have become more aware over the last decade that behaviors such as intimidation, public humiliation, offensive name-calling, social exclusion, and unwanted physical contact has the potential to undermine the integrity and confidence of employees and reduce efficiency […]\(^4\).

Bullying may go beyond colleague-on-colleague abuse and become an accepted, or even encouraged, aspect of the culture of an organization. “A number of organizations now recognize the need to change the culture of the workplace and have developed clear company policies to offer protection from bullying to their employees”\(^5\).

Bullying behavior can exist at any level of an organization—bullies can be superiors, subordinates, co-workers and colleagues\(^6\). Although the terms *mobbing* and *bullying* have been in current usage for work psychologists, managers or lawyers for many decades, it seems that the issue is still on the agenda of many researchers as well as advocates of employees rights.

According to Duffy and Sperry\(^7\) “Workplace mobbing is a complex phenomenon that is inadequately explained by only looking at

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individual behaviour. In fact, it takes looking at the interaction of three different levels of explanation to adequately understand workplace mobbing […] to provide a reasonably coherent and compelling account of workplace mobbing: the individual dynamics or »bad apple« view; the work group dynamics or the »some bad apples« view and the organizational dynamics or the »bad barrel« view”.

In general terms, bullying describes a wide variety of negative workplace behaviours including verbal threats, personal attacks, humiliation, innuendo, and deliberate isolation of a colleague. Separate incidents may be relatively innocuous but are often sustained or persistent in character, with a cumulative negative effect⁸.

1. Workplace Bullying in Organizational Culture

There is no agreed definition of the phenomenon described by various terms used in the field such as⁹: workplace harassment¹⁰, workplace mobbing¹¹, workplace bullying¹², harassment¹³, workplace

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aggression\textsuperscript{14}, workplace victimization\textsuperscript{15}, perceived victimization\textsuperscript{16}, aggression\textsuperscript{17}, etc. „To understand the full nature of phenomenon we must take care to collaborate regarding its terms and definition. This collaboration will support in the development of a standard nomenclature to facilitate employers and legislatures for the development of intervention strategies”\textsuperscript{18}.

Lewis thinks that the early period of interest saw many debates surrounding the key issues concerning the definition and terminology as terms such “bullying”, “mobbing” and “abuse” are all widely used depending on the geographical location of the authors and on how bullying differs, if it does, from workplace harassment\textsuperscript{19}.

Brodsky offered the definition of \textit{workplace bullying or harassment} in 1976, as being repeated and persistent attempts by one person to torment, wear down, frustrate, or get a reaction from another. It is treatment which persistently provokes, pressures, frightens, intimidates or otherwise discomforts another person\textsuperscript{20}.


\textsuperscript{18}A. Anjun, K. Yasmeen, K. Yasmeen, \textit{Bullying at work...}, p. 81.


The term *mobbing* was coined by Leymann as “workplace mobbing” after carrying out his previous research in the 80’s about hostile environment in educational system. He transferred his studies to work environment and observed the consequences of campaigns initiated most often by persons in a position of power and carried on by co-workers against a person in the same work environment for the purpose of excluding, punishing or humiliating a given person.

Westhues considers that, as the campaign proceeds, a steadily larger range of hostile ploys and communications come to be seen as legitimate\textsuperscript{21}. At the same time, Leymann suggested that the frequency should be around one incident per week over a period of at least 6 months in order to be considered a criterion for bullying.

Whitney and Smith\textsuperscript{22} emphasize that bullying is a form of aggression which is perpetuated on the victim in a position of lesser authority and encompasses a problem that is social as well as interpersonal in nature.

Einarsen and Skogstad\textsuperscript{23} consider that aggressive behaviours that have taken place within the last 6 months ‘now and then’ or ‘weekly’ can be defined as bullying. Bullying is also defined by Olweus\textsuperscript{24} as a subset of aggressive behavior, in which the aggression is repeated, and in which there is an imbalance of power such that it is difficult for the victim to defend him/herself.


Bullying and mobbing are “vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees” with mobbing additionally defined as a “concerted effort by a group of employees to isolate a co-worker through ostracism and denigration”\(^\text{25}\).

Workplace bullying is repeated physical, psychological, or sexual abuse, harassment, or hostility within workplaces and consists of behavior that is known, or ought to be known, to be offensive, unwanted, or unwelcome\(^\text{26}\).

Shahbazi et al. show that virtually all definitions of workplace bullying have three key included elements in common\(^\text{27}\):

- repetitive, negative actions,
- that occur on a frequent basis,
- and occur in a place of work, where there is imbalance of power between the parties.

From another perspective, the elements of these definitions include the following: perpetrator, victim, and workplace.

According to the Queensland Bullying Taskforce (2002) bullying can be approached according to whether they are ‘overt’, ‘covert’ and ‘hostile’ behaviours. Examples of overt workplace harassment include loud and abusive language, yelling and screaming, unexplained fits of rage, unjustified criticisms and insults, constant humiliation, and unjustified threats of dismissal or other disciplinary procedures. Covert workplace harassment includes acts such as sabotaging an employee’s work by withholding information which is required to fulfil tasks, hiding


documents or equipment, constantly changing targets or work guidelines, not providing appropriate resources and training, as well as isolating or ignoring an employee in a consistent manner.

Hostile behaviours include deliberately overloading an employee with work and impossible deadlines, exclusion, or harming an employee’s employment or career prospects\textsuperscript{28}.

There is a range of statutory provisions and common-law precedents that relate to workplace violence. While some of the statutory instruments apply only to certain forms of workplace violence (for example, criminal provisions are primarily applied against those who breach the criminal law), others have more generic applications, such as the “general duties of care” called up under many occupational safety and health Acts and Regulations. Employment injury legislation\textsuperscript{29}, including social security or workers’ compensation, is generally the exclusive remedy for work-related injury and disease occurring during, or arising from, employment. Whether or not injury from workplace violence is covered by specific employment injury schemes will depend on the interpretation of their particular legislative provisions\textsuperscript{30}.

2. Workplace bullying in legislative culture

*Workplace bullying* is a general term mainly used in the UK, US and Australia but also covering the elements included in the category of hostile behaviour and abuse. Nevertheless, European countries having legislation in the field also use terms such as mobbing,


\textsuperscript{29} D. Chappel, V. Di Martino, *Violence at Work...*, p. 147.

\textsuperscript{30} *Ibidem*, p. 149.
moral harassment or psychological terror dealing with the same concepts and having synonymous meaning:

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In some nation States (such as in Scandinavia), “mobbing” is a term used interchangeably with “bullying”. However in the English-speaking world, the term “mobbing” is most commonly used where a group of perpetrators singles out one victim; in contrast, the term “bullying” tends to be used when a single perpetrator bullies one recipient31.

The EU sets the framework for outlawing the bullying by assuming that there can be a line drawn between the general practice of bullying and specific circumstances as harassment on specific prohibited grounds.

Thus, the European legal framework related to bullying, mobbing, moral harassment or psychological terror is based on Article 31 of the Charter of Fundamental Rights of the European Union32, Article 19 of the Community Charter of Fundamental Social Rights33, the EU Health and Safety Framework Directive (89/391/EEC)34 all of them containing

32 “Any worker has the right to benefit from working conditions respective of his health, security and dignity”.
33 “Any employee must benefit, in his working environment, from satisfactory conditions in order to protect his health and safety (...)
34 Employers must “ensure the safety and health of workers in every aspect related to work” including obligations to avoid workplace risks, combat them at source and carry out workplace risk assessments.
an overriding obligation to protect health, security and dignity including obligations to avoid workplace risks, combat them at source and carry out workplace risk assessments.

Besides the general references to preserving fundamental social rights (health, security and dignity) opposing bullying, harassment may be approached as a form of discrimination if protected characteristics such as age, disability, gender, marriage, civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation are disregarded or used in a discriminatory manner in order to intimidate. Therefore, Directive 2000/43 (Article 1\(^{35}\) and Article 2, paragraph 3\(^{36}\)) and Directive 2000/78 (Article 1\(^{37}\) and Article 2, paragraph 3\(^{38}\)) on Equality of Treatment state that harassment may be deemed as a form of discrimination with the conditions enumerated if relates to any related characteristics and takes place with the purpose of violating the dignity of a person, intimidating, degradating or humiliating a given person.

\(^{35}\) “The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment”.

\(^{36}\) “Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States”.

\(^{37}\) “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment”.

\(^{38}\) “Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States”.
The Directives also highlight the necessity of measures laid down by national law in order to protect public security, public order, health and rights and freedoms of others and to prevent criminal offences.

In many countries, new legislation came into force or new provisions were incorporated into existing legislation to protect workers from bullying. Nine European countries have enacted anti-bullying laws, including Sweden, France, and Denmark\textsuperscript{39}.

Early European countries to enact workplace bullying laws were Sweden and France, with Sweden enacting a 1993 statutory provision against bullying entitled “Victimization at work”\textsuperscript{40}.

France subsequently introduced an obligation on employers to prevent psychological harassment, and countries including Norway, Denmark, and the Netherlands, have followed suit. The United Kingdom does not have a specific law against bullying in the workplace, but claims may be brought under a variety of other laws (Equality Act 2010 against discrimination). Other countries have opted for non-regulatory instruments, such as codes of practice and provisions in collective bargaining agreements.

3. Legislation in European Countries

For the purposes of approaching workplace bullying, two European countries have been chosen: France as it was one of first countries that enacted bullying laws, and Germany as Dr. Heinz Leyman was the first person who released a scientific report in 1984 for The National Board of Occupational Safety and Health in Stockholm, Sweden, that used the

\textsuperscript{39} E. Cobb, \textit{Workplace Bullying: A Global Overview}...
\textsuperscript{40} (ASF 1993) \textit{Menaces at the Workplace (FS 1993)}. 
term mobbing in work relations\textsuperscript{41}. Furthermore, Romanian legislation will be analysed in comparison to the legislation of respective countries and the European provisions.

\textbf{3.a France}


The subject of stress has been addressed by the inter-professional social partners (employer and employee representatives) in a nationwide collective bargaining agreement concluded on July 2, 2008. This defines stress and examines work organizations, employee privacy, the quality of working life and liability of employers.

The aim of these agreements is to define stress, to identify stressful working situations and the implementation of preventative measures and to avoid consequences on human health that can lead to suicide.

France has specific laws prohibiting workplace bullying which were adopted before the implementation of EU Directives. The Labour Code defines moral harassment, that is the French equivalent for bullying, as “repeated acts leading to a deterioration of the working conditions and that are likely to harm the dignity, the physical or psychological health of the victim or his professional career” and it is prohibited under Article L. 1152-1 of the French Labour Code. Discriminatory harassment is prohibited if it relates to any Protected Characteristic; on the other hand, a “national agreement” on harassment and violence

\footnote{H. Leymann, A. Gustafsson, \textit{Mobbing at Work and the Development}..., pp. 251-275.}
at work concluded on 26 March 2010 aims to identify and prevent acts of bullying and violence at work. Specific meaning of bullying evolves through case law, due to the fact that moral harassment under the French Labour Code is defined by reference to a number of separate elements which can be interpreted: “repeated acts” refer to a number of acts that occur in a shorter period (a few weeks) or a longer one (two years)⁴²; “the aim at or result in a deterioration” refer to intentional or unintentional acts that lead to a deterioration of working conditions and therefore can constitute bullying (for example humiliation and excessive pressure imposed by management⁴³); “That are likely to harm the rights, the dignity, the physical or psychological health of the victim or his professional career”: In most cases, the deterioration of the physical or psychological health of the employee will have actually occurred. However, there can be bullying where be the deterioration is merely “likely” to affect the health of an employee even though such deterioration has not in fact occurred⁴⁴. In addition, these broad definitions mean that a wide range of acts can constitute bullying, such as: unjustified disciplinary measures; demotion; denigration; humiliating statements; and ostracism.

In addition to the definition under the French Labour Code, bullying also includes harassment on the grounds of Protected Characteristics by reason of France’s implementation on EU Equal Treatment Directive. An employer is strictly liable for incidents and actions that harm employees. Once bullying has been identified, the employer is liable, regardless of preventative measures in place or other seemingly mitigating factors: liable for bullying caused by managers of the employee; responsible for bullying by colleagues of the employee;

may in certain circumstances also be liable for bullying performed by a third party with authority over employees.

3.b Germany

The Occupational Health and Safety Act requires employers of ten or more workers to assess the health and safety risks of their employees and to implement measures to reduce these risks. Such risk assessments must include testing the level of mental stress present in the workplace.

In Germany bullying is dealt with through a variety of legal frameworks as there is no specific legislation prohibiting bullying (commonly called “mobbing” in Germany). The German Constitution provides protection of personality, honor, health and equal rights of individuals. This is deemed to include the outlawing of bullying. The German Civil Code (GCC) provides the legal foundation for contractual liability and tort claims which can be extended to claims for bullying and stress at work. Further legal bases for anti-discrimination at work and ensuring of health and safety for all employees include: the General Equal Treatment Act of 2006 (ETA) (Allgemeines Gleichbehandlungsgesetz) preventing discrimination at work, the Occupational Health and Safety Act of 1996 (Arbeitsschutzgesetz), implementing measures to improve the health and safety of employees and the Works Constitution Act of 2001 promoting workplace equality.

In addition, many businesses treat bullying as a violation of their collective work agreements and/or have implemented internal regulations to address work-related stress and harassment.

German Federal Labour Court jurisprudence has defined bullying as “systematic hostility, harassment and discrimination with the goal of systematically harming the other with respect to his or her feeling of worth”. This definition has further evolved through case law; as such, the following three conditions have to be satisfied for bullying
to exist: a combination of single events with continuity, or “links in a chain” of systematic harassment; violation of the target’s legal rights (health, personality or property/financial interests); an “unidirectional character” – which means there should be neither reciprocation nor provocation by the victim.

Germany’s General Act on Equal Treatment prohibits adverse treatment on the basis of Protected Characteristics. Bullying can also be a criminal offence (in more extreme cases). Depending upon the acts committed, bullying can be prosecuted under a variety of German Criminal Code articles, including intentional or negligent bodily injury, duress, defamation and baseless insult.

**3.c Romanian Legislation**

Although in Romania the bullying and mobbing practices are not recognized by the population at large, various NGOs have started to raise the level of awareness of the general public with a view to bullying in organizational environment. Such cases are brought into attention of the National Council for Fighting Discrimination (2003) and the first Anti-Mobbing Romanian Centre.

In 2005, Romania’s Government adopted the Decision no.1258 called the National Action plan for Fighting Discrimination. At the same time, there was a settlement within the Chamber of Deputies of the Commission for Equality of Chances for both Men and Women.

In 2010, the first action against moral harassment at workplace was taken to court and in 2013 the National Council for Combating Discrimination received 77 files on grounds of moral or psychological discrimination. Of this total number, 8 were confirmed, 21 were not

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45 Importantly, these have been held to apply equally to an employee’s *perceived* protected traits, for example, if an employee is mistreated because he is suspected to be a Muslim, but in fact he is Christian, then this treatment would still be classified as illegal discrimination in spite of the perpetrator’s mistake.
confirmed, 13 were filed and disposed of, 4 were rejected for lack of competence and 31 require settlement.

The results of the research “Is there any psychic violence at your workplace?” demonstrates there is a change in physical and mental status of the employees experiencing bullying actions. Thus, 1 out of 10 persons had a panic attack following a conflict with a superior (witnessed by the colleagues) and a quarter of the employees facing such situations acknowledged they suffered anxiety. Moreover, 41% of those who witnessed such conflicts admitted they felt lack of energy, while 11% confirmed they had insomnia at home or felt asleep at their workplace.

In Romania, Art. 5, paragraph 1 of the Labour Code stipulates that work relations are grounded on the principle of good faith, which means that all the actions of the employer should focus on achieving the purpose of the organization. The actions of the employer should not affect the personality or moral and professional integrity of an employee. Art. 5 para. 2 thereunder contains the provisions against direct or indirect discrimination based on protected characteristics: “Any type of discrimination, direct or indirect against an employee, based on characteristics including sex, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political option, social origin, disability, family distress or responsibility, union activity or appurtenance, is forbidden”.

At the same time, according to Article 39 paragraph 1 of said Labour Code, the employee has the right to physical and psychic security and health at the workplace. According to this legal provision, it is mandatory for the employer to take all steps in order to protect employees’ mental health by compensating them with extra bonuses for stressful environment, as in, for example, the case of teachers and magistrates, who have an extra bonus for psychological distress (Law no. 128/1997 regarding the status of the didactic personnel, Law
no. 30/2009 regarding the personnel paid out of the public funds, Law 50/1996 regarding the salaries of the magistrates in the courts of justice).

According to said Article 39(1), the employee has the right to dignity in work. Therefore, the employer has the obligation to avoid any action or gesture that would harm the employee’s dignity and honour.

The Government Ordinance no. 137/2000, Law no. 48/2002 on the prevention and sanction of all forms of discrimination provide as follows:

– Article 1 states that the principle of equality between citizens is guaranteed within a certain number of fields, which includes the right to be protected against any violence or abuse, the right to inherit, and the right to an equal pay for equal work. Gender discrimination is defined as any differentiation, exclusion, restriction or preference based on sex (Art. 2(1)). Article 2(4), however, adds that the following do not constitute discrimination:
  a. measures taken by public authorities or private persons in favour of a person, a group of persons or of a community, and aiming to ensure their natural development and the effective achievement of their right to equal opportunities, as opposed to other persons, groups of persons or communities;
  b. positive measures aiming to protect disfavoured groups.
– Article 2(5) states that the elimination of all forms of discrimination is realized through the adoption of special measures of protection for those who do not enjoy equal opportunities, and through sanctions against discriminatory behaviours enumerated in the Act. The Act applies, according to Article 3, to all natural and legal persons, public or private, and its scope includes:
a. employment conditions;
b. recruitment and promotion criteria;
c. access to all levels of professional orientation, refresher courses and professional training;
d. social protection and social security;
e. public services or other services, access to good and facilities;
f. education system;
g. enforcement of public peace and order.

Act no. 48/2002 also gives a list of fields where gender discrimination is prohibited:

a. Equal employment opportunities: exercise of an economic activity or of a profession (Art. 5); work relations and social care (Art. 6); hiring conditions (in this respect, employment agencies shall ensure free and equal access to all job advertisements, Art. 7); right to social security benefits (Art. 8(2)),
b. Access to administrative, legal, health, and other public services, to goods and facilities (Art. 10),
c. Access to education (Art. 15),
d. Freedom to choose one’s residence (Art. 17),
e. Access to public places (Art. 18), and lastly,
f. Art. 19 which prohibits behaviours which offend one’s dignity or create an intimidating, hostile, degrading or offending atmosphere on the basis of one’s gender.

Infractions of Act No. 48/2002 are punishable by fines ranging from 1 million lei to 10 million lei if the discrimination affects a natural person; from 2 million lei to 20 million lei, if the discrimination affects a group of persons. In addition, victims of discrimination are entitled to an indemnity proportionate to the damage sustained, as well as to restoration of the status quo ante or the annulment of the situation created by the discrimination (Art. 20).
According to Article 22, NGOs operating in the field of human rights can institute proceedings where discrimination against a community or group of persons is alleged in their field of activity. They can also represent a natural person who is the victim of discrimination.


Bullying also infringes some of the personality rights stipulated under the New Romanian Civil Code, such as the right to express oneself Art. 70, the right to private life (Art. 71), the right to dignity (Art. 72), the right to a personal image (Art. 73) etc.

At the same time, Romania’s Criminal Code provides definitions of menace (Art. 206) blackmail (Art. 207), harassment (Art. 208) and sexual harassment (Art. 233).

Conclusions

Far from being exhausted, the topic is of great interest mainly in the last few years when the economic crisis affected not only the life of business organizations, but also the mentality of people and groups within. For the fear of losing their jobs or being dismissed, people accept various forms of physical or mental abuse, harassment, bullying etc. without considering the long-term effects on their health, even where such lack of consideration will prevent them from having a balanced and healthy life.

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Membership of the Republic of Poland in the European Union from the Perspective of the Case-Law of ECJ/CJEU

There is no doubt that the process of harmonization of Polish law with EU standards was not finished at the day of accession in 2004, when Poland became a full-fledged EU Member State. Since that time all the national institutions has been still obliged to prove Poland’s capacity to guarantee the effective adoption, implementation and enforcement of the acquis. Currently, however, major challenges of implementation have been changed; as of now, such challenges do not include the introduction of new legal provisions or even whole new legal branches that was typical for the first decade after the collapse of communism as main ones. Nowadays, it is not a legislative authority that is only responsible for fulfilment of EU membership obligations related to proper functioning of European legal order within national system. First of all, Poland – as any Member State – is expected to maintain appropriate domestic structures – both administrative and even more judicial ones – to ensure full respect for the principle of supremacy, for direct effect and for observance of EU standards and implementation of EU policies.

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Entering into second decade of EU membership is a good moment for some kind of summarization. At the same time, analysis of ECJ/CJEU case-law seems to offer the best perspective to evaluate actual effects of these complex processes of law making and application. There is no better way to create a genuine image of Polish legal order as a part of the EU system. To achieve this, it is not necessary to concentrate on details of all tens of cases with Poland as a party or where Polish courts requested a ruling from Court of Justice. Therefore, the idea of this paper is to instead select the most representative aspects and some particularly interesting disputes settled with a help of EU court judgments as examples of the leading challenges that provide a more general view on the matter.

1. General overview

Preliminary rulings

Following the above-mentioned issues, the main points of interest for this paper are therefore preliminary rulings held when Polish courts decided to refer to the Court of Justice. It is well established that this procedure has always been of seminal importance for the development of Community and EU law. The so-called Polish cases are not an exception thereto. If national court makes a reference in many cases, its expectations are not concerned only on the sole interpretation of Treaties and acts of the institutions. Quite often such a request may be even seen as a kind of an announcement that there might be a problem with proper “Union functioning” of domestic legal or institutional system – especially regarding conflicts between the legal norms contained in both orders as well as \textit{effet utile} of EU provisions

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and transposition of directives. This is the most practical side of the Union’s membership showing the genuine visage of the application of EU law in Poland and uncovering actual shortcomings of implementation. Usually, a given domestic court refers a case to the Court of Justice because individuals who are parties in litigation assert that their home state have broken a Community or an EU provision which accords rights that are able to be enforced to those parties, and that court treats the preliminary ruling procedure as a mechanism through which it is possible to “make up” those deficiencies.

It should not be a surprise that, in Poland, administrative courts have done it much more often\(^3\) than for example civil ones\(^4\). Especially during first years of Polish membership legal challenges turned up to exist more often within public than private law, particularly outside the area of cross-border cases of free movement and civil cooperation. But what is worth of pointing out is the fact that – year after year – Polish courts are more and more eager to refer to the Court, which seems to be very promising. Often, it might be the only way to correct an imperfect legal system and its deficiencies, particularly when they are related to a lack of proper attitude of public administration that is not ready to give full effect of EU provisions and guarantees. Sometimes, from the point of view of a particular judge of lower instance who is concerned on EU law values, reference for preliminary ruling may serve as a special protection of his judgment from being quashed in future by higher more traditional instance. It was therefore no surprise that famous ruling of the Court in the case of *Georgi Ivanov Elchinov* has become so popular among young Polish judges. According to that decision, “European Union law precludes a national court which is called upon to decide

\(^3\) Polish administrative courts’ references are listed on http://www.nsa.gov.pl/pytania-prejudycjalne-wsa-i-nsa.php.

a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law”⁵.

There might also be situations when a judge has no doubts that Polish provisions contravene EU law and is ready to give judgment on their automatic inapplicability by himself. Despite that he decides to refer to the Court of Justice in order to clear any controversies especially when there is lack of consistency of domestic case law in the area or the government declares that everything conforms to the law and should stay unchanged. Sometimes in response to that Court of Justice may decide to rule by reasoned order instead of a judgment. Such an opportunity, based on Art. 99 of Rules of Procedure, has been used by the Court in number of Polish cases with statements that referred to famous doctrines of *acte eclaire* and *acte clair*. This provision relates to situations where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt⁶.

It should also be mentioned that Polish courts were not able to avoid referring questions completely outside the scope of EU law, where the Court of Justice manifestly lacks any jurisdiction. Such situations were occurring not only immediately after the accession, but also later. Quite recent examples of that would be the *Pańczyk* case – former communist secret police officer, whose pension was reduced

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⁵ Case C-173/09, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa. EU:C:2010:581.

⁶ This provision was applied lately in Polish Case C-313/14, Asprod sp. z o.o. przeciwko Dyrektor Izby Celnej w Szczecinie, EU:C:2014:2426.
due to that previous vocation\textsuperscript{7} and the \textit{Stylinart} case regarding compensation for expropriation of real estate designed for highway construction\textsuperscript{8}, which, nevertheless, could have been understandable since they were both based on Charter of Fundamental Rights, which seems to be a new act for all national Courts. But there is also the \textit{Teisseyre} case from last year, where the classical prohibition of discrimination on grounds of nationality from Art. 18 TFEU served as a basis for the Supreme Administrative Court to challenge and exclusion of the right to compensation for property left beyond the present borders of the Republic of Poland\textsuperscript{9}. It is no surprise that Polish citizens may also have problems with understanding the scope of CJEU jurisdiction and referring applications in a proper way. In the \textit{Guja} case, an individual claimed compensation for losses suffered due to Polish court judgments in direct action before General Court\textsuperscript{10} and in \textit{Uznański} case, a party expected the Court of First Instance to repeal a decision on expropriation issued by a Polish authority\textsuperscript{11}.

\textbf{Review of Legality}

Taking into consideration the main point of interest of this paper, review of legality of Union acts based on Art. 263 TFEU and which concerns control of the functioning of institutions, seems to be much less relevant. Even if some of the cases that involve such a review are generally very interesting, they may not help with comprehending challenges of proper implementation of EU law by Poland. Nevertheless,

\begin{itemize}
  \item \textsuperscript{7} Case C-28/14, \textit{Ryszard Pańczyk v Dyrektor Zakładu Emerytalno-Rentowego Ministerstwa Spraw Wewnętrznych i Administracji w Warszawie}, EU:C:2014:2003.
  \item \textsuperscript{8} Case C-282/14, \textit{Stylinart sp. z o.o. v Skarb Państwa - Wojewoda Podkarpacki and Skarb Państwa - Prezydent Miasta Przemyśla}, EU:C:2014:2486.
  \item \textsuperscript{9} Case C-370/13, \textit{Henryk Teisseyre and Jan Teisseyre v Minister Skarbu Państwa}, EU:C:2014:2033.
  \item \textsuperscript{10} Case T-348/09, \textit{Uznański v Poland}, EU:T:2009:470.
\end{itemize}
out of such cases, particularly important are those that were initiated by Polish government, such as e.g. a recent one against Parliament and Council. Therein, Poland brought a challenge against the new Directive 2014/40/EU, the objective of which is, by means of the establishment of a prohibition of the marketing of tobacco products with characterizing flavours, to exclude entirely menthol cigarettes from the internal market\textsuperscript{12}. Furthermore, one of the first Polish cases before the Court concerned an unsuccessful Polish government’s claim to declare particular articles of Directive 2005/36/EC on the recognition of professional qualifications that introduced unjust conditions constituting a derogation from the rules relating to recognition of acquired rights specific to Polish nurses responsible for general care and midwives invalid\textsuperscript{13}. But even there one can find some examples of Polish maladministration, as it happened to action against Commission Decision 2010/152/EU excluding from European Union financing certain expenditure incurred by Poland under agricultural funds as a consequence of correction resulting from alleged failings in the system for the identification and monitoring of agricultural land parcels\textsuperscript{14}.

Since the latest case concerned dispute between Poland and the Commission, it was reviewed by the Court of Justice hearing an appeal against the decision of the General Court. In addition, there have been several Polish applications belonging to above category lodged in the GC, dominated by private parties’ actions against EU institutions and offices. Even if they do not exhibit prime importance in analyzed context, it is nonetheless relevant to point out an increasing number of them, since that proves the fact that individuals’ awareness of their rights

\textsuperscript{12} Case C-358/14, Poland v Parliament and Council.
\textsuperscript{13} Case C-460/05, Republic of Poland v European Parliament and Council of the European Union, EU:C:2007:447.
\textsuperscript{14} Case C-273/13 P, Appeal brought by the Republic of Poland against the judgment delivered by the General Court on 27 February 2013 in Case T-241/10 Republic of Poland v European Commission, EU:C:2014:2295.
in EU law and ability to defend themselves are rising. Quite typical complaints against Commission can be included thereunder, especially regarding State aids, such as *Buczek Automotive* case\(^ {15}\). This example seems to be even more interesting, as in another case Court of Justice declared that Poland failed to take all the measures necessary to implement the Commission Decision on State aid for the steel producer involved in those proceedings\(^ {16}\). Among others are less known actions challenging decisions of the Office for Harmonisation in the Internal Market in cases of registration of trademarks and even action to annul the decision of the European Chemicals Agency imposing on the applicant an administrative charge.

**Actions against Poland**

If one were to take both the numbers and practical use of particular actions in analyzed context into account, preliminary rulings seem to be the most important. However, actions against Poland initiated by the Commission based on Articles 258 and 260 TFEU should not be underestimated, since they are also crucial to ensure proper application of EU law. Sometimes they may even function as indirect means of judicial protection for individuals when initiated by the Commission after receiving their complaints on violations of EU law that were carried out by a Member State\(^ {17}\). Therefore, those means require a mention, even despite the fact that, compared to preliminary rulings, the meaning of this kind of actions for judicial and administrative implementation seems to be less obvious. What is more, in case of proceedings against Poland, one may find quite a number of applications that were


removed from the Court’ register without delivering final judgments. It is quite often that the Commission as the applicant decides to discontinue the proceedings on the basis of Art. 148 of Rules of Procedure – usually due to the delayed fulfilment of its obligation by the state. It might even be positively surprising that the sixth biggest member of EU with quite large population and so many problems with the transition period and implementation of EU law, experienced relatively limited numbers of Commission’s actions finalized in unfavourable manner – i.e. a genuinely condemning judgment.

The latter category is in turn dominated by cases of lack or incorrect transposition of directives or not taking necessary measures to comply with regulations and decisions. Probably one of the most famous cases regarded lack of adoption the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services\textsuperscript{18}. But there were also similar cases regarding directives on organizational requirements and operating conditions for investment firms\textsuperscript{19}, on the re-use of public sector information\textsuperscript{20} and on reinsurance, where Poland was unsuccessfully trying to defend itself declaring that Polish law was already in conformity with this directive, by presenting particular national acts regulating problematic area\textsuperscript{21}. In case C-512/10, the problem was more complicated than sheer absence of national provisions, as Poland failed to adopt incentives to encourage the railway infrastructure manager to reduce the costs of providing infrastructure and generally simplify access to it\textsuperscript{22}.

\textsuperscript{18} Case C-326/09, European Commission v Republic of Poland, EU:C:2011:155.
\textsuperscript{19} Case C-143/08, Commission of the European Communities v Republic of Poland, EU:C:2009:174.
\textsuperscript{20} Case C-362/10, European Commission v Republic of Poland, EU:C:2011:703.
\textsuperscript{21} Case C-551/08, Commission of the European Communities v Republic of Poland, EU:C:2009:683.
\textsuperscript{22} Case C-512/10, European Commission v Republic of Poland, EU:C:2012:790.
One can also find the example of not taking the necessary measures to comply with the Regulation, as in Case C-90/12 regarding air service agreements with third countries. Sometimes, declaration of failure to fulfil Poland’s obligations was based on various kinds of legal acts like e.g. in case of retaining by the government marketing authorizations for generic medications in breach of two regulations and one directive. In fact, it was not the only judgment regarding problems with implementation of the Directive relating to medicinal products for human use. In another case Commission successfully challenged a Polish provision that dispensed with the requirement for an authorization for such products having particular features.

Moreover, it is necessary to highlight one of two most legally problematic areas of Polish EU membership, seen here against the background of the Commission’s actions, especially as far as effective fulfilment of the obligations of the state towards Union is concerned. Proper implementation of EU environmental rules seems to be a systemic problem in Poland that caused number of proceedings based on Art. 258 TFEU. That alone would not be that much surprising taking into account how much underdeveloped country Poland was in this area at the time of accession, and how complicated (as well as expensive) it is to introduce this legal regime, while also requiring the change of approach of Polish administration. Yet, it appears that at times, the major reason for this is concerns administrative negligence, rather than serious problems of implementation. Polish case-law covered various aspects of protection of nature and environment dominated by absence of transposition or wrong transposition of particular provisions of directives. There were cases of inadequate measures to fulfil obligations concerning the protection of waters against pollution caused by nitrates.

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23 Case C-90/12, *European Commission v Republic of Poland*, EU:C:2013:724.
from agricultural sources\textsuperscript{26} or of not applying national conservation measures to all species of birds naturally occurring in the wild, which are entitled to EU protection\textsuperscript{27} as well as of inadequate protection of certain species, in particular the otter, infringing certain articles of the Directive on the conservation of natural habitats and of wild fauna and flora\textsuperscript{28}.

Sometimes, however, it was for the European Commission to be blamed for abusing its powers. That happened when Poland notified its national allocation plan for greenhouse gas emission allowances (NAP) that concerned national industry which recognized by the Commission’s decision to infringe Directive 2003/87, establishing a scheme for it causing the reduction of the total annual quantity. The Court of First Instance reminded that the Commission’s power to consider and reject such a plan is severely limited and it is for Member States only to draw it up by stating such a total quantity and the manner in which they propose to allocate allowances, as well as to launch the process for individually allocating them to the operators of each installation. Therefore, the CFI annulled the decision and held that the Commission exceeded the powers conferred upon it by virtue of the Directive, which was upheld by the Court of Justice on appeal\textsuperscript{29}.

There has also been a special line of cases relating to GMO which turned up to be a particularly difficult area of implementation for Poland, due to concerns regarding possible risks associated with its use to humans, animals and the environment. For instance, the Court of Justice found against Poland in regard to failure to fulfil its obligations to transpose several articles of Directive 2009/41 on the contained

\textsuperscript{26} Case C-356/13, European Commission v Republic of Poland, EU:C:2014:2386.
\textsuperscript{27} Case C-192/11, European Commission v Republic of Poland, EU:C:2012:44.
\textsuperscript{28} Case C-46/11, European Commission v Republic of Poland, EU:C:2012:146.
use of genetically modified micro-organisms\textsuperscript{30}. In the context of strong social and political debate on the issue, the Polish government has voiced serious doubts as far as implementation of EU legislation in this area is concerned, recalling several ongoing studies relating to the effect of GMO production and supply. Probably the most known case concerned national law providing that the production, placing on the market and use in animal feed in Poland of genetically modified feed and GMOs intended for feed use was prohibited. That constituted an infringement of Regulation (EC) no. 1829/2003, according to Commission’s statement, in so far as it affected the free placing on the market, movement and use of animal feed already approved under its provisions that could be prohibited only in exceptional cases, the conditions of which were not satisfied in that instance. But the action brought by the Commission was dismissed as Court accepted a defence plea of Poland, relying on the fact that the contested prohibition was based on Polish law which came into force in 2006 but itself had still not entered into force at the time of proceedings since it was due to enter into force several years later\textsuperscript{31}.

On the other hand, Court of Justice was not so favourable for Poland while ruling on general national prohibition of the free circulation of genetically modified seed varieties and the inclusion of genetically modified varieties in the national catalogue of varieties as it violated Directive 2001/18 on the deliberate release into the environment of genetically modified organisms. It was therein reminded that Member States are under an obligation not to prohibit, restrict or impede the placing on the market of such organisms or products which comply with the requirements of that directive, as well as not to make seed varieties accepted in accordance with EU regime subject to any marketing

\textsuperscript{30} Case C-281/11, European Commission v Republic of Poland, EU:C:2013:855.
\textsuperscript{31} Case C-313/11, European Commission v Republic of Poland, EU:C:2013:481.
restrictions relating to variety, save for some exceptions\textsuperscript{32}. Failure to fulfil the same directive was also declared when Poland did not lay down an obligation to inform the competent national authorities of the locations at which genetically modified organism crops are being grown, did not establish a register of those locations as well as did not make the information relating to them public\textsuperscript{33}.

2. Particular areas of case-law

\textit{VAT and other taxes}

Beside these environmental problems, that to certain extend might even seem to be understandable, there is another even more challenging and problematic (as well as less excusable) area of serious deficiencies as far as implementation, general effectiveness and proper interpretation of EU law are concerned. It might even seem astonishing to realize how big a portion of all the Polish cases is related to taxes. Some of those will also be analyzed below. It is mainly VAT, of course, that is of concern here. Paradoxically, however it should be not so surprising, taking national budget deficit, level of complexity of these regulations as well as the approach of Polish tax administration that may turn to be not only inefficient but unfriendly for taxpayers looking for extra revenues into account. Most of these cases originate from disputes on interpretation between these two parties referred within preliminary ruling procedure and a long list of different tax problems that were solved by the Court of Justice may be composed by way of summarizing them.

\textsuperscript{32} Case C-165/08, \textit{Commission of the European Communities v Republic of Poland}, EU:C:2009:473.
First, there are those cases that regard combining more than one service, such as the provision of electricity, heating and water and refuse collection in the context of the letting of immovable property or provision to a tourist by a travel agent an in-house transport service which forms part of a general tourist service in return for an all-inclusive price. There was also the case of the supply of insurance services for a leased item and the supply of the leasing services themselves when the lessor insures the leased item itself and re-invoices the exact cost of the insurance to the lessee. Other preliminary rulings concerned on the deprivation of a right to deduct VAT – e.g. affecting both partners and their partnership as to input VAT on investment costs incurred by those partners, before the creation and registration of the partnership, for the purposes of and with the view to its economic activity. Court also found that taxable person may not be refused the right to deduct VAT due or paid in respect of goods supplied to him on the ground that, in view of fraud or irregularities committed by the issuer of the invoice for that supply, the supply is considered not to have actually been made by the issuer.

Taking special formalism maintained by Polish tax authorities into account, it should not be surprising that a significant number of Polish courts’ references to Luxembourg concern oft-encountered procedural aspects of application of VAT legislation. One of the very typical cases seems to be Kraft Foods Polska case, regarding the requirement

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34 Case C-42/14, Minister Finansów v Wojskowa Agencja Mieszkaniami w Warszawie, EU:C:2015:229.
35 Case C-557/11, Maria Kozak v Dyrektor Izby Skarbowej w Lublinie, EU:C:2012:672.
36 Case C-224/11, BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie, EU:C:2013:15.
38 Case C-33/13, Marcin Jagiello v Dyrektor Izby Skarbowej w Łodzi, EU:C:2014:184.
that, in order to be entitled to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services, even if it is impossible or excessively difficult for the supplier to obtain it within a reasonable period of time. Court found that such a person cannot be denied the opportunity of establishing, by other means, before the tax authorities, that he has taken all the steps necessary to satisfy himself that the purchaser is in possession of such an invoice, is aware of it, and that the transaction in question was in fact carried out in accordance with the conditions set out there\textsuperscript{39}. In addition, fixing a date when value added tax is to become chargeable in unfavourable way without any relation to whether the invoice has been issued earlier or whether it specifies a later deadline for payment than this date was not accepted\textsuperscript{40}.

The same happened to the extension from 60 to 180 days starting from the date of submission of the taxable person’s VAT return, \textit{i.e.} to the period available to the national tax office for repayment of excess VAT to a category of taxable persons. The period was to be extended unless those persons lodged a security deposit to a value of PLN 250.000; according to Polish authorities (with whom the Court disagreed), it was allegedly justified by the need to allow for investigations required to prevent tax evasion and avoidance to take place\textsuperscript{41}. Another example was the exclusion of the right to deduct VAT paid by a taxable person to another taxable person who has provided services, where the latter has not registered for the purposes of that tax, especially where the relevant invoices contain all the information required by law, in particular as to the need to identify the person who

\begin{itemize}
  \item[40] Case C-169/12, \textit{TNT Express Worldwide (Poland) sp. z o.o. v Minister Finansów}, EU:C:2013:314.
  \item[41] Case C-25/07, \textit{Alicja Sosnowska v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu}, EU:C:2008:395.
\end{itemize}
drew them up and to ascertain the nature of the services provided\textsuperscript{42}. Conversely, the Court did not call imposition by national legislation a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to keep accounting records of their sales to deduct input tax paid into question, on condition that it complied with the principle of proportionality\textsuperscript{43}. The Court also did not preclude an administrative penalty called the ‘additional tax’ that was to be applied where it was established that the taxable person had indicated an amount of tax difference to be repaid or an amount of input tax to be repaid in the tax declaration submitted which had been greater than the amount due – said additional tax being equivalent to 30% of the amount of the overstatement and independent from correct amount to be repaid\textsuperscript{44}.

It would also be prudent from a purely legal point of view, but also from the political one, to mention some particularly high-profile cases regarding VAT, such as exemption of educational services from value added tax, particularly when provided for commercial purposes by bodies not governed by public law\textsuperscript{45}. The Court recognized transactions envisaged by the gmina (municipality) as being subject to value added tax, in so far as they constitute an economic activity and are not carried out by that municipality as a public authority or even when such an exemption would be capable of giving rise to significant distortions of competition\textsuperscript{46}. One of the most commented problems in Polish press was the one whether the supply of land designated for development

\begin{itemize}
\item \textsuperscript{42} Case C-438/09, Bogusław Juliusz Dankowski v Dyrektor Izby Skarbowej w Łodzi, EU:C:2010:818.
\item \textsuperscript{43} Case C-188/09, Dyrektor Izby Skarbowej w Białymstoku v Profaktor Kulesza, Frankowski, Jóźwiak, Orlowski sp. j., EU:C:2010:454.
\item \textsuperscript{44} Case C-502/07, K-1 sp. z o.o. v Dyrektor Izby Skarbowej w Bydgoszczy, EU:C:2009:11.
\item \textsuperscript{45} Case C-319/12, Minister Finansów v MDDP sp. z o.o. Akademia Biznesu, sp. komandytowa, EU:C:2013:778.
\item \textsuperscript{46} Case C-72/13, Gmina Wrocław v Minister Finansów, EU:C:2014:197.
\end{itemize}
is to be regarded as subject to value added tax, irrespective of whether the transaction is carried out on a continuing basis or whether the person who effected the supply carries out an activity of a producer, a trader or a person supplying services, to the extent that that transaction does not constitute the mere exercise of the right of ownership by its holder. The special ambit of the case related to the issue of a natural person carrying agricultural activity on land that was reclassified as designated for development, following a change to urban management plans when he or she began to sell it within the scope of the management of his private property.47

In another controversial case, the CJEU did not find against obligations imposed on the court enforcement officer who made the sale of immovable property effected through enforcement, in that said officer was to calculate, collect and pay the value added tax on the proceeds of that transaction within the prescribed time-limits as well as was subject to liability with his entire property for the amount of that tax where he would not have carried these obligations out, provided that he or she had all legal means to discharge them.48 Among these high-profile cases there are also those based on Art. 258 TFEU, i.e. initiated by the European Commission. One of them caused serious political problems for the government touching sensitive social area when Court of Justice found that Poland failed to fulfill its obligations under VAT Directive by application of a reduced value added tax rate of 7% to supplies, import and intra-Community acquisition of clothing and clothing accessories for babies and of footwear for children.49 Application of a reduced rate

47 Joined cases C-180/10 and C-181/10, Jarosław Słaby v Minister Finansów (C-180/10) and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie (C-181/10), EU:C:2011:589.
48 Case C-499/13, Marian Macikowski v Dyrektor Izby Skarbowej w Gdańsku, EU:C:2015:201.
49 Case C-49/09, European Commission v Republic of Poland, EU:C:2010:332.
of value added tax to supplies of goods designed for fire protection also was not accepted by the Court of Justice in another case\(^{50}\).

VAT legislation is certainly not the only public tribute to be interpreted by Court of Justice as one may find Polish cases regarding harmonised excise duty on alcohol\(^{51}\) and motor or heating fuel additives\(^{52}\) as well case regarding the electricity tax and the time at which it becomes chargeable\(^{53}\). There are also some cases of indirect taxes on raising of capital where e.g. Court of Justice ruled on the exclusion of the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty, from the amount on which capital duty is charged\(^{54}\), or precluded a reintroduction of a capital duty on a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company, where that Member State has previously waived the levying of that tax\(^{55}\). It was also ruled that in determining the amount of capital duty chargeable on an increase in a company’s capital arising from the conversion into shares following Poland’s accession, of loans taken up by that company prior to that accession, account is to be taken of the previous taxation of those loans on the basis of the national law in force at the material time\(^{56}\). In the latest ruling on interpretation of Directive 2008/7/EC concerning indirect taxes on the raising of capital

\(^{50}\) Case C-639/13, European Commission v Republic of Poland, EU:C:2014:2468.

\(^{51}\) Case C-313/14, Asprod sp. z o.o. v Dyrektor Izby Celnej w Szczecinie, EU:C:2014:2426.

\(^{52}\) Case C-275/14, Jednostka Innowacyjno-Wdrożeniowa Petrol S.C. Paczuski Maciej i Pulawski Ryszard v Minister Finansów, EU:C:2015:75.

\(^{53}\) Case C-475/07, Commission of the European Communities v Republic of Poland, EU:C:2009:86.

\(^{54}\) Case C-372/10, Pak-Holdco sp. zoo v Dyrektor Izby Skarbowej w Poznaniu, EU:C:2012:86.

\(^{55}\) Case C-212/10, Logstor ROR Polska sp. z o.o. v Dyrektor Izby Skarbowej w Katowicach, EU:C:2011:404.

\(^{56}\) Case C-441/08, Elektrownia Pątnów II sp. zoo v Dyrektor Izby Skarbowej w Poznaniu, EU:C:2009:698.
considered here, the Court found that a partnership limited by shares under Polish law must be regarded as a capital company within its meaning\(^57\). Some other tax cases will also be considered further down below.

**Cross-border movement**

What seems to be particularly interesting as far as tax regulations are concerned are those cases which pertained to cross-border movement. In that vein, there were some VAT judgments relating to receiving and delivering services between Member States and determining the place of taxation\(^58\) or to exclusion of the right to deduct input tax paid at the time of the purchase of imported services, the price of which was paid to a person established in a territory classified as a “tax haven”\(^59\). The Court of Justice also ruled on the provision of services consisting of research and development work, carried out by engineers established in one Member State for the benefit of a recipient established in another one\(^60\).

One particularly interesting case in this area regarded tax regulations under which dividends paid by companies established in Poland to an investment fund situated in a non-Member State could not qualify for a tax exemption, despite the fact that both states were bound by an obligation under a convention on mutual administrative assistance which enables the national tax authorities to verify any information which may be transmitted by the investment fund. According to the

\(^57\) Case C-357/13, *Drukarnia Multipress sp. z o.o. v Minister Finansów*, EU:C:2015:253.

\(^58\) Case C-605/12, *Welmory sp. z o.o. v Dyrektor Izby Skarbowej w Gdańsku*, EU:C:2014:2298; Case C-155/12, *Minister Finansów v RR Donnelley Global Turnkey Solutions Poland sp. z o.o.*, EU:C:2013:434.

\(^59\) Case C-395/09, *Oasis East sp. z o.o. v Minister Finansów*, EU:C:2010:570.

\(^60\) Case C-222/09, *Kronospan Mielec sp. z o.o. v Dyrektor Izby Skarbowej w Rzeszowie*, EU:C:2010:593.
Court, that difference in the tax treatment of dividends as between resident and non-resident investment funds may discourage, on the one hand, investment funds established in a third country from investing in companies established in Poland and, on the other, investors resident in Poland from acquiring shares in non-resident investment funds. Therefore, it was recognized as a restriction on the free movement of capital prohibited by Article 63 TFEU\textsuperscript{61}. Another good example of this freedom’s guarantees being breached by Poland – outside of the area of pure tax law - would be the introduction of strict limits on open pension funds with regard to investments made outside national territory, where said investments could not exceed 5% of the value of the fund assets and were reserved only to certain options. The Court had no doubt that such a measure had a restrictive effect in relation to companies established in other Member States and constituted an obstacle to the raising of capital in Poland by them and that it was completely incomparable with accepted limit of 30% maintained elsewhere. Even though several risks against which a measure was supposed to protect from were listed, such as stability and security of the assets administered by a pension fund, they were considered unjustified\textsuperscript{62}.

The idea of protection of public expenditures, with a special emphasis put on fiscal interests of the State, also shaped other aspects of tax and social security legislation in Poland that created obstacles in free movement causing following references to the Court of Justice, such as one of the widely known Filipiak case\textsuperscript{63}. A Polish tax resident carried out an economic activity in the Netherlands as a partner in a Dutch partnership while paying obligatory social and health contributions there - contributions that could not reduce his tax liability

\textsuperscript{61} Case C-190/12, Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowej w Bydgoszczy, EU:C:2014:249.

\textsuperscript{62} Case C-271/09, European Commission v Republic of Poland, EU:C:2011:855.

\textsuperscript{63} Case C-314/08, Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu, EU:C:2009:719.
in Poland. His case seems to enjoy more universal application, since before Court of Justice held it ruling against Polish law, the Polish Constitutional Court also ruled on contested national provision and declared it contrary to principles of equality and social justice enshrined in the Polish Constitution. Unfortunately, at the same time, its loss of its validity was deferred for a future date, i.e. in the period occurring after the reference to Luxembourg was made by Polish administrative court. That meant that the restriction was still fully valid and Mr. Filipiak could not take advantage of ruling of unconstitutionality. However, according to the Court of Justice, to the extent that Community law prevails over provisions of national law, the primacy of Community law obliges the national court to apply Community law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force. This rule has become very popular among Polish lawyers and is called upon quite often in courtrooms.

As to the substance, there was no doubt that if the only amounts that could be deducted from the assessment base and the tax payable in his home country were those paid there, as obligation towards Polish social security institutions, it had to be found contrary to the guarantees of freedom of establishment (Art. 49 TFEU) and movement of services (Art. 56 TFEU). According to the Court of Justice, such a taxpayer was treated less favourably than any other taxpayer who was resident in Poland, his economic activity restricted to an area within Polish borders and under obligation of paying his compulsory contributions to Polish competent public authority, while at the same time these two groups were not in objectively different situations capable of justifying such a difference in treatment. The Rüffler case was somewhat similar, concerning the person residing in Poland while receiving pensions from Germany, forced to pay compulsory health insurance contribution
to the German health insurance institution and entitled to healthcare benefits in Poland - provided at the expense of this last institution. As a subject of unlimited liability to tax in Poland, he was not entitled for his tax here to be reduced by the amount of this German contribution. However, a grant of such a tax advantage only in case of Polish contributions had to be precluded by current Art. 21 TFEU on EU citizens’ free movement of persons, as Mr. Rüffler exercised his freedom of movement by leaving his home country in which he had carried out all his occupational activity in order to take up residence in Poland64.

The Treaty provision referred to above was also used by the Court of Justice in another known case of *Nerkowska*, a Polish national entitled to a disability pension for the damage her health had suffered while she was a deportee to Soviet Union at her early age after World War II. Its payment was suspended on the ground that she had not resided in Polish territory for some time (while living in Germany); such a state of affairs was unsuccessfully challenged by her before Polish EU accession and held to be fully lawful. But after 2004 she submitted a fresh application claiming that EU citizenship guaranties precluded such a refusal since her present place of residence within Union could not constitute an obstacle to the payment of that benefit. Court had no doubt that Article 21 EC is to be interpreted as precluding legislation of a Member State under which it refuses, generally and in all circumstances, to pay to its nationals a benefit granted to civilian victims of war or repression solely because they are not resident in the territory of that State throughout the period of payment of the benefit, but who are resident in the territory of another Member State65.

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64 Case C-544/07, *Uwe Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*, EU:C:2009:258.

In previous cases, the Court referred not only to Treaty provisions but also to acts of secondary law on the coordination of national social security schemes, i.e. to Regulation (EC) No 883/2004. Taking into account how popular are migrations among Poles – and the complexity of this area of legislation regulating such a kind of rights of migrant workers – such a development of case-law should not be surprising. It was then confirmed that in the determination of the minimum insurance period required by national law for the purpose of the acquisition of entitlement to a retirement pension, national institution competent therefor must take all insurance periods completed in the course of the migrant worker’s career into consideration, including those completed in other Member States. In response to national court’s questions, the Court of Justice had also a chance to specify a legal situation of a person who, under successive employment contracts stating the place of employment to be the territory of several Member States, in fact works during the term of each of those contracts only on the territory of one of those States at a given time. It was then held that such a person cannot fall within the concept of ‘a person normally employed in the territory of two or more Member States’, within the meaning of the Regulation above.

One of the main purposes of this system is to lay down rules governing the determination of the legislation to be applied to migrant workers using their residence as a connecting factor. It is not only intended to ensure that they are not left without social security cover because there is no legislation applicable to them, but also to ensure

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67 Case C-440/09, Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu v Stanisława Tomaszewska, EU:C:2011:114.
68 Case C-115/11, Format Urządzenia i Montaże Przemysłowe sp. z o.o. v Zakład Ubezpieczeń Społecznych, EU:C:2012:606.
that they are subject to the social security scheme of only one Member State, in order to prevent any more from being applicable and to avoid possible complications of it. Therefore a person having simultaneously, for such purposes, a number of habitual residences in different Member States is not accepted thereunder. Yet, despite the finding above, the Court ruled that the competent institution of a Member State cannot legitimately withdraw, retroactively, the entitlement to a retirement pension of the person concerned and require that person to repay any pension in regard to which it is alleged he or she was not entitled, on the ground that he receives a survivor’s pension in another Member State in whose territory he has also been resident. However, the amount of the retirement pension paid in the first Member State may be reduced, up to the limit of the amount of the benefits received in the other Member State, by virtue of the application of any national rule precluding the cumulation of benefits\(^69\).

One more category of cases that touch upon aspects of cross-border movement is connected to judicial cooperation in civil matters. Again also here at least one ruling was widely commented both by theoreticians and practitioners i.e. the Alder case, where persons residing in Germany lodged a claim for payment of a debt with Polish civil court against Polish resident and lost due to the procedure for notional service. Polish legislation that was precluded by this judgment provided that judicial documents addressed to a party whose place of residence or habitual abode is in another Member State were placed in the case file, and deemed to have been effectively served, if that party had failed to appoint a representative who was authorized to accept service being resident in Poland\(^70\). In other judgments Court of Justice could

\(^{69}\) Case C-589/10, Janina Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku, EU:C:2013:303.

\(^{70}\) Case C-325/11, Krystyna Alder and Ewald Alder v Sabina Orlowska and Czesław Orlowski, EU:C:2012:824.
also rule on conditions governing a European order for payment procedure applied by Polish civil courts, as well as means of cooperation between national courts in taking of evidence in civil or commercial matters, especially as to payments for the expenses.

Special cases referred to cross-border insolvency proceedings, particularly determining jurisdiction of courts and other competent authorities from more than one Member State and their obligation to recognize and enforce foreign judgments as well as interpretation of conflict of laws rules. Court of Justice also confirmed that insolvency proceedings opened in a Member State encompass all of the debtor’s assets, including those situated in another Member State, and the law of the State of the opening of proceedings determines not only the opening of insolvency proceedings but also their course and closure. On that basis, the law of the State of the opening of proceedings is required to govern the treatment of assets situated in other Member States and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject.

**Electronic Communications**

Leaving cross-border movement aside, there are some other areas of law covered by the CJEU case-law worth mentioning. Some of them may have already developed into a line of judgments, while others are “represented” by only single case, but not necessarily an unimportant one. What seems to be very interesting is that the third generally most problematic area of EU law implementation in Poland after protection of environment and taxes turned up to be electronic

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74 Case C-444/07, *MG Probud Gdynia sp. z o.o.*, EU:C:2010:24.
communications networks and services, regulated mainly by the Directive 2002/21, on a common regulatory framework for electronic communications networks and services and Directive 2002/22 on universal service and users’ rights relating to electronic communications networks and services. First of many cases here was a successful action on part of the Commission against Poland that concerned failure to correctly transpose one of the Directives, in particular with reference to the definition of “subscriber”\textsuperscript{75}.

Next, Court had to deal with the problem of acceptable scope of State intervention on the market as in the case of regulating retail tariffs for access to high-speed internet without previously carrying out a market analysis\textsuperscript{76}. Analogous problem regarded imposition of a general obligation to negotiate agreements for access to the telecommunications network on operators of public communications networks, without any allowance to withdraw from them or have them amended where competition in the market intensifies. Directives referred to above allow the operators to offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority; such an obligation may be imposed by such authorities on operators with significant market power, following an analysis of that market\textsuperscript{77}. In another case concerning restrictions imposed on electronic communications services providers, the Court did not call national legislation which prohibited making the conclusion of a contract for the provision of services contingent on the conclusion, by the enduser, of a contract for the provision of other services into question. However, it was held to preclude national legislation which, with certain exceptions, and without taking

\textsuperscript{75} Case C-492/07, Commission of the European Communities v Republic of Poland, EU:C:2009:31.

\textsuperscript{76} Case C-545/08, European Commission v Republic of Poland, EU:C:2010:249.

\textsuperscript{77} Case C-227/07, Commission of the European Communities v Republic of Poland, EU:C:2008:620.
account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer.\(^{78}\)

Finally, there were some cases regarding the duties and competences of national regulatory authority such as those concerning a procedure that has to be implemented if, in resolving a dispute between undertakings providing electronic communications networks or services in a Member State, it intends to impose obligations designed to ensure access to non-geographic numbers.\(^{79}\) In another one of those cases, the Court ruled on the obligation to take account of the costs incurred by mobile telephone network operators in regard to implementing the number portability service. When an operator assesses whether the direct charge to subscribers for the use of that service is a disincentive while retaining the power to fix the maximum amount of that charge levied by operators at a level below the costs incurred by them, a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility.\(^{80}\)

**Others**

While trying to mention more self-standing rulings of various branches of EU law, one should start from another widely known and commented on case of *Nierodzik*, which concerned labour law in a purely internal situation, *i.e.* without any cross-border element nor involvement of EU internal market freedoms. What Ms. Nierodzik did was quite typical for numbers of Polish employees who asked their own employer to terminate a long-lasting employment contract of indefinite duration in order to take an early retirement and subsequently accept


\(^{80}\) Case C-99/09, *Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej*, EU:C:2010:395.
fixed-term contract for part-time employment, sometimes again and again, for several years. Unfortunately in Poland, in case of such contracts of more than six months, a fixed notice period of two weeks may be applied regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months. Since those two categories of workers were in comparable situations, the Court of Justice had no choice but to find it precluded, regardless of the fact that this regulation used to have very long tradition in Poland. It was not possible to accept justification on the basis of a criterion which, in a general and abstract manner, referred precisely to the term of the employment81.

Republic of Poland did also have serious problems with fulfilment of a very important general obligation to communicate any draft technical regulation that would be based on Directive 98/34 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 the Commission. In famous Fortuna case, the problem concerned national law of highly political sensitiveness, i.e. games of chance, that had been introduced some years ago as a consequence of a political scandal in order to combat gambling. Unfortunately, due to these special circumstances, the Polish government decided to act extremely quickly and the law was enacted without following the EU rules referred to above as to a part of that legislation82.

The applicants in the national proceedings before administrative court were companies whose economic activity included the organization and running of gaming on low-prize machines; for those purposes,
they were purchasing them on the European Union market. They were refused when submitted their applications for authorization to organize and run gaming on low-prize machines or for alteration or extension thereof, since according to this new law it was prohibited. The aim of the law at issue was to gradually render running games of chance impossible anywhere other than in casinos and gaming arcades. Those administrative decisions were challenged before Polish courts – the parties maintained that this law could not be relied upon by the authorities in support of their decisions, as it was not notified to the Commission although it contained so called ‘technical regulations’ within the meaning of Directive 98/34. Court of Justice found that it was to be interpreted as meaning that national provisions which could have above effect were capable of constituting such ‘regulations’ and that the drafts of them had to be communicated to the Commission, provided that certain conditions were met.

In another ruling Court of Justice did not accept very severe Polish public procurement law regulations requiring an automatic exclusion of an economic operator from a procedure for the award of a public contract in progress in case of grave professional misconduct, which was interpreted very broadly on grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators. In fact, it was applied without carrying out a specific and individual assessment of the conduct of a given operator, always where the contracting authority concerned had annulled, terminated or renounced a public contract with a given operator due to circumstances for which that operator was responsible, where there was such an occurrence in the three-year period before the procedure had been initiated and the value
of the non-performed part of the contract amounted to at least 5% of value of the contract\textsuperscript{83}.

As it is well-known, most competition cases are dealt with by the General Court. Nevertheless, one of the cases decided by the Court of Justice regarding Polish system seems to be particularly important and interesting, while, at the same time, trying to delineate more general limits of national procedural autonomy. \textit{Tele 2}, the case at issue, regarded national competition authorities’ power within the proceedings against the subject suspected of infringement of the prohibition of abuse of a dominant position (within the meaning of Article 102 TFEU) that was based on Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty. It should be recalled that in order to ensure the coherent application of the competition rules in the Member States, a cooperation mechanism was set up thereunder between the Commission and the national competition authorities that were authorized to conduct such proceedings in the Commission’s stead. European Commission may adopt special decisions of a declaratory nature when there has been no breach of above Article since the conditions for prohibition were not met, finding that it is not applicable. In the case referred to above, the Polish Supreme Court wanted to be clear whether national competition authority has also power to adopt such a negative decision on merits as regards the assessment of compatibility of undertakings’ practices with Article 102 TFEU, since according to general procedural administrative rules in force in Poland it is done usually on request of a party. However, the Court of Justice made it clear that such decisions of NCAs may not be accepted in this area even if Polish authorities are generally bound by them. The Regulation was interpreted as precluding such an authority to act on equal footing with the

\textsuperscript{83} Case C-465/11, \textit{Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA}, EU:C:2012:801.
Commission since such a ‘negative’ decision on the merits would risk undermining the uniform application of this article and might prevent the Commission from subsequently finding that the practice in question amounts to a breach of Union law\textsuperscript{84}.

**Case study – judgments regarding cars**

Finally, at the end of this paper, it is appropriate to offer some kind of a case study that would allow for a view across various branches of EU law, instead of analysing implementation problems separately within each of them, even if tax and environmental law seem to particularly dominate ‘Polish’ case-law of the Court of Justice. It is even more justified given that there is one area which has turned up to be a very sensitive one for Polish state and has had a chance to employ several kinds of proceedings and legal problems. It relates to importing cars from other Member States and these “car cases” may be considered as a certain benchmark in terms of all the problems and challenges of application and implementation of EU law that seem to be focused on all possible procedural and substantive issues in this area.

Poland is not the only EU State to experience difficulties in this area, yet there are two new Members (Romania is the second) that make Court of Justice work around the clock to guarantee free movement of one particular product at a larger scale than ever. As such, one has to face introduction of barriers discouraging a Member State’s own citizens dreaming of their own cars from enjoying their basic rights in order to protect domestic market or even due to a simple bureaucratic stubbornness. Therefore it is vital to try to adopt such a perspective of analysis that would not be concerned with one particular branch, but one that could combine different ones.

\textsuperscript{84} Case C-375/09, Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA, EU:C:2011:270.
In fact, the first Polish ruling of the Court of Justice and probably the most famous one among ordinary citizens was the Brzeziński case, regarding excise duty due for the cars imported from abroad – a public levy that was obligatory also after the accession to the Union, when hundreds of thousands of Poles started buying cars in Western Europe. Awareness of its incompatibility with EC Treaty was quite high, but most of people decided to pay it anyway at that time to drive car on national territory. But Mr Brzeziński was a journalist working for an automotive magazine who imported a car just after Poland joined Union in order to “test the system” and uncover the way Polish administration might respect European standards, especially when they collided with the interests of the State in the fiscal area. Therefore, it deserves a more detailed description, as it – so to speak – paved the way, as far as application of EU law in Polish courts and change in the administration’s mentality were concerned.

According to Polish regulations, passenger cars not registered in Poland in accordance with road traffic provisions were subject to two kinds of excise duty – in case of those which were less than two years old, it was 3.1% – or 13.6%, depending on engine capacity. For the older vehicles that percentage varied according to the age of the vehicle, attaining a maximum of 65% of the tax base after 8 years. That meant that all the old cars purchased in Poland were subject to much lower tax – if they were new, it would be only ca. 3% or 13%; if they were already registered, no tax would be required to be paid while the car was being re-registered after the internal purchase within domestic territory. The only duty applicable to the latter category was the so-called residual amount of the duty, incorporated into the market value of similar vehicles. There was no doubt at the same time that comparison of two second-hand cars over than two years old – one already registered and another just imported – would lead to a conclusion that the second one was put under tax discrimination, as its owner
was forced to pay excise duty of even 65%, while residual duty never exceeded 13%.

Therefore, after the registration Mr Brzeziński requested reimbursement of the excise duty paid which, in his view, had been wrongly charged, contrary to EC Treaty. His claim was decided to be rejected by the customs office, which caused an action before an administrative court. The claimant asked for the decision to be set aside and for the customs administration to be ordered to reimburse him for the amount of the excise duty collected unduly by it, on the ground of its incompatibility with EU law. European Court of Justice interpreted article 90 EC Treaty (now Art. 110 TFEU) as meaning that it precluded an excise duty, in so far as the amount of the duty imposed on second-hand vehicles that were over two years old and acquired in a Member State other than Poland exceeds the residual amount of the same duty incorporated into the market value of similar vehicles which had been previously registered in Poland.

Few months later, the Court of Justice gave a judgment in a similar case regarding the liability for that excise duty, but in regard to a person being subject to it; it affected any sale of passenger cars before their initial registration in Poland. The issue arose in the case of acquisition in the Community, from the time of acquisition of the right to use a passenger car as owner and, at the latest, to its registration in Poland in accordance with the road traffic provisions. Such a sale is usually done by professionals importing many cars into Poland for individual buyers who are then to register those cars themselves; therefore, the due amounts of excise duties are more serious then. The CJ confirmed that the same Treaty provision referred to above was to be interpreted as precluding an excise duty, such as that at issue in the main proceedings, in so far as the amount of the duty imposed on the

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85 Case C-313/05, Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie, EU:C:2007:33.
sale, before their first registration, of second-hand vehicles imported from another Member State exceeded the residual amount of the same duty incorporated into the market value of similar vehicles previously registered in the Member State which introduced that duty.\(^{86}\)

The current Article 110 TFEU had to be applied in another case, where Polish authorities were trying to make profit out of their own citizens by breaching rules on free movement, through a special obligation to obtain a certificate of first registration of the vehicle in Poland which was necessary to register a car and drive legally. According to the Regulation of the Polish Minister for Infrastructure for the issue of such certificate the registration authority levied a charge amounting to PLN 500, yet for an issue of a duplicate, it was only PLN 75. Such a rune was not only in breach of the EC Treaty as it then was. The Polish Constitutional Tribunal declared that it was, in essence, contrary to the Polish Constitution and subsequently, the Polish Minister for Transport and Construction was forced to amend it, lowering the levy to the one hitherto applied to duplicates.

Unfortunately, in Kawala case, the applicant could not take advantage of the above when he brought an action before a district court for payment of the difference between the charge which he had paid for the issue of the certificate and the amount to be paid for the issue of its duplicate of that certificate. It was not only that the above amendment came into force too late, but also the Constitutional Tribunal decided again that the loss of validity of original Regulation was deferred for the future date – the same as in already analysed Filipiak case. The Court of Justice left no doubts that the EC Treaty as it then stood was to be interpreted as precluding a charge, which, in practice, was levied on the first registration of a second-hand motor vehicle imported from another Member State and not levied on the purchase of a second-hand

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\(^{86}\) Case C-426/07, Dariusz Krawczyński v Dyrektor Izby Celnej w Białymstoku, EU:C:2008:434.
motor vehicle in Poland, in so far as the latter had been already registered there. Obviously, the contested domestic provision which was contrary to it should have been set aside by a Polish court, the period prior to the date on which the Constitutional Court declared, in its judgment, that it would cease to have binding force included\textsuperscript{87}.

Taking into account all the circumstances mentioned previously in this paper, it was foreseeable that the Court would have to handle a ‘car case’ regarding VAT. The primary source of the problem was the fact that restrictions on the deduction of input tax on purchases of cars and fuel after Poland joined EU were expanded, in order to practically block the reduction of the amount or the refund of the difference of the tax due to such items purchased by the taxable person, which would have been quite obvious in case of any other goods. Instead of liberalizing it in conformity with the terms and (especially) the spirit of the common system of value added tax (Sixth Directive on the harmonisation of the laws of the Member States relating to turnover taxes) which is based on so called ‘standstill’ principle, the Polish government was trying to combat any VAT deductions in case of cars and, step by step, introduced more and more severe measures after the accession.

In \textit{Magoora} case, the dispute pending before Polish administrative court concerned the possibility for a company to deduct the input tax on the purchase of fuel for a vehicle used for its activities under a leasing contract that was open on the day on which this contract was concluded. However, following the adoption of the new wording of provisions of the Polish Law on VAT, the prohibition of such a deduction was applied to that company some time later, since the vehicle did not meet new, more demanding standards. What seems to be particularly astonishing in this case, when Magoora submitted its application to the tax office, taking the view that it should have retained its right

\textsuperscript{87} Case C-134/07, \textit{Piotr Kawala v Gmina Miasta Jaworzna}, EU:C:2007:770.
to deduct tax on the basis of VAT Directive, it was told that this act could not constitute a source of national law in Poland. The Court of Justice made it clear that it precluded Poland from amending its legislation so as to extend the scope of above restrictions and added that the party was fully entitled to claim the right based on the Directive\(^88\).

Cases regarding taxes and other public charges did not exhaust long list of obstacles to free movement of cars within the internal market that were introduced by Polish authorities. In fact, the Republic of Poland even had difficulty with the transposition of the Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive)\(^89\). What’s more, it was not acceptable to impose an obligation to carry out a roadworthiness test prior to the first registration of vehicles in Poland, which applied in practice only to second-hand vehicles imported from other Member States. Again Polish authorities charged a significant fee for it, almost twice as high as the fee for periodical tests for a domestic vehicle of the same category and again could not put forward any legitimate justification for such a test. In its pleas in law presented by the European Commission before the Court of Justice it has been acknowledged that the use of a vehicle on the public highway since the last roadworthiness test might have justified a test to be carried on grounds of the protection of health and life of humans. Nevertheless provisions of Polish law did not require it for domestic vehicles submitted for registration in the same circumstances as vehicles imported from other Member States. The latter was treated in a completely different way and had to go through such a procedure even if the vehicle had been tested in one of the Member States, despite the fact that at least in some

\(^{88}\) Case C-414/07, Magoora sp. z o.o. v Dyrektor Izby Skarbowej w Krakowie, EU:C:2008:766.

\(^{89}\) Case C-311/10, European Commission v Republic of Poland, EU:C:2011:702.
of them like Germany equivalent test was much more careful and restrictive\textsuperscript{90}.

The very last case that is worth mentioning in this paper regarded another famous problem of cars previously registered in United Kingdom or Ireland – which obviously had a steering wheel on the right hand side – that were imported by Poles. Polish law made their registration in domestic territory dependent on repositioning of the steering wheel to the other side, which seemed to be a very complicated modification. While it was an action of the European Commission against Poland, that case belongs to the one of the most famous ones. It is sometimes called \textit{Dorobek} case – who was precisely a person that returned from the UK with such a car and faced a refusal to register it. He attempted to challenge a decision before Polish courts up to the Supreme Administrative Court, yet without any success. What seemed to be very last chance was to submit a complaint to the Commission; it turned up to work the case through, proving efficiency of the system. A series of complaints from people who exercised professional activity abroad and wished to register such vehicles in Poland had been also received at that time by the Commission. The Court of Justice ruled that by enforcing the requirement outlined above, the Republic of Poland had failed to fulfil its obligations under particular directives relating to motor vehicles, as well as infringed Article 34 TFEU prohibiting measures having effect equivalent to quantitative restrictions, the concept of which has been applied hundreds of times against all the Member States during long history of European integration, along with extremely famous \textit{Cassis de Dijon} case\textsuperscript{91}.

\textsuperscript{90} Case C-170/07, \textit{Commission of the European Communities v Republic of Poland}, EU:C:2008:322.

Impact of EU Membership on regulation of Lithuanian close companies: enrichment or legal irritants?

Introduction

Lithuania’s road to the European Union (hereinafter EU) began in December 1995 when official application for EU membership was submitted. Unfortunately, under the Commission’s opinion as of July 1997, Lithuania had been assessed as not ready to join, and an invitation to start negotiations was received only in December 1999. The negotiations were officially completed in December 2002 and on 1st of May 2004 Lithuania became an EU Member State, together with nine other countries – the Czech Republic, Estonia, Cyprus, Latvia, Malta, Poland, Slovakia, Slovenia and Hungary.

EU membership has had a huge influence on many areas of legal regulations in Lithuania. Lithuanian company law was not an exception. This impact was enhanced by the fact that statutory regulations of private companies in Lithuania do not have old traditions. The respective legal forms of private companies were introduced and regulated just in the year 1990, following Restoration of Independence of the Republic of Lithuania. This statutory regulation has been reformed several times.

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to reflect both: developments within the domestic business environment as well as trends of the European company law.

Our aim is to assess an impact of the EU membership on regulations of Lithuanian close companies. In other words, we will try to identify whether it encouraged the improvement of Lithuanian company law or maybe it was only an irritant for national legislator.

1. Lithuanian close company before EU membership

Lithuanian private limited liability company (Lith. – uždaroji akcinė bendrovė, abbreviation: UAB; hereinafter UAB) was first introduced by the Law on Enterprises of the Republic of Lithuania³ as of 8th of May 1990. That Law (Article 6), in addition to the UAB, specified another five types of private legal entities allowed in Lithuania such as: individual (personal) company (Lith. – individuali (personalinė) įmonė, abbreviation - IĮ), general partnership (Lith. – tikroji ūkinė bendrija, abbreviation - TŪB), limited (trust) partnerships (Lith. – komanditinė ūkinė bendrija, abbreviation - KŪB), public limited liability company (Lith. – akcinė bendrovė, abbreviation - AB) and state (local government) companies (Lith. – valstybinė (vietos savivaldybės) įmonė, abbreviation - VĮ). Later, in 1993, the list of available forms of enterprises was extended with a cooperative society (cooperative) (Lith. – kooperatinė bendrovė (kooperatyvas))⁴.

The first Law on Companies of the Republic of Lithuania⁵ (hereinafter ABĮ) came into force on 1st August 1990. The UAB from very

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beginning became the most popular legal form of business organization in Lithuania. Such popularity of UAB was mainly determined by its assumed flexibility, comprehensive statutory regulations, limited liability of shareholders, lower amount of required minimum share capital, simplified procedure for transferring shares, clear structure of company’s management and possibility to choose from a wide range of management structures, etc.⁶. Further we will review the regulatory features attributed to UAB before EU membership.

First of all, Lithuania, as some other countries (e.g. the UK, Ireland, Italy, Malta, Poland, Sweden, etc.)⁷, has adopted a statutory provision prohibiting to buy and to sell the shares of UAB publicly or on the stock exchange (Article 2(4) of 1990 ABĮ). Therefore, UAB cannot distribute its shares to the public because it is expressly prohibited by law.

Different state legislators had different attitudes towards the closed (private) nature of regulation of private companies. In some jurisdictions (e.g. in France, Spain, and at the same time in Belgium) legislation stipulates the maximum number of shareholders (usually 50), which implies the closed nature of a company. If this number is exceeded the company has to be transformed into a public company. Other lawmakers applied the principle of intuitu personae, when the possibility to transfer the shares is imperatively restricted (e.g. in Netherlands, France)⁸. ABĮ applied both the aforementioned models of ensuring of closed (private) nature (intuitu personae) of regulation of UAB. 1990 ABĮ imperatively limited the number of company’s shareholders – not less than 2 and no more than 50. However, while calculating the maximal number of shareholders, the law allowed

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an exclusion of permanent employees of the company (Articles 2(4), 4(1) of 1990 ABĮ). Later the maximum number of UAB’s founders (shareholders) was increased up to 100 in 2000 and up to 249 in 2003. However, such a high threshold suggested that Lithuanian legal acts had no more elements reflecting the private nature of company – the definition of the narrow circle of shareholders. The main motive of such an amendment was also the possibility for public limited liability companies having a small number of shareholders (in most cases companies established after privatization), whose shares are generally illiquid, to be reorganized into the UAB thereby avoiding an obligation to comply with costly requirements of information disclosure necessary to open (public) companies⁹. Also, the company’s articles of association might determine the necessity of consent of the company’s board to transfer the registered shares (Article 34(2) of 1990 ABĮ), i.e. the incorporators were able to choose one of the most commonly used systems of restrictions on share transfer in private companies¹⁰ – so called consent clause.

In 1990 ABĮ, the minimum size of the required authorized capital was not established. A minimum capital requirement for UAB was introduced as late as in 1994¹¹. The minimum limit of LTL 10,000 (approx. € 2,896) had been established and remained at the same level until 1st of January 2015 when, after Lithuania’s accession to the euro zone, this amount was reduced to € 2,500¹².

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⁹ Explanatory Note of the Project of the Law on Companies of the Republic of Lithuania. 13/01/2000, No. P-2300.

¹⁰ The other system is also called as proposal clause or pre-emption clause (see more at: J. Maitland-Walker, Guide to European Company Laws, 3rd ed., London: Sweet & Maxwell, 2008, p. 669).


¹² Law on Amendment of the Law on Companies of the Republic of Lithuania Articles 2, 40 and 70. Legislation Register, 22/10/2014, No. 2014-14524, Article 1(2).
Lithuania has chosen a ‘mixed’ system of corporate structure. The bodies of the company management included: the general meeting of shareholders, the supervisory board, the management board and the head of the company’s administration. The general meeting of shareholders of UAB can decide not to set up the management board at the same time transferring its functions to the head of the company’s administration and general meeting of shareholders (such possibility was not allowed in case of public limited liability companies (AB)). The supervisory board also do not have to be formed.

The requirement for each company to have an elected auditor remained in until 2000, when companies were given a possibility to appoint such control body in its articles of association (Article 37(1) of 2000 ABĮ). Thus, the companies (shareholders) themselves could decide on the necessity of the same or similar body, as well as its expertise outside the company\textsuperscript{13}.

2. Impact of harmonization with EU directives

Undoubtedly, the greatest impact on UAB regulations took place due to the need to harmonize the Lithuanian legislation with EU law. Although the EU Company Law directives were mainly addressed to public companies some provisions had impact on UAB regulations. It can be noted that some influenced changes had been introduced before official invitation for Lithuania to start negotiations regarding EU membership was made. For example, with respect to the Twelfth Company Law Directive 89/667/EEC on single-member private limited-liability companies\textsuperscript{14}, the requirement for the minimum number (no less than 2) of company’s incorporators (shareholders) has been revoked.

\textsuperscript{13} Explanatory Note (fn. 8).
(Article 2(4), Article 4(3) of 1994 ABĮ). However, the main amendments took place during 2000 and 2003 ABĮ reforms.

Following the provisions of the Second Company Law Directive 77/91/EEC\(^{15}\) (Article 2(b)) the requirement to specify all possible economic activities in the articles of association of the company was revoked - it was sufficient to indicate only the nature of economic activity (Article 5(2) Subparagraph 3 of 2000 ABĮ). Thus, the shareholders themselves could decide on the detailed definition of the company’s objects in the articles of association. Also, the mentioned Second Company Law Directive 77/91/EEC (Article 19) extended a refusal of the prohibition to purchase company’s own shares which until then had been applied to UAB (Article 55 of 2003 ABĮ).

An important change constituted the determination of the mandatory annual audit in large UAB (Article 60(2) of 2000 ABĮ). Such a change occurred with regard to the provisions of the Fourth Council’s Directive 78/660/EEC\(^ {16}\). The amounts of limits were increased in 2003 and 2014 and now the annual audit is mandatory for UAB when it satisfied at least two of the three conditions: a) sales revenue exceeded € 3.5 million during the financial year; b) the amount of the assets indicated in the balance sheet exceeded € 1.8 million; c) the average number of employees during the financial year was not less than 50\(^ {17}\).

\(^{15}\) Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. Official Journal L 26, 31/01/1977, p. 1–13.


Directive 2012/30/EU\textsuperscript{18} (Article 25) determined the emergence of a new phenomenon in Lithuanian company law – company’s financial aid for acquisition of its shares. After ABĮ amendments as of 5\textsuperscript{th} of June 2014\textsuperscript{19} rendering of financial aid has been permitted for financial organizations and for companies in case its shares are to be acquired by its employees.

Another effect was that after Lithuania’s accession to the European Union the list of active Lithuanian business structures, i.e. private legal entities, was supplemented by the European supranational corporate forms: \textit{European Economic Interest Group} (the law came into force as of 01/05/2004)\textsuperscript{20}, \textit{European Company} (the law came into force as of 11/05/2004)\textsuperscript{21} and the \textit{European Cooperative Society} (the law came into force as of 18/08/2006)\textsuperscript{22}.

### 2.1. Establishment of companies by electronic means

We would like to discuss separately the issue of establishment of the entities by electronic means, which was likely to have been

\textsuperscript{18} Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. Official Journal L 315, 14/11/2012, p. 74–97.


\textsuperscript{20} Law on the European Economic Interest Grouping of the Republic of Lithuania. Official Gazette, 07/01/2004, No. 4-43.


\textsuperscript{22} Law on European Cooperative Societies of the Republic of Lithuania. Official Gazette, 30/06/2006, No. 73-2764.

The implementation of the idea to establish \textit{UAB} electronically began in Lithuania with \textit{ABI} amendments\textsuperscript{24} which came into force on the 31\textsuperscript{st} of September 2009 and which indicated that the model forms of \textit{UAB} establishment act and agreement, as well as the model articles of association shall be confirmed by the Government or its authorized institution (Articles 4(4) and 7(8). It was the first step necessary in providing the opportunity to reject mandatory notarisation of documents of \textit{UAB} establishment, if these documents conformed to confirmed model documents. The model form of \textit{UAB} establishment act and the form of the model articles of association were confirmed on the 18\textsuperscript{th} of November 2009\textsuperscript{25}. However, the actual opportunity to provide documents of \textit{UAB} establishment electronically became accessible upon installment of the information system which took place one year later (on the 3\textsuperscript{rd} of November 2010)\textsuperscript{26}. Firstly, it was possible

\textsuperscript{23} Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent. Official Journal L 258, 01/10/2009, p. 11–19.

\textsuperscript{24} Law on Amendment and Supplement of the Law on Companies of the Republic of Lithuania Articles 1, 4, 7, 14, 16, 18, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35, 37, 51, 52, 58, 59, 63, 64, 65, 74, 76, 78, 7th Chapter title, Annex, and on the Supplement of the Law on Companies of the Republic of Lithuania by the Articles 16(1), 26(1), 26(2), 30(1), 30(2), 30(3). Official Gazette, 31/07/2009, No. 91-3914.

\textsuperscript{25} Commandment of the Minister of Economy of the Republic of Lithuania, No. 4-589 Regarding the confirmation of a model incorporation act form for the private limited liability company, model articles of association of the private limited liability company and model filling recommendations for incorporation act form for the private limited liability company and model articles of association of the private limited liability company, 18/11/2009. Official Gazette, 21/11/2009, No. 138-6083.

\textsuperscript{26} Notification of the State Enterprise Centre of Registers, 03/11/2010.
to establish *UAB* with single founder electronically, but later, when the model form of *UAB* establishment agreement was confirmed (on the 16th of December 2010)\(^{27}\), such opportunity was provided to several founders.

Thus, since 3rd of November 2010 the documents required for the incorporation of a *UAB* have been able to be submitted electronically directly to the Manager of the Register via the Register’s online self-service system provided that all the following conditions have been met: (1) the incorporator holds a qualified electronic signature; (2) the incorporation documents have been drawn up in accordance with the approved model forms (statute, articles of association, incorporation act or incorporation agreement); (3) the short name of the State (*Lietuva*) is not used in the name of the *UAB* being formed; (4) in case the incorporator is not the owner of the premises to be used as the registered office, a consent of the owner of the premises, signed with the electronic signature, must be provided; (5) no seizure has been registered in the Register of Real Estate in respect of the premises; (6) the name has been temporarily included in the Register of Legal Entities; (7) for *UAB*, the shares have been paid for through a cash contribution\(^{28}\). Where a *UAB* is formed electronically, a cumulative account for formation of the authorised capital can be opened and the capital can be formed by this method as well.

\(^{27}\) Commandment of the Minister of Economy of the Republic of Lithuania No. 4-917 Regarding the confirmation of a model incorporation agreement form for the private limited liability company, model articles of association of the private limited liability company and model filling recommendations for incorporation agreement form for the private limited liability company and model articles of association of the private limited liability company, 16/12/2010. Official Gazette, 23/12/2010, No. 151-7735.

Unfortunately, existing on-line registration in Lithuania did not mean real cross-border registration. Therefore, the costs for foreign founders were likely to be more significant than for domestic founders. First of all, as it has been noted above, a qualified e-signature is a necessary condition for on-line registration. An incorporator needs e-signature for signing of incorporation documents, as well as for the opening of cumulative account for payment of cash contributions. In case the incorporator is not the owner of the premises to be used as the company’s registered office, e-signature is also necessary for the owner of the premises to sign appropriate consent. However, the Centre of Registers has chosen to accept only those e-signature certificates that may uniquely identify the signatory, i.e. the certificate must involve a Lithuanian personal code of the signatory. All Lithuanian suppliers of e-signatures (the Certification Centre of the Centre of Registers and Lithuanian mobile operators) declare that they issue qualified e-certificates to natural persons who have the citizenship of the Republic of Lithuania or permanent or temporary residence permit to stay in Lithuania. Thus, only Lithuanian qualified e-signatures with identified Lithuanian personal code might be used for on-line registration of companies. On the other hand, the problem also lies in technical possibilities of implementation. Technical possibilities for recognition of qualified e-signature, thanks to a competitiveness and innovation framework programme STORK, existed in respect of only six foreign countries: Estonia, Portugal, Greece, Italy, Iceland and Latvia. Of course, after the newly adopted Regulation No 910/2014 Lithuania is obliged to solve the mentioned

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30 See more: Description of Pilot 1 “Cross-Border Authentication for Electronic Services”. STORK.

technical issues and, together with other Member States, to find a solution how to accept qualified e-signatures from all Member States. The Lithuanian registrar could, for example, apply the technical solutions referred to in e-IDAS proposal (mutual recognition)\textsuperscript{32} or provided under the Internal Market Information system (IMI) in order to exchange information about the identity of the founders\textsuperscript{33}.

2.2. Improvement of shareholders rights

Other initiatives were connected with implementation of the Shareholder Rights Directive (2007/36/EC)\textsuperscript{34}. This Directive mainly aims to ensure the proper realization of shareholder rights to participate and vote in the meeting of shareholders using electronic means of communication.

The provision established under \textit{ABĮ} amendments of the 17\textsuperscript{th} of July of 2009\textsuperscript{35} gave the right to shareholders to participate directly in the meeting of shareholders and to vote using electronic means of communication (Article 21). Under the mentioned amendments the rights of shareholders were also complemented with one more right, i.e. the right to submit questions related to the agenda of shareholder’s


\textsuperscript{35} Law on Amendment and Supplement of the Law on Companies of the Republic of Lithuania (fn. 23).
general meeting for a company in advance and imposed an obligation for a company to answer them until the general meeting (Article 16').

The ABĮ amendments of the 15th of December of 200936 regulated particular alterations of shareholders’ pre-emption right to acquire the shares of the UAB being sold (Article 47). The terms for exercising this right have been shortened. It was also decided not to apply the pre-emption right if there were two shareholders in the UAB and one of them would like to sell all or part of shares to the other. Finally, it was allowed to indicate in UAB articles of association a different order of the sale of shares including the implementation of the pre-emption right which was indicated in ABĮ. These amendments show the tendency to give more freedom for UAB shareholders to regulate inter-relationships at their own discretion.

3. Minimum capital requirement: European trends and Lithuanian option

As mentioned, primarily (in 1990) ABĮ provided no minimum capital requirement for UAB and only in 1994 the minimum limit of LTL 10,000 (approx. €2,896) was introduced. The introduction of the minimum capital requirement was motivated, in principle, by the elimination of gaps determined in practice allowing incorporation of fictitious companies37. Therefore, Lithuanian legislator behaved similarly to most other EU Member States zealous legislators and simply extended the

36 Law on Amendment and Supplement of the Law on Companies of the Republic of Lithuania Articles 2, 4, 7, 10, 11, 12, 14, 17, 18, 26, 26(1), 32, 34, 35, 37, 41, 45, 47, 48, 52, 53, 57, 62, 63, 65, 72, 73, 74, 75, 77, 78 and on the Supplement of the Law on Companies of the Republic of Lithuania by the Articles 41(1). Official Gazette, 28/12/2009, No. 154-6945.

application of the traditional capital doctrine to closed type of companies without deeper research and detailed analysis, regardless the Second Directive were applicable only to the open (public) companies\textsuperscript{38}.

Obviously, due to EU membership the Lithuanian legislator had to take into consideration the European trends and actualities such as the following: practice of the European Court of Justice (hereinafter \textit{ECJ}) regarding free movement (corporate mobility) as well as horizontal regulatory competition between EU Member States and the European Commission’s initiatives in the field of private companies’ regulation.

The ECJ in number of cases in junction of XX and XXI centuries has stated a right of freedom of establishment. In famous \textit{Centros} case\textsuperscript{39} the \textit{ECJ} approved the general rule that a company may choose to operate in another Member State either through a subsidiary, branch or agency. This practice was detailed in \textit{Uberseering} case\textsuperscript{40} while stipulating that the company must be recognised as such in all other Member States, even if it conducts no business in the state of incorporation. In \textit{Inspire Art Ltd} case\textsuperscript{41} the \textit{ECJ} stated that where the choice is to act through a branch, Member State cannot impose obligations on the branch equivalent to those imposed to businesses incorporated in the Member State.


\textsuperscript{39} Case C-212/97, \textit{Centros Ltd v. Erhvervs- og Selskabsstyrelsen} (1999), ECR I-01459.

\textsuperscript{40} Case C-208/00, \textit{Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)} (2002), ECR I-09919.

\textsuperscript{41} Case C-167/01, \textit{Kamer van Koophandelen Fabriekenvoor Amsterdam v. Inspire Art Ltd} (2003), ECR I-10155.
The mentioned *ECJ* practice means that there is now a considerable measure of corporate mobility within the EU\(^{42}\) and entrepreneurs may establish the company in another EU Member State and conduct operations in Lithuania while exercising the right of establishment recognised by the *ECJ*. The decisions of the *ECJ* have inspired a certain degree of horizontal regulatory competition among the EU Member States – they react to possible migration of businesses to Member States with less ‘expensive’ legal forms by modifying and improving their legal structures, too\(^{43}\). During the last decade the dominant trend in Europe is to abolish or at least to reduce minimum capital requirements. There were 16 Member States wherein it was possible to establish a company with minimum share value of €1 or less\(^{44}\). However, there is some variety of approaches, e.g. there are Member States which only provide for such a possibility with regard to founders that are natural persons (e.g. Estonia, Latvia) and also Member States (e.g. Belgium, Germany) that allow to form companies with €1 share capital, but require that the capital be paid or built gradually over the life of the company\(^{45}\). Furthermore, the Member States, which provided the possibility to establish a private limited liability company with a symbolic minimum capital requirement, made this in two ways. Some countries have chosen a reduction or elimination of the minimum capital requirement for private companies. Since 2003, minimum capital requirements have been reduced in 10 Member States and in 5 countries only €1 has to be paid as a minimum capital requirement (e. g. the


\(^{44}\) Commission Staff Working Document Impact Assessment (fn. 32), p. 34.

\(^{45}\) *Ibidem*. 

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UK, Ireland, Cyprus, France or Germany)\(^ {46}\). In addition, other countries have introduced new legal forms for start-ups with no or €1 minimum capital requirement (for example, French simplified company with capital divided by shares (SAS) or Spanish new limited liability company (S.L.N.E.))\(^ {47}\).

The trends described above have been also influenced by the European Commission’s initiatives in a field of regulations on private limited liability companies. In the European Commission’s proposal (2008) on the Statute for a European Private Company (\textit{Societas Privata Europaea, SPE})\(^ {48}\) the €1 minimum capital requirement was proposed for \textit{SPE}. Truth, due to a failure to reach the Member States’ consensus on the \textit{SPE} Statute the Commission has already abandoned its proposal on \textit{SPE} (in October 2013)\(^ {49}\). However, in April 2014, the Commission published its Proposal for the Directive on Single-Member Private Limited Liability Companies\(^ {50}\), which would provide an EU-wide set of harmonised rules for single-member private limited liability companies and would result in appearance of national legal forms of a company called \textit{Societas Unius Personae} (SUP) with the minimum capital requirement of at least €1, or at least one unit of the national currency in a Member State which has not adopted euro as the common currency (Article 16(1) of the draft Directive). Moreover.

\(^{46}\) M. Eckard, (fn. 42), p. 163.


SUP shall not be required to build up legal reserves, as it will be able to do this on a voluntary basis (Article 16(4)).

Lithuania has also addressed the issues of a minimum capital requirement for the private limited liability companies. During the period of recent years (in 2009\textsuperscript{51} and 2012\textsuperscript{52}) there were some initiatives introduced to reduce the minimum capital requirement for \textit{UAB} to LTL 1,000 (approx. € 290) or to abolish it. These initiatives took place with a view of facilitating business conditions, promoting the establishment of companies and making \textit{UAB} a more attractive legal form for small and medium-sized businesses\textsuperscript{53}, as well as by the Commission’s proposal to set € 1 minimum capital requirement for \textit{SPE} and tendencies of the “recapitalization” idea of certain business entities emerging in Europe\textsuperscript{54}. Nevertheless attempts to reduce the limit failed. The main arguments of opponents were a fear of possible insolvency of \textit{UAB} in the first month already\textsuperscript{55} and the guarantee function of the minimum share capital requirement\textsuperscript{56}.

\textsuperscript{51} Law on Amendment and Supplement of the Law on Companies of the Republic of Lithuania (fn. 35).
\textsuperscript{52} Draft Law on Amendment of the Law on Companies of the Republic of Lithuania Articles 2, 24/05/2012, No. XIP-4483.
\textsuperscript{53} Explanatory Note to the Draft Law on Amendment and Supplement of the Law on Companies of the Republic of Lithuania Articles 2, 4, 7, 10, 11, 12, 14, 17, 18, 26, 26(1), 32, 34, 35, 37, 41, 45, 47, 48, 52, 53, 57, 62, 63, 65, 72, 73, 74, 75, 77, 78 and on the Supplement of the Law on Companies of the Republic of Lithuania by the Articles 41(1). 02/11/2009, No. XIP-1340.
\textsuperscript{54} Explanatory Note to the Draft Law on Amendment of the Law on Companies of the Republic of Lithuania Article 2, 24/05/2012.
\textsuperscript{55} Offer by member of the Seimas of the Republic of Lithuania Jurgis Razmas Regarding the Draft Law on Amendment and Supplement of the Law on Companies of the Republic of Lithuania Articles 2, 4, 7, 10, 11, 12, 14, 17, 18, 26, 26(1), 32, 34, 35, 37, 41, 45, 47, 48, 52, 53, 57, 62, 63, 65, 72, 73, 74, 75, 77, 78 and on the Supplement of the Law on Companies of the Republic of Lithuania by the Articles 41(1). 18/11/2009.
\textsuperscript{56} Conclusion of the Legal Department of the Office of the Seimas of the Republic of Lithuania for the Draft Law on Amendment of the Law on Companies of the Republic of Lithuania Articles 2, 06/06/2012.
However, in Lithuania an issue of minimum capital requirement was partially solved by introduction of a new private entity structure, i.e. a small partnership (Lith. – *mažoji bendrija, MB*; hereinafter *MB*). The natural persons have been allowed, since 1 September 2012 when the Law on Small Partnerships of the Republic of Lithuania\(^{57}\) (hereinafter *MBĮ*) came into force, to form *MB* with limited liability and no minimum share capital. This form of business structure is not deemed to be a company, but a particular form of partnership. The new form has many advantages and may be distinguished by more flexible regulations as compared to *UAB*. Truth, the adopted law provided also for some restrictions regarding a number and status of the members, i.e. maximum 10 natural persons, in addition, the admission of new members takes place upon an approval of the meeting of existing *MB* members (*intuitu personae* principle). As well as *UAB*, *MB* may be established electronically, using confirmed model forms of the documents of establishment\(^{58}\). Respectively, it presupposes lower costs of the establishment of *MB*. Moreover, the capital contribution to *MB* does not have to be monetary, but also other assets (things, securities, property rights, etc.) may be contributed, except for work and services. The other important feature of *MB* compared to *UAB* is a more flexible and simpler management system. One of two management systems may be chosen according to particular needs and thus one may choose between the meeting of members of *MB*, which is also the managing body or the meeting of members and sole managing body, i.e. the manager of *MB*. Unlike in *UAB*, wherein the employment agreement is subject to mandatory conclusion with its manager, the civil (service) contract is concluded


\(^{58}\) Commandment of the Ministry of Economy of the Republic of Lithuania No. 4-878, Regarding the confirmation of the model small partnership incorporation acts and agreements, and the confirmation of the model small partnership statute and its fulfilment recommendations, 31/08/2012. Official Gazette, 06/09/2012, No. 104-5292.
with manager of MB. It represents an increasingly softening attitude of the legislator towards the formalisation of relationship between the legal entity and its sole management body. The progressive attitude of the legislator has also been reflected by the fact that the members of MB can deal with more issues themselves (e.g. regarding the order of calling the meeting, acceptance of new members, etc.).

Consequently, a reduction of minimum capital requirement for UAB would have greater potential impact on Lithuanian legal persons (corporate groups) than on individual founders, because the legal persons do not have a possibility to incorporate a Lithuanian MB with no minimum capital requirement. On the other hand, the amount of €2,500, which can be used in the company’s operations upon incorporation of a UAB, might be quite small for legal persons. Apart from those states where a private company with the initial capital of €1 may be formed (e.g. the UK, Ireland, Cyprus, France, Germany, etc.), the capital requirement for the Lithuanian UAB is practically the lowest among the EU Member States59.

**Instead of Conclusions**

EU membership resulted in improvement of Lithuanian closed companies’ regulations – Lithuanian legislator is monitoring trends within the European company law, with the inclusion of innovative legal provisions as well.

Due to the mentioned innovativeness, Lithuania is possibly among those jurisdictions where incorporation of a UAB, in particular a single-member UAB, is the most straightforward. Incorporation

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of a MB is even simpler. The entrepreneurs are able to choose between ordinary UAB and simpler and more flexible MB without losing a privilege of a limited liability. Incorporation costs are not very high compared with other EU Member States. While the amount of minimum share capital requirement (€2,500 for UAB and no such a requirement for MB) is among the lowest in Europe. Payment of notary’s fees, however, can be avoided by forming an enterprise electronically. The incorporators can save costs of legal services by using the approved forms of model incorporation documents.

Evidence of this is that newly incorporated UAB numbers continuously had been increasing with each year (during 2004 – 2918 UAB) and reached the top in 2012 – when 10902 UABs were established. However, over the year of 2013 (i.e. after emergence of the small partnership as a form of legal entities) the latter number decreased by more than a quarter – only 7977 UABs were incorporated per year and 7962 during 201460.

Another evidence constitutes an impressive leap of Lithuania in Starting a business rank (189 countries evaluated) from 107th place in 201361 to 11th in 201462. That leap was mainly caused by creating a new form of MB with limited liability and with no minimum capital requirement, also by introducing online registration for limited liability companies and eliminating the notarization requirement for incorporation documents.

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New Member States and the EU cross-border medical healthcare

Introduction

Discussion on the health protection in the EU is always of the moment, especially in the newest Members of the EU, like Poland or Bulgaria where legislative works on the laws implementing Directive on the application of patients’ rights in cross-border healthcare have just been finished and where the state administrative and health sector scarce resources deeply influenced the way it has been transposed.

The aim of this study is to face several challenging questions considering exclusive Member States’ competence to regulate labour and social security law as guaranteed in the Treaty Article 168\(^2\) and consistent line of rulings of the CJEU\(^3\) stating that individuals and institutions providing benefits, rendering and buying medical services are beneficiaries of the economic basic freedoms, therefore they participate in the free movements of goods and services under Articles 34 and 56 of the Treaty.

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\(^3\) The Court of Justice of the European Union; further: the Court or CJEU.
The new Patient Mobility Directive\(^4\) is to clarify the system of the free movement of patients within the EU that had been created primarily on the basis of internal market law, through the free provision of services, not on the mere competence of the EU in public health. The directive confirms and codifies the case law rules for reimbursement of expenses incurred by an insured person receiving medical care outside their country of affiliation. Interestingly, although the new Member States authorities are concerned about the prospect of paying for their own citizens travelling abroad, they also tend to see the Directive as a potential business opportunity for their service providers, particularly in cross-border regions. Unfortunately, most of the directive transpositions in new Member States have specifically been designed to limit the financial exposure of national health systems. Polish legislative proposals, for instance seem to be far away from the major idea of the directive – namely – to enhance the cross-border medical services. Rendering medical services has been considered as one of the most dynamic sectors of Polish economy, however for economical reasons the new laws on cross-border healthcare are oriented to curb Polish patients from being treated abroad and having their medical expenses reimbursed. All the above-mentioned issues make the last point of this study – addressing medical tourism as a big chance or a great danger worth a few additional comments.

1. **Member States’ & the EU’s competence in healthcare**

It is common knowledge that the Treaty grants very limited powers to the EU in the field of health. Title XIV – “Public Health”

consists of a single Article 168 that only provides for cooperation and some sort of coordination, “supplementing” actions by Member States. The Treaty provisions are very limited in scope, recognize the precedence of national over the EU policy in the field of healthcare services and contain an express reservation of competence in favour of the states. However, Article 168(4) grants express powers to the EU to pass legislative acts aimed at adopting measures meeting common safety standards concerning: (a) high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; (b) the veterinary and phytosanitary fields which have as their direct objective the protection of public health; (c) high standards of quality and safety for medicinal products and devices for medical use. However, according to the Member States’ Declaration annexed to the Treaty - the measures to be adopted pursuant to Article 168(4)(c) must meet common safety concerns and aim to set high standards of quality and safety where national standards affecting the internal market would otherwise prevent a high level of human health protection being achieved.

Due to the exclusive Member States’ competence to regulate labour and social security law there has been created reciprocal healthcare cover to EEA citizens through the coordination of Member States’ social security systems. This coordination is founded on the cooperation of national social security administrations and based on the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems that

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5 Declaration 32 on Article 168(4)(c) of the Treaty on the Functioning of the European Union, OJ 2012/C 326/01.
provides for mechanisms designed to guarantee smooth functioning and enhanced cooperation between Member States and institutions in the field of social security\(^7\). The Regulation follows the principle, confirmed time and again by the Court that, social security remains a domain reserved to Member States’ competence\(^8\). It therefore does not touch the core of the national rules, but only establishes some degree of coordination, whereby fundamentally different systems may work together in order to secure minimal social and healthcare benefits\(^9\).


\(^7\) A well-known EU social security systems coordination product is European Health Insurance Card that grants access to medically necessary, state-provided healthcare during a temporary stay in any of the 28 EU countries, Iceland, Lichtenstein, Norway and Switzerland, under the same conditions and at the same cost (free in some countries) as people insured in that country; see: Decision No 189 of 18 June 2003 aimed at introducing a European health insurance card to replace the forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 as regards access to health care during a temporary stay in a Member State other than the competent State or the State of residence, OJ L 276 of 27.10.2003; Decision No 190 of 18 June 2003 concerning the technical specifications of the European health insurance card, OJ L 276 of 27.10.2003; Decision No 191 of 18 June 2003 concerning the replacement of forms E 111 and E 111 B by the European health insurance card, OJ L 276 of 27.10.2003.

\(^8\) See: Case 100/78, Rossi, [1979] ECR 831, para 13 – where the Court expressly acknowledges that “the regulations did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions”.

the exclusion limits only Article 168 itself, rather than being a general prohibition on use of the Treaty to harmonize this area. It is still possible to harmonize healthcare using Article 114 of the Treaty, insofar as such harmonization serves the goals of removing obstacles to the free movement of services or appreciable distortions of competition\textsuperscript{10}. Moreover, Article 352 of the Treaty allows other measures necessary for the internal market. These two latter articles are the most obvious legal bases for healthcare related measures. Additional possibilities are Articles 50 and 59 of the Treaty allowing measures to be taken to promote freedom of establishment and the free movement of services. EU is required to take non-economic interests, such as health, into account in its internal market legislation\textsuperscript{11}. The Court has found that so long as such legislation genuinely serves movement and competition goals, it is no objection that it also takes account of health issues, not even if it contains provisions specifically addressing them\textsuperscript{12}. On the one hand this is reasonable. It is not possible to separate the economic and the non-economic and it is desirable that economic law not trample on other interests. So far internal market legislation remains primarily oriented towards economic goals, so the admission of other interests serves in fact to make it easier for economic law to be used to regulate sectors of great non-economic importance – such as healthcare. It would be politically unacceptable to apply Article 114 of the Treaty to health if only trade matters could be considered. If broader values can be taken into account the article effectively becomes more broadly applicable\textsuperscript{13}.

\textsuperscript{10} Case C-491/01 Ex parte BAT [2002] ECR I-11453.
\textsuperscript{11} See: Article 114 (3); 169 (1) of the Treaty.
\textsuperscript{13} G. Davies, The Community’s internal market based competence to regulate healthcare: scope, strategies and consequences, Maastricht Journal of European and Comparative law 2007, no 14(3), s. 218-220.
Notwithstanding the fact that the EU lacks the competence to intervene directly in the field of healthcare services, there are a number of specific measures, which either coordinate or harmonize issues directly linked to the administration of such services. However, the actual impact of the EU law on national healthcare systems has had the direct application by the Court of the general Treaty rules on the internal market to the provision of healthcare services.

2. Treaty-based freedom to provide medical services

This point seeks to review the key aspects of the case law concerning cross-border medical treatment. The analysis is focused on five key issues: firstly, on the EU impact on the Member States’ exclusive competence in healthcare; secondly on the exclusive MS’ powers to delimit social benefits; thirdly on the MS’ freedom to establish limitative lists of medical services paid for by its social insurance system; fourthly, on medical treatment as a service; and finally on the Member States’ obligation to follow the ECJ’s case law on the freedom to provide medical services.

In *tobacco advertising directive* case\(^{14}\) that may perfectly be used as an illustrative case study of the EU impact on the Member States’ exclusive competence in healthcare – the Court reiterated that Article 129(4) of the Treaty excluded any harmonisation of Member States’ laws and regulations designed to protect and improve human health. However, that provision did not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. Indeed, the third paragraph of Article 129(1) provides that health requirements were to form

a constituent part of the Community’s other policies\textsuperscript{15}. In Müller-Fauré, van Riet\textsuperscript{16} case ECJ decided that it follows from the settled case-law that Community law does not detract from the power of the Member States to organise their social security systems\textsuperscript{17}. Therefore, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions on which social security benefits are granted\textsuperscript{18}. However, it is nevertheless the case that the Member States must comply with Community law when exercising that power\textsuperscript{19}. Therefore, achievement of the fundamental freedoms guaranteed by the Treaty inevitably requires MS to make some adjustments to their national systems of social security. It does not follow that this would undermine their sovereign powers in this field. It is sufficient in this regard to look to the adjustments which they have had to make to their social security legislation in order to comply with Regulation No 1408/71, in particular with the requirements laid down in Article 69 thereof regarding the payment of unemployment benefit to workers residing in the territory of other MS when no national system provided for the grant of such benefits to unemployed persons registered with an employment agency in another MS. Furthermore, a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system

\textsuperscript{15} Ibidem, paras 77-78.


\textsuperscript{17} Müller-Fauré, van Riet, para 100; see also: case 238/82 Duphar and Others [1984] ECR 523, para. 16, and case C-70/95 Sodemare and Others [1997] ECR I-3395, para. 27.


providing benefits in kind\textsuperscript{20}. The Court has, in particular, held that a medical service provided in one Member State and paid for by the patient cannot cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State’s sickness insurance legislation which is essentially of the type which provides for benefits in kind\textsuperscript{21}. The requirement for prior authorisation where a person is subsequently to be reimbursed for the costs of that treatment is precisely what constitutes the barrier to freedom to provide services, that is to say, to a patient’s ability to go to the medical service provider of its choice in a Member State other than that of affiliation. There is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly\textsuperscript{22}. Similarly, in \textit{Watts} case\textsuperscript{23}

\textsuperscript{20} The healthcare systems in Member States are organized according to two main models and may be classified into two brand categories: a) National Health Systems – based on the Beveridge model – which recognize a universal right for the whole population to receive (nearly) free medical care, financed from tax revenues; such systems are to be found in the UK, Ireland, Spain, Italy, Portugal, Greece, Denmark, Finland and Sweden; b) Social Insurance Systems – based on Bismarckian model – where coverage is dependant upon the exercise of some activity or Membership in a group, and are mainly financed through the payment of premiums. Such systems may be further divided into: 1) benefits in kind systems where the patient goes to some contracted health provider and receives treatment, while the latter gets paid directly from the social security institution, such systems are to be found in Austria, Germany, and the Netherlands and 2) reimbursement systems, where the patient goes to the health provider of his choice, pays the fees and then gets reimbursed by the social security institution, such systems are to be found in Belgium, France and Luxembourg. National Health Systems leave very little room for the application of free market and competition principles, while the Social Insurance Systems, especially the ones based on reimbursement are more adapted to such preoccupations.


\textsuperscript{22} \textit{Müller-Fauré}, van Riet, para 102-103.

ECJ reminded that, according to Article 152(5) EC, Community action in the field of public health is to fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care. That provision does not, however, exclude the possibility that the Member States may be required under other Treaty provisions, such as Article 49 EC, or Community measures adopted on the basis of other Treaty provisions, such as Article 22 of Regulation No 1408/71, to make adjustments to their national systems of social security. It does not follow that this undermines their sovereign powers in the field. The obligation of the competent institution under both Article 22 of Regulation No 1408/71 and Article 49 EC to authorise a patient registered with a national health service to obtain, at that institution’s expense, hospital treatment in another Member State where the waiting time exceeds an acceptable period having regard to an objective medical assessment of the condition and clinical requirements of the patient concerned does not contravene Article 152(5) EC.

The Court for the first time decided on the exclusive MS’ powers to delimit social benefits in 1980, in *Una Coonan v Insurance Officer* case. When Mrs Coonan, an Irish national brought an action against a local social security officer in the UK, the key question raised was – whether and if so, under what conditions, a national of a Member State – in this case of Ireland – who, after being employed in that Member State, came to the UK and worked there before she reached pensionable age in her country of origin but after she had reached pensionable age in the UK is entitled in that second Member State to the cash sickness benefits provided for workers under its social security legislation? ECJ

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24 See to that effect Müller-Fauré and van Riet, para. 102, and, by analogy, Case C-376/98Germany v Parliament and Council [2000] ECR I-8419, para 78.
25 Case C-372/04,Yvonne Watts, para 146-148.
decided that Articles 1 (A) and 3 of regulation 1408/71 must be interpreted as meaning that it is for the legislature of each Member State to lay down rules for vesting a right or imposing an obligation to become affiliated to a social security scheme or to a particular branch under such a scheme provided always that in this connexion there is no discrimination between nationals of the host state and nationals of the other Member States. Consequently if national legislation makes affiliation to a social security scheme or to a particular branch under that scheme conditional under certain circumstances on prior affiliation by the person concerned to the national social security scheme, regulation no 1408/71 does not compel MS’ to treat as equivalent insurance periods completed in another MS and those completed previously on national territory.

Another vital for exclusive MS’ powers to delimit social benefits issues were rules of a Member State which required to take into account dependent children for the calculation of family allowances subject to the condition that they reside on the national territory. This kind of questions arose in two sets of proceedings between Mr Stöber and Mr Piosa Pereira, on the one hand, and Bundesanstalt für Arbeit, on the other, in relation to the latter’s refusal to take their children who were non-resident in Germany into account for the purposes of determining the amount of dependent children’s allowances under German law. By virtue of paragraph 2(5) of the Bundeskindergeldgesetz (German Law on Allowances in respect of Dependent Children) of 25 June 1969, children who were not habitually or normally resident in Germany were not taken into account for the purposes of calculating family benefits. ECJ decided that - Article 52 of the EC Treaty must be interpreted as precluding national rules which cause the taking of a self-employed person’s children into account when calculating family allowances to be dependent upon their residing in that Member State. In the absence

of objective justification, such rules discriminate against migrant workers, since it is primarily their children who reside abroad\textsuperscript{28}.

Another case-law principle influencing cross-border medical health care is freedom to establish limitative lists of medical services paid for by a Member State’s social insurance system. Very illustrative examples confirming MS’s exclusive powers in this area are the two joined cases: \textit{Geraets-Smits and Peerbooms}\textsuperscript{29}. Mrs Geraets-Smits suffered from Parkinson’s disease. In 1996, she requested Stichting VGZ to reimburse the costs of care received in Germany for specific, multidisciplinary treatment of that disease. That method involved, inter alia, examinations and treatment to determine the ideal medical treatment, physiotherapy and ergotherapy and socio-psychological support. Mr Peerbooms fell into a coma following a road accident in 1996. He was taken to hospital in the Netherlands and then transferred in a vegetative state to the Austrian clinic in 1997, there he underwent special intensive therapy using neurostimulation. In the Netherlands, that technique is used only experimentally at two medical centres and patients over the age of 25 years are not allowed to undergo this therapy. It is therefore common ground that if Mr Peerbooms born in 1961, had remained in the Netherlands, he would not have been able to receive such treatment. In 1997 Mr Peerbooms’s neurologist requested Stichting CZ to pay the costs of the treatment abroad. Deciding the joined cases the Court firstly determined whether the situations at issue in the main proceedings did indeed fall within the ambit of the freedom to provide services provided for in Articles 59 and 60 of the EC Treaty. Than reminded the settled case-law establishing that medical activities fall within the scope of Article 60 of the EC Treaty, there being no need to distinguish in that regard between care provided in a hospital environment and care

\textsuperscript{28} \textit{Ibidem}, para 41.

provided outside such an environment\textsuperscript{30}, at the same time it is worth stressing that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement\textsuperscript{31}, so that the fact that the national rules at issue in the main proceedings are social security rules cannot exclude application of Articles 59 and 60 of the EC Treaty\textsuperscript{32}.

The Court’s concept of healthcare services falling within the scope of Article 49 EC - on the provision of services has been undoubtedly one of the most radical steps, undertaken by the ECJ. Through the recognition that healthcare services come within the economic circuit, the Court rendered applicable not only the rules on the internal market but also these on competition, state aids and public procurement\textsuperscript{33}. The variable, unpredictable and often cumulative effects that these rules may have when applied to the various health care systems of Member States and the ensuing legal uncertainty may constitute the decisive thrust towards further EU action in the field. First, the Court has qualified medical activities as services within the meaning of Articles 49 and 50 EC Treaty and later, on the basis of that qualification, the Court has proceeded to define the conditions under which reimbursement of medical expenses incurred in other Member States may be obtained. In that regard, a fundamental distinction has to be drawn between the cases where the reimbursement is to take place according to relevant articles of the social security coordination regulations and the cases where it is to take place outside the scope of application of these provisions.


\textsuperscript{32} Kohll, para 21.

The text of Article 49 EC explicitly mentions only the freedom to provide services, and not that to receive them. However, in cases such as *Luisi and Carbone* (1984) and *Bachmann* (1992) the European Court of Justice had clarified that this freedom included the freedom for the recipient of services to travel to another Member State in order to receive the service there i.e. tourists, *per-sons* receiving medical treatment and persons travelling for the purposes of education or business were to be regarded as recipients of services.\(^{34}\) Deciding a very controversial case brought by the Society for the Protection of Unborn Children Ireland Ltd („SPUC“) against Stephen Grogan\(^ {35}\) ECJ determined that medical termination of pregnancy, performed in accordance with the law of the state in which it is carried out, constituted a service within the meaning of Article 60 of the Treaty. The provision of information on an economic activity was not to be regarded as a provision of services within the meaning of Article 60 of the Treaty where the information was not distributed on behalf of an economic operator but constituted merely a manifestation of freedom of expression. As a result, it was not contrary to Community law for a Member State in which medical termination of pregnancy was forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy was lawfully carried out and the

\[^{34}\text{See especially: joined cases 286/82 and 26/83 Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro, [1984] ECR 377, para 16: “the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there” - in this case, actually involving undefined healthcare services; case C-204/90 Hanns-Martin Bachmann v Belgium [1992] ECR I-249, para 31 - which states the restrictions in the home Member State on the ability of consumers to purchase services in another Member State constitute a restriction on the ability of the providers in that other Member State to provide services to them. Combining these cases, such rules can therefore be seen as restricting both the freedom of the provider, and that of the recipient of the services in question, and therefore as a barrier to the freedom to provide services in both senses; Case C-158/96 Kohll, para 35.}\]

\[^{35}\text{Case C-159/90.}\]
clinics in question had no involvement in the distribution of the said information. With the landmark cases Kohll and Decker\textsuperscript{36}, the Court based its argumentation directly on the Treaty provisions by confirming that healthcare services have been considered services in the meaning of the Treaty and have been thus subject to the rules on free movement of services. Therefore, any national measures resulting in making the provision of services between Member States more difficult than the provision of services purely within one Member State breach primary law unless properly justified\textsuperscript{37}. The vital questions arose in proceedings between Mr Kohll, a Luxembourg national, and the Union des Caisses de Maladie, with which he was insured, concerning a request by a doctor established in Luxembourg for authorisation for his daughter, who was a minor, to receive treatment from an orthodontist established in Trier (Germany). Mr Decker, a Luxembourg national, initiated proceedings against and the Caisse de Maladie des Employés Privés because his request for reimbursement of the cost of a pair of spectacles with corrective lenses purchased from an optician established in Arlon, Belgium, on a prescription from an ophthalmologist established in Luxembourg was rejected on the ground that they had been purchased abroad without its prior authorisation. The key points of these judgements can be summarised as follows: the determination of the national social security schemes falls within the competence of the Member States alone\textsuperscript{38}; medical goods and treatments are subject to the Treaty rules on free movement of goods\textsuperscript{39} and services\textsuperscript{40}; the prior authorization scheme implemented

\textsuperscript{36} Cases: C-158/96 & C-120/95.

\textsuperscript{37} C-158/96 Kohll, para 33; C-368/98 Vanbraekel, para 44; C-157/99 Ger-aets-Smits and Peerbooms, para 61; C-8/02 Leichtle, para 37; C-372/04 Watts, para 94; C-444/05 Stamatelaki, para 25.

\textsuperscript{38} C-120/95 Decker, para 21-23; C-158/96 Kohll, para 17-19.

\textsuperscript{39} C-120/95 Decker, para 24; See also C-238/82 Duphar, para 18.

\textsuperscript{40} C-158/96 Kohll, para 21.
in the national legislation is considered a barrier to free movement; and this restriction of free movement cannot be justified. Undoubtedly, the merit of Kohll and Decker is that they unequivocally strengthened the patients’ position by declaring that the reimbursement of the cost of medical products and services obtained in other Member States is no longer to be regarded as a privilege given by the competent insurance organ, but rather as an enforceable individual right which can only in some cases be limited to certain extend.

Starting from this basis, the Court has systematically diminished the discretionary power of the Member States in the field of healthcare. In 2001, in Vanbraekel case the Court concluded that EU citizens who have obtained from their health insurance organ an authorization to receive medical treatment in a Member State where the rules for insurance cover are less advantageous than at home can rely on Art. 56 TFEU to claim reimbursement covering the difference. At the same time the ECJ systematized all the case–law reimbursement rules. For instance, where the request of an insured person for authorisation on the basis of Article 22(1)(c) of regulation no 1408/71 has been refused by the competent institution and it is subsequently established that such refusal was unfounded, the person concerned is entitled to be reimbursed directly by the competent institution by an amount equivalent to that which would have been borne by the institution of the place of treatment under the rules laid down by the legislation applied by the latter institution if authorisation had been properly granted in the first place.

As Article 22 of that regulation is not intended to regulate any reimbursement at the tariffs in force in the Member State of registration, it does not have the effect of preventing or prescribing payment

41 C-120/95 Decker, para 36; C-158/96 Kohll, para 35.
42 C-120/95 Decker, para 39-45; C-158/96 Kohll, para 53.
43 Case C-368/98 Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC), [2001] ECR I-05363.
by that State of additional reimbursement covering the difference between the system of cover laid down by the legislation of that State and the system applied by the Member State of treatment, where the former is more advantageous than the latter and such reimbursement is provided for by the legislation of the Member State of registration. Article 59 of the EC Treaty should be interpreted as meaning that, if the reimbursement of costs incurred on hospital services provided in a Member State of stay, calculated under the rules in force in that State, is less than the amount which application of the legislation in force in the Member State of registration would afford to a person receiving hospital treatment in that State, additional reimbursement covering that difference must be granted to the insured person by the competent institution.\(^44\). Elchinov case\(^45\) seems to be a good evidence for the fact that EU penetrates areas lying beyond the European Union’s own competence, this judgement demonstrates that prior authorisations may be dispensed with in cases of medical urgency.\(^46\) A national rule excluding, in all cases, payment for hospital treatment given in another MS without prior authorisation deprives the insured person of reimbursement from the competent institution in respect of such treatment, even though all other conditions for such reimbursement to be made are met, does not satisfy the requirement of proportionality, thus, it constitutes an unjustified restriction on the freedom to provide services.\(^47\) Than the Court reiterated that – it was for each MS to decide which medical benefits are reimbursed by its own social security system. To that end, the MS concerned

\(^{44}\) A. P. Van der Mei, *Cross-border access to healthcare and entitlement to complementary “Vanbraekeel reimbursement”*, European Law Review 2011, no 36, 431-439.


\(^{47}\) Case C-173/09 Georgi Ivanov Elchinov, para 45-47.
is entitled to list precisely treatments or treatment methods or to state more generally the categories or types of treatments or treatment methods. Article 22(2) of Regulation 1408/71 precludes the national bodies competent to rule on an application for prior authorisation from presuming that the hospital treatment which cannot be given in the MS of residence is not included in the benefits for which reimbursement is provided for by the legislation of that State and, conversely, that the hospital treatment included in those benefits can be given in that MS.

The most significant thesis of this judgement is that – if a refusal to issue the authorisation was unjustified, when the hospital treatment has been completed and the related expenses incurred by the insured person, the national court must oblige the competent institution, in accordance with national procedural rules, to reimburse that insured person in the amount which it would ordinarily have paid if authorisation had been properly granted.

Learned from experience and considering the future case-law it can easily be foreseen that the Court will probably continue to play its role in demarcating the scope of patient’s rights at the same time exceeding its Treaty powers. Especially as there is another aspect which is becoming more and more important within the EU sphere, namely the subjective right of citizens to health care, proclaimed in Article 35 of the Charter of Fundamental Rights of the European Union, since – ‘being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties’.

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48 Ibidem, para 59.
49 Ibidem, para 73.
50 OJ 2012/C 326/02; The provision states that ‘everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’.
51 Opinion of the European Economic and Social Committee on ‘Healthcare’, approved by the Plenary Session on 16 and 17 July 2003, OJ 2003 C 234, p. 36.
right is perceived as a personal entitlement, unconnected to a person’s relationship with social security\textsuperscript{52}, and the Court of Justice cannot overlook that aspect\textsuperscript{53}.

Having considered the above case-study and Article 168 (7) TFEU and similarly, recital 4 and 19 of the Preamble of the Patient Mobility Directive stating that Member States retain responsibility for providing safe, high quality, efficient and quantitatively adequate healthcare to citizens on their territory one has to admit that in the course of the high level process of reflection on patient mobility and healthcare developments in the EU, a few key areas of national responsibility have been identified. They include such issues as: how the health and social security system is financed (e.g. tax, social insurance etc) and overall organisation of the system including how prices are fixed; internal allocations of resources (human resources too) through central or devolved mechanisms; setting overall priorities for health expenditure, and the right of determining the scope of publicly funded care; prioritisation of individuals’ access to the system (if being paid for by the national scheme) with regard to clinical need; management strategies within set budgets, for instance the use of evidence-based medicine – with allowance for national diversity in health policies and treatment patterns; and issues of quality, effectiveness and efficiency of health care such as clinical guidelines\textsuperscript{54}.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{52} F. Cavas Martínez, C. Sánchez Triguero, \textit{La protección de la salud en la Constitución Europea}, Revista del Ministerio de Trabajo y Asuntos Sociales, No 57, Madrid, 2005, p. 28.
\item \textsuperscript{53} Opinion of advocate general Ruiz-Jarabo Colomer delivered on 11 January 2007, Case C-444/05 Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmation (OAEE), para 40.
\end{enumerate}
\end{footnotesize}
3. Patient-centred approach to Patient Mobility Directive?

It was considered a remarkable success when on 19 January 2011 the European Parliament by a large majority approved its legislative resolution on the Council position at first reading with a view to the adoption of a directive on the application of patients’ rights in cross-border healthcare, approved by the Council on 28 February. Thus a new piece of the legal framework on European patient mobility was born. The Directive has become known as the Patient Mobility Directive\(^{55}\). The agreement of the EP and the Council put an end to a lengthy and complicated legislative procedure, which began in 2006, when healthcare services were excluded from the material scope of the so-called Services Directive\(^{56}\) due to their special characteristics\(^{57}\), and the legislators decided in favour of adopting a separate legal instrument on healthcare service provision.

The Directive’s stated aim is to, incorporate the findings of the CJEU on the provision of healthcare services and to clarify its relationship with the existing framework of social security coordination. It also wants to facilitate cooperation among the Member States in the field of healthcare\(^{58}\). Importantly, the Directive does not replace EU


\(^{58}\) Article 1 (1), Patient Mobility Directive.
legislation on social security co-ordination. The two-track system is therefore preserved with the more beneficial rights guaranteed\(^\text{59}\). Therefore, following Article 8 (3) of the Directive the states authorities must, as a first step, determine whether the conditions of the Regulation are satisfied before applying the Directive. Moreover, its declared intention is to cease the legal uncertainties related to the Union legislation on patient mobility. Although satisfying this ambition is more than desirable from the patients’ point of view, it is debatable whether the recently adopted Directive can reach its target and fully tackle the problems mentioned above in order to develop the healthcare systems in the European Union in a patient – friendly way.

The question whether the Directive succeeded in its objective of providing clarity for patients as to their entitlements or not has still been up-to-date. The Directive adopts the case – law solutions – which are based on the crucial distinction between non-hospital care (no authorization required) and hospital care (an authorization may be required). The challenge of the adoption of the Directive was to recognize the leeway enjoyed by the States for requiring prior authorization, including enlarging the categories of care likely to be subject to prior authorization requirements and reimbursement rules.

One source of confusion under the previous system concerned non-hospital care, which was subject to authorization under the Regulation 1408/71 but not the Treaty. Article 8 (2) of the Directive provides some clarification in this regard, but the provisions setting out the types of care that may be subject to prior authorization seem to be unclear and inconsistent with the previous case law. Under the Patient Mobility Directive MS’s may relay on 3 mandatory requirements regarding healthcare that may be subject to a prior authorisation and these are as follows: firstly, healthcare that is made subject to planning requirements

\(^{59}\) Recital 31, Patient Mobility Directive.
and involves overnight hospital accommodation of the patient in question for at least one night; or requires use of highly specialised and cost-intensive medical infrastructure or medical equipment healthcare involves treatments presenting a particular risk for the patient or the population; or is provided by a healthcare provider that, on a case-by-case basis, could give rise to serious and specific concerns relating to the quality or safety of the care. It seems to be possible that the two final conditions may perfectly encompass non-hospital care too, and this would be a step backwards in comparison with the case-law solutions.

The most difficult pre-legislative negotiations were therefore focused on the prior authorization requirement for the delivery of medical care. For the European Parliament, authorization had to be the exception and not the rule, whereas the States defended the opposite position. The financial repercussions of patient mobility tend to affect more the smaller states, cross-border areas and the new Member States where medical services are relatively cheap in comparison with the Member States from old Europe. The role of resources is a key factor for shaping transposition within the Member States. Especially in Eastern European countries, for instance Poland and Bulgaria, where resources are likely to be particularly important. The authorization is a key feature that allows especially new Member States to regulate the flow of patients and prevent a potential exodus of the latter to hospitals abroad. Therefore Polish legislator when implementing the Directive extended an authorization requirement to as many cases as possible. Limited resources within MS’s public health care systems constitute an important concern. Polish authorities on the one hand are concerned about the prospect of paying for their own citizens travelling abroad, but they also tend to see the Directive as a potential business opportunity for Polish service providers, particularly in the border regions. This has led the Polish government to sponsor campaigns, for example in Sweden, to attract foreign patients. A growing number
of Danes and Germans already use Polish dental care facilities. Most of this traffic goes to private providers in Poland.

A significant challenge arises also from the great diversity of national healthcare systems. While there are a few recurring general models, when it comes to harmonization the devil is in the detail. Mechanisms and levels of payment and subsidy, the relationship between payers and providers, and the position of the patient in a given system are so different that it is hard to imagine any significant degree of substantive harmonization that would not amount to a healthcare revolution in many states.

The Coordination Regulations, the CJEU case law and the Patient Mobility Directive contain different rules on the reimbursement of costs through public healthcare schemes. The differences relate to the requirement of advancing the healthcare costs and to the scope and level of reimbursement. As these are crucial questions, they influence patients’ choices to a great extent. Putting it simply, there are two ways, and two procedures to choose. Under the regulation – patient has to be authorized in advance and when the hospital treatment has been completed the actual price is paid usually by social security of the Member State of insurance. Under the directive patient may or may not need an authorization – depending on the implementing measures and as a rule pays out of his pocket, and then applies for reimbursement. What is important a repayment cannot exceed prices of an analogous treatment in the country of patient’s insurance. The immediate

60 See footnote 19.

61 In Poland, access to cross-border medical healthcare in line with the coordination regulations is very limited, for instance, under the Article 26 ust.1 of Polish Medical Services Act the National Health Fund grants approx. 160 authorizations per year; A. Rutecka, Dostępność służby medycznej państw Unii Europejskiej dla obywatele polskiego w świetle orzecznictwa Trybunału Sprawiedliwości i polskiego sądownictwa administracyjnego oraz praktyki Narodowego Funduszu Zdrowia, Palestra 2013, nr 9-10, p. 142.
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consequences of these two features of the Directive, i.e. the payment up to the level of coverage at the Member State of affiliation and the up-front payment of costs by the patients, favour wealthier patients disproportionately. Since medical expenses can be considerable, patients treated under the provisions of the Directive will need to be able to cover these personally prior to being reimbursed. In addition to that, they will also need to cover travel and possibly accommodation expenses. Thus, whilst the Directive opens up national healthcare systems to foreign patients, it would be naïve to expect that it offers foreign treatment on equal terms. By emphasising the financial aspects of treatment abroad, the Directive exacerbates existing national divisions, and strengthens patients’ rights predominantly for those who can already afford to enjoy them. In a context of international comparison, this means that the Directive is likely to have greater impact in the older Member States, while its effect in the new ones will be limited to the wealthiest patients\(^\text{62}\). Therefore the Directive will have minimum to no impact for the majority of Bulgarian patients. Since the Directive requires only reimbursement to the level of coverage in the MS of affiliation, this puts Bulgarian patients at a serious disadvantage. Prices for medical treatments in Bulgaria are not determined according to market principles and are frequently undervalued. This means that the financial exposure to the Bulgarian healthcare system is minimal, whilst the price for treatment abroad will be shifted massively towards the patients\(^\text{63}\). The minimalistic transposition approach of new Member States has been characterized not only by extensive implementation of an authorization requirement, but also by very restrictive reimbursement rules – excluding extra repayments for instance for medical transport.


\(^{63}\) *Ibidem*, p. 13.
4. Medical tourism – a big chance or a great danger?

It is noteworthy that there are many widely used terms with similar meanings concerning persons receiving healthcare abroad. One of the most commonly used expressions is ‘medical tourism’\textsuperscript{64}, however this “industry-driven” term seems to insinuate leisurely travelling and does not capture the seriousness of most patient mobility. The term ‘tourism’ is often affixed to diverse forms of patient movements, such as: ‘abortion tourism’, ‘reproductive tourism’, ‘stem cell tourism’, ‘transplant tourism’ or even ‘euthanasia tourism’, in which cases the intention behind the patient movement is far from the traditional notion of tourism. On the contrary, these are usually very delicate situations that involve persons who are desperately seeking the medical treatment required by their state of health. However, medical tourism also includes situations wherein health services and ancillary touristic services are closely linked together\textsuperscript{65}.

Cross-border health care professional practice is only marginally affected by either EU employment law or the provisions on services. Undoubtedly, there are numerous legal issues which are closely or less closely linked to cross-border patient mobility – within this study special attention will be paid to cross-border medical liability since the financial liability for delivering medical services to foreigners became one of the major threats for new Member States implementing Patient

\textsuperscript{64} In this context, medical tourists are looked at as consumers on the healthcare market; N. Lunt, P. Carrera, Medical tourism: Assessing the evidence on treatment abroad, Maturitas 2010, Vol. 66, p. 28; J. Connell Contemporary medical tourism: Conceptualisation, culture and commodification, Tourism Management 2013, Vol. 34, p. 2.

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Mobility Directive. Among the responsibilities of the MS of treatment the Directive points out at the MS’s obligation to provide patients with relevant information on the standards of healthcare including provisions on supervision and assessment of healthcare providers. The healthcare providers should guarantee certain scope of information to help patients to make an informed choice on, including but not limited to, treatment options, the availability, quality and safety of the healthcare, as well as their insurance cover or other means of personal or collective protection with regard to professional liability. Member State of treatment is obliged to ensure that there are transparent complaints procedures and mechanisms in place for patients, in order for them to seek remedies in accordance with the legislation of the Member State of treatment if they suffer harm arising from the healthcare they receive. Systems of professional liability insurance, or a guarantee or similar arrangement that is equivalent or essentially comparable as regards its purpose and which is appropriate to the nature and the extent of the risk, should be in place for treatments provided there.

Consumer protection is regarded as an overriding principle of the EU law. It is clear from the above that patient - consumer should also be at the core of EU health law. This is so, in respect of the actual treatments and pharmaceuticals offered to patients, but also in respect of the overall position that the patient occupies in the process of health delivery, research and development and data protection. The commented Directive initiates discussion on certain patient - consumer rights i.e: right to health protection, right to information, right to damages etc. As with health practitioners, the free movement of pharmaceuticals (goods) within the EU is considerably restricted due to consumer protection considerations. Patient - consumer protection is coordinated at the EU level through lots of categories of measures. However, the impact of the

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66 Patient Mobility Directive, Article 4 b.
67 Ibidem, Articles 4 c, d.
internal market rules on services, persons and goods is limited. The Court in drawing a balance between the interests of Member States in protecting patients’ or consumers’ health and the interests of a single market tend to respect the legitimate interests underpinning national regulatory structures protecting human health\textsuperscript{68}. Therefore systems of professional liability insurance in the EU remain untouched by the EU law and personal injury compensation levels in Europe vary significantly. There is a world of discrepancy between the new MS’s and the old MS’s insurance rates for health providers\textsuperscript{69} and damages granted by national courts for non-pecuniary losses\textsuperscript{70}.

Facing significant financial risk while delivering cross-border health-care services medical sectors, especially in new Member States, initiated stormy discussions on professional liability, posing vital questions concerning key aspects of private international law – i.e. what law would be applicable, which court would be competent, whether forum shopping practices in patient - consumer cases for damages would be possible? Having considered that a contract for medical treatment abroad is a consumer contract the first step would

\textsuperscript{68} V.G., Hatzopolous, \textit{Is it healthy to have an EU health law?} European Law Review 2005, no 30, 697-710.

\textsuperscript{69} Considering professional liability of nurses and midwives: in Poland insurance cover amounts to € 30.000 per 1 case, to compare in UK: insurance cover amounts to £ 5 -10 million per case. In Germany nurses and midwives pay € 3,689 liability insurance fees annually, gynaecologists up to € 90 000 of insurance fee annually, insurance cover amounts to € 2 000 000 per case, at the same time average level of damages granted for personal injury suffered during a delivery is 2 900 000 €; \textit{Survey of European Midwifery Regulators}, 2 Issue, French Chamber of Midwives 2010; J.K. Emons, M.I.J. Luiten, \textit{Midwifery in Europe An inventory in fifteen EU-Member States}, Deloitte &Touche, Leusden 2001.

\textsuperscript{70} Comparing levels of damages granted by national courts in the EU – in Germany: paralysis caused by injury – € 175.000 – 250. 000, loss of vision – € 75.000 – 250.000, loss of sense of smell – € 3.500 – 22 500, post traumatic stress disorder – € 12.500-110.000; France: paralysis caused by illness or injury – € 276 000, loss of vision – € 230 000; The UK: paralysis caused by illness or injury – € 270.000 – 333.000, loss of vision – € 225.000, loss of sense of smell – € 33.000, post traumatic stress disorder – € 16.500 – 83.000.
be to apply Regulation 1215/2012\textsuperscript{71} general rule, that a person can be brought to justice only in front of the courts from the Member State where it has its domicile, no matter its nationality (Article 4 (1)), however – Regulation 1215/2012 sets out special rules, taking into consideration the consumer’s position: when the consumer acts as a plaintiff he/she can start the procedure in the state where he/she has his domicile or in the state where the professional is established depending on his choice. In case the consumer acts as a defendant, the professional can only start the action in front of the courts from the state where the consumer has his domicile (Article 5, 18)\textsuperscript{72}.

**Conclusion**

As it has been indicated above, patient mobility can be considered as standing at crossroads between healthcare legislation and the rules on free movement. Accordingly, the legal instruments in this field are complex and different in nature. The current instruments governing cross-border patient mobility can be grouped into three main categories: firstly, the coordination scheme – generally referred to as the Regulation-based approach; secondly, the rulings of the CJEU considering


healthcare as subject to the Treaty rules on free movement of services, developing a case law based approach; and thirdly, the Patient Mobility Directive aiming to create a coherent legal framework on cross-border healthcare. The “patient mobility” jurisprudence has been described as creating a right to obtain effective and speedy medical treatment anywhere in the EU. However, while the case-law upholds the free movement paradigm and important individual rights – as guaranteed in Article 35 of the Charter of Fundamental Rights of the EU the subjection of national healthcare to the full rigours of the internal market has proved highly controversial, not least because it is considered to be an unwarranted incursion into Member State’s autonomy to organize their social security system. Undoubtedly, it should be acknowledged that there are some constitutional limits to the scope of lawful EU activity in the health field – the effect of the catch-all provisions of Articles 352 and 114 TFUE – in the light of the tobacco advertising case and the subsequent Imperial tobacco cases\(^7\) can perfectly be controlled.

Although European patients have the right to cross-border healthcare, they encounter various difficulties – both of a non-legal and legal nature – that discourage or even deter them from exercising their rights. The current Union legislation on cross-border patient mobility has several defects due to which it cannot fully tackle the potential problems patients face when obtaining healthcare in a Member State other than their state of residence. Even though the EU law entitles border-crossing patients to claim the reimbursement of costs occurred in relation to cross-border healthcare, the interaction between different financial regimes which are in place in the EU is often unclear and results in confusion on the patients’ side. Furthermore, the financial mechanism of the

Patient Mobility Directive has the potential to increase inequality and result in a one-sided European patient mobility pattern.

Both the health law and policy are crucial for the EU internal market, however material limitations to health services and the gatekeeping function operated by state administration, medical health insurance providers and finally unwilling – due to professional liability – medical professionals, create serious obstacles. State administrative and health sector resources influenced Patient Mobility Directive transposition in new Member States significantly. Having met considerable resistance in Member States the implementation schemes were specifically designed to limit the financial exposure of both sectors. Cautious or protectionist transpositions created as many safeguards and barriers as possible. Extensive implementation of pre-treatment authorization requirement and very restrictive reimbursement rules made Patient Mobility Directive disproportionately beneficial to richer patients, leaving the poorer ones, like those in Bulgaria, with little chance of enjoying cross-border treatments. Therefore, vital questions typical to health law analysis – whether access to healthcare services, entitlement of patients and health rights are independent (?) has to be negative – they are wholly dependent upon the material availability of a given service.
The City of Slupsk after 10 years of Polish membership in the European Union

On May 1, 2014 we celebrated 10th anniversary of Polish membership in the European Union. This round anniversary was an excellent opportunity to present and issue reports, analyses and balances showing how the opportunities arisen due to the accession of Poland to the EU have been used over the ten years. In this article I will present how local authorities have changed during these ten years, on the example of the city of Slupsk.

At the time of Polish accession to the European Union, in all regions of Poland Gross Domestic Product (GDP) per capita was less than 75% of the EU average. In 2004, Poland received 435 million euro, while in 2007, it was already 3.1 billion under the Structural Funds. In the years 2004–2007 nearly 85,000 projects worth 22.5 billion euros, including 15,000 projects aimed at business support were implemented. The priority was given to investments in basic infrastructure. These projects constituted half of actions in the framework of European funds.

In the years 2007–2013 Poland was granted 67.3 billion euros. This amount classifies our country as the largest beneficiary of EU cohesion policy. During these years Poland has managed to carry out

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projects due to which: more than 43000 jobs have been created, 3.2 million citizens have gained access to improved public transport, 5800 kilometres of roads have been built or rebuilt, 800000 people have gained access to broadband Internet and 6.7 million people have been trained thanks to European Social Fund³.

In the years 2014–2020 Poland will implement 22 operational programs under the cohesion policy⁴, for which Poland has received about 77.6 billion euros, thereby remaining the biggest beneficiary of EU funds⁵.

How does the Polish government make use of the opportunity of membership in the European Union? Does the government spend structural funds effectively? Have the government sought possibilities outside the European funds? I will attempt to answer these questions on the example of Slupsk.

Slupsk is a city in the Pomeranian Voivodeship, in the northern part of Poland. Before 1 January 1999, it was the capital of the separate Slupsk Voivodeship. It is the administrative seat of Slupsk County, although it is not part of that county (the city has county status in its own right). It has a population of 98757 and its territory amounts to 43.15 square kilometres⁶.

In the years 2004–2014 Slupsk received nearly 500 million from European funds. For the realization of only 52 major investments the

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⁵ Ibidem.

The city spent almost 481 million zlotys. Funding from the European Union amounted to 347 million, which gives 72% of the total investment.7

One of the implemented projects was: „The water and wastewater management in the area of Slupsk”. The beneficiaries of this project were: Wodociągi Slupsk, Sp. z o.o. as a leader, City of Slupsk, municipality of Slupsk and Kobylnica. The project was implemented through co-financing from the Cohesion Fund. The funding amounted to 13.7 million euros. The aim of the project was to build a common sewage system, which would discharge sewage to a modern sewage treatment plant in Slupsk. As a result of the project, several goals were achieved, among others: expanding the sewage treatment plant in Slupsk, building a water treatment plant in Slupsk, building the main collector pipe in Slupsk, building a sanitary sewage system in City of Slupsk and municipality of Slupsk and Kobylnica.8

One of the biggest projects in Slupsk was „Redevelopment of the Prince’s Route within the 1st problem area of the Local Regeneration Programme of Slupsk for the years 2009–2015”. The project was carried out thanks to the co-financing from the European Regional Development Fund under the Regional Operational Programme for Pomeranian Voivodeship for the years 2007–2013. The total project value amounted to 55.6 million, while funding from the European Union amounted to 36.6 million. The project included: modernization of 47 tenement houses of the housing cooperative, construction of rainwater drainpipes on the Niedziałkowskiego Street and Krasińskiego Street, re-construction of the pedestrian precinct on the Wojska Polskiego Street, Starzyńskiego Street and Pierwszych Słupszczan Square, expansion of the “Rondo” Theatre, construction of the Workshop of Ceramics including equipment, construction of the Sports and Recreation Centre

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8 Ibidem.
including equipment, construction of NGO Social and Economic Centre. The project encompassed also the activities of the flexibility instrument – among others: festival of theatres, workshops in modern dance, photography, theatre and dance, juggling classes, stilt walkers, ceramics and art-therapy, martial arts and foreign languages classes, sports and recreational activities, psychological and pedagogical support for students and citizens of the redeveloped area.

The final project I would like to present is: „E-administration, E-School – Interactive implementation of e-administration services and electronic school registers in the City of Slupsk”. The project was completed due to the co-financing from the European Regional Development Fund under the Regional Operational Programme for Pomorskie Voivodeship for the years 2007–2013. The total project cost amounted to 3.12 million, while EU funding amounted to 2.14 million. The project aimed at creating a basis for the development of the information society in Slupsk through the construction, extension and modernization of platforms for cooperation between the residents and the city authorities and the modernization of Slupsk education system by replacing the traditional school registers with the electronic school registers.

The following activities fell within the scope of the project:

- purchase and implementation of applications of electronic school registers in Slupsk’s schools;
- purchase of 600 laptops, which will replace the traditional paper school register in educational institutions;
- construction of wireless networks in schools included in the project;

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The City of Slupsk after 10 years of Polish membership in the European Union

- purchase and implementation of the following portals: education, public consultation, intranet and e-learning platform for the citizens of Slupsk;
- purchase of services and equipment for the transmission of the session of the City Council;
- training sessions for the users to familiarize them with the applications and equipment’s work\(^{10}\).

The projects implemented with the financial support of the European Union constitute the most noticeable benefit of Polish membership in this international organization. However, there are also other benefits enjoyed by Slupsk.

One of the above-mentioned benefits is the possibility of becoming a member of the institutions and advisory bodies of the European Union. Committee of Regions is a perfect place for representatives of local and regional authorities, where they can represent the interests of local governments at the European Union level\(^{11}\). All draft legislative acts are presented to the Committee of Regions. Thus, the Members of the Committee of Regions are very well-informed about current EU policy. Maciej Kobyliński (Mayor of the City of Slupsk: 2002–2014) was a member of the Committee of Regions from May 2004 to December 2014. During the 100th Plenary Session of the Committee of Regions (11 April 2013) the opinion: „Support of the European Union for sustainable transformation in Societies during transition”\(^{12}\) delivered by Maciej Kobyliński was unanimously adopted. The opinion

\(^{10}\) Słupsk. 10 projektów na 10 lat Polski w Unii Europejskiej, p. 23–24.


constitutes part of the EU’s response to the recent political changes in its neighbourhood, especially in the countries of the Arab Spring. Maciej Kobyliński pointed out that: „EU local governments have already been involved for many years in local and regional projects with partner countries”. In that regard he also pointed out that platforms set up by the Committee of Regions, such as the Euro-Mediterranean Regional and Local Assembly (ARLEM) and the Conference of Regional and Local Authorities for the Eastern Partnership (CORLEAP) have been already supporting the exchange of experiences on cooperation between important regional and local players. M. Kobyliński also referred to the role of the Portal on Decentralised Cooperation, an online Committee of Regions tool aimed at facilitating and sharing successful decentralised cooperation projects\(^{13}\).

The creation of Europe Direct Information Centre (EDIC) may be considered as another benefit\(^ {14}\). The Europe Direct is an information network of the European Commission with 500 points operating in 28 Member States of the European Union. Every year, more than 10,000 organized events provide participants with knowledge, inter alia, concerning various European affairs and European funds\(^ {15}\).

From the 1\(^{st}\) January 2013 the Europe Direct Information Centre – Slupsk started operating. Inhabitants of the region can obtain there information on the functioning of the European Union, job opportunities in the European institutions, as well as the possibilities of obtaining funding from the European Union. EDIC organizes numerous European lessons, the National Knowledge Contest on the European Union: „Gwiezdny Krąg” as well as workshops and debates on European issues. European Grouping of Territorial Cooperation (EGTC)\(^ {13}\) Cities and regions from transition countries need direct access to EU funds, source: [http://cor.europa.eu/en/news/Pages/transition-countries-need-direct-access-to-funds.aspx](http://cor.europa.eu/en/news/Pages/transition-countries-need-direct-access-to-funds.aspx).


The City of Slupsk after 10 years of Polish membership in the European Union is a new legal instrument for conducting efficient and effective international cooperation by local and regional governments\textsuperscript{16}.

Moreover, European Documentation Centre (EDC) is also located in Slupsk. It is part of European Network of the Europe Direct Information Centre. Currently there are over 600 such centres all over the world, with about 400 located in the Member States of the European Union. EDC is the depositary of the European Union’s Publications. It collects and provides materials issued by the Office for Official Publications of the European Union in Luxembourg, publications of various European institutions and the Polish government, as well as non-governmental organizations\textsuperscript{17}.

European Documentation Centre’s collection includes books, magazines, brochures and maps, both printed and in electronic version. Materials are published mainly in Polish and English language versions. EDC has the following objectives\textsuperscript{18}:

- to collect, develop and make accessible thematically linked publications on the European Union and on integration processes in Europe;
- to facilitate promotion of materials on the European Union;
- to organize meetings on the European Union addressed to young people, students and other interested subjects.

Anyone seeking specific acts or information about European Union can turn to the EDC for help. European Documentation Centre in Slupsk has been the 19\textsuperscript{th} such institution in the country\textsuperscript{19}.

Adoption of Regulation No 1082/2006 of European Parliament and of the Council on a European grouping of territorial cooperation

\textsuperscript{19} Ibidem.
on 5 July 2006 (hereinafter referred to as: Regulation EGTC) has been a crucial event in terms of the legal framework for territorial cooperation in the European Union and its evolution. EGTC is the first legal instrument in the history of the EU governing this area. The issue of creation of legal norms at the level of territorial cooperation was placed in the centre of the integration process, which until now, had been neglected by the European legislator.

Local and regional authorities in the European Union faced a lot of problems in the field of international cooperation. In order to overcome these obstacles, the European Commission has taken action to enable creation of a group cooperation having legal personality at the level of the European Union.

On July 14, 2004, the European Commission adopted a proposal for Regulation of the European Parliament and of the Council establishing a European grouping of territorial cooperation (EGTC). This

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21 Committee of Regions, Europejskie Ugrupowanie Współpracy Terytorialnej, study for European Policy Studies Group, chaired by Professor Nicolas Levrat under the research program of the Committee of the Regions under the supervision of the Department of Political Analysis, Research and Legislative Planning (Mr Gianluca Spinaci, Jaroslaw Lotarski and Lucia Cannellini) and the COTER secretariat (Damian Lluna Taberner), http://cor.europa.eu/en/Archived/Documents/8af77b7b-a510-4d1b-9f8e-576a771eeb76.pdf.

22 Among the problems that can be identified one can enumerate in particular: different banking systems, differences in regulations relating to accounting policies and accounting. More information: Committee of the Regions, Europejskie Ugrupowanie Współpracy Terytorialnej, p. 57–62.

project was consulted with a number of bodies and environments\textsuperscript{24}, including the most interested – the Committee of Regions. The advisory body of the European Parliament, the Commission and the Council accepted the idea of establishing EGTC, proposing a few legislative changes in its opinion\textsuperscript{25}. The Committee of Regions has paid particular attention to the fact that part of the EGTC cooperation should be possible at three levels of international cooperation: territorial, inter-regional and trans-national, and not only territorial – as proposed by the European Commission in their proposal. Furthermore, the Committee also recommended that: „EGTC carries out tasks assigned by its Members or by a third party with the Members consent and in accordance with this Regulation“, so that in the future EGTC could apply for funding from the European Union\textsuperscript{26}.

International cooperation of local and regional government units in Poland, despite weak legal regulations, was carried out effectively for many years\textsuperscript{27}. Cooperation between Wielkopolskie Voivodeship and Georgia\textsuperscript{28}, or 25 years of cooperation within the framework of the Triple Entente Carlisle – Flensburg – Słupsk can serve as examples.

In Poland, until now there has been one example of a European grouping of territorial cooperation. It was established by two Polish regions, one region from Czech Republic and one from Slovakia, namely:

\textsuperscript{24} The draft Regulation was approved by the Economic - Social Committee, Official Journal C 255 z 14.10.2005, p. 76 and Committee of Regions, Official Journal C 71 z 22.03.2005.
\textsuperscript{26} \textit{Ibidem}, s. 49.
\textsuperscript{28} More: \url{http://www.umww.pl}. 
Opolskie and Śląskie Voivodeship (Poland), Moravian-Silesian Region (Czech Republic) and Zilinan Region (Slovakia). These regions first applied for the establishment of the grouping in 2009. After three years, on December 4, 2012, the first European Grouping of Territorial Cooperation which includes Polish regions was established – TRI-TIA. This is undoubtedly the first step for the Polish local government units in the activities of the European Grouping of Territorial Cooperation.

The City of Slupsk in agreement with its foreign partners also began the procedure of establishing the next EGTC.

Described activities constitute only part of the actions that the city of Slupsk has undertaken to benefit the most from the Polish membership in the European Union over the last 10 years. As can be seen from the examples, the outcome of the membership in the European Union cannot be assessed only on the basis of funds collected in Europe. Numerous local and regional authorities, including Slupsk operate on many levels using a number of instruments and opportunities associated with their membership in the European Union.

For its activities Slupsk has been noticed on the international scene. On April 10, 2014 Słupsk was awarded with the Prize of Europe, which was established by the Council of Europe. Europe Prize is the highest award presented by Parliamentary Assembly of the Council of Europe.

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31 The highest award, created in 1955 to recognize outstanding efforts in promoting European unity. Fifty-eight towns have been honoured; only one or two prizes are awarded each year to Plaque and Flag winners. The Trophy (held for a year), the bronze medal and the commemorative parchment are accompanied by a 7,600 euros scholarship to fund European study visits for young people. The President of the Council of Europe’s Parliamentary Assembly presents the prize at a municipally-organised „Europe Day” attended by the Europe Prize Sub-Committee.
Council of Europe to the European cities for building European solidarity, distinctive international cooperation, international trade and activity in international organizations. The Council of Europe recognized the contribution of Slupsk in building European values.

According to the Members of the Council, Slupsk deserves special recognition for:

- pioneering project Triple Entente Carlisle – Flensburg – Slupsk, which was established in 1987;
- facilitating cooperation of youth and educational institutions with foreign partners;
- multitude of cultural projects carried out in cooperation with foreign entities;
- cooperation with 10 partner cities from Europe and Asia;
- activities of the mayor of the City of Slupsk in the Committee of Regions of the European Union;
- activities of Slupsk in the New Hanseatic League;
- activities of the Youth Council of the City of Slupsk on the international arena;
- establishing and running the Europe Direct Information Center in Slupsk;
- organization of the National Competition on European Union „Gwiezdy Krąg”;
- international cooperation with its external neighbours.

The awarded prize is a recognition of the activities of City of Slupsk in the international arena. Slupsk is the 4th Polish and 72nd European city that has received the Prize, which has been presented since 60 years.

Slupsk, in order to qualify for the Europe Prize, had to gain „Honorary Diploma of the Council of Europe” (1993), „Honorary Flag of the Council of Europe” (1994) and „Honorary Plaque of the Council of Europe” (1997).
The Europe Prize is not awarded by the European Union, but by the Council of Europe. However, the criteria for selecting the winner city require that the town must prove remarkable activity on the international plane, and in its activities this town must be guided by the principles which are also fundamental for the European Union. Slupsk being awarded the Europe Prize serves as the best example of how Polish local governments have benefited from the opportunities offered by the membership in the European Union during the last 10 years. For example Slupsk’s local authorities are constantly developing, not only through benefits arising from European funds, but also by using all other rights associated with the membership in the EU.
Recenzowane opracowanie, przygotowane pod redakcją Barbary Mielnik, zatytułowane zostało: The Consequences of Membership in the EU for new Member States – structural, political and economic changes. Problematyka nim objęta jest jak najbardziej aktualna, gdyż odnosi się do współcześnie zachodzących procesów i wyzwań, jakie dotyczą zmian w prawie wewnętrznym państw – nowych członków Unii Europejskiej, po upływie kilku lat od chwili integracji. Praca jest zbiorem artykułów poświęconych szeroko rozumianej problematyce integracyjnej i obejmuje bardzo zróżnicowane kwestie oraz zjawiska zachodzące w państwach członkowskich. Poszczególni Autorzy przedstawiają zmiany wywołane procesami integracyjnymi, które obejmowały przemiany konstytucyjne, poprzez kwestie polityczne funkcjonowania samej UE, aż po sprawy gospodarcze i zmiany w zakresie funkcjonowania gmin.

Z recenzji wydawniczej dr. hab. Wojciecha Szczepana Staszewskiego