CONNECTING THE EUROPEAN UNION OF SHARED AIMS, FREEDOMS, VALUES AND RESPONSIBILITIES

EUROPEAN UNION AND ITS LAW, POLICY, AND ECONOMY: INTERNAL AND EXTERNAL DIMENSIONS

Edited by
Aleksandra Borowicz, Małgorzata Dziembała, Anna Masłoń-Oracz, Ewa Latoszek

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Preface

The 21st century has been a period of turbulent changes in the world economy and global political order, sparking a transformation of the international environment in which groupings, countries, and enterprises operate. It is a time that poses numerous, often unprecedented, external and internal challenges to which the European Union and its Member States have to face. Therefore, the EU has to develop an institutional framework that enables it to promote its goals and ensure a better life for its societies through the effective implementation of its policies. The EU approach towards the process of integration must be revised. This has been forced in part by Brexit, which gives a new role to the United Kingdom in mutual relations with the EU, and in the model of how EU institutions function, which must be redefined. Another important topic is the Single European Market, which should operate smoothly and ensure the growth of the EU economy through a better regulatory framework. These regulations must protect European interests, and the FDI screening mechanism is an example of this.

The EU always has had the ambition to become an area of stability and prosperity, one with high employment and economic and social cohesion. To achieve this and to meet the expectations of EU citizens, the Union's budget for the financial perspective 2021-2027 must be properly designed and implemented and consider the priorities of the EU and its Member States. The new financial rules assume a tightened procedure to make EU cohesion policy more efficient and effective. The global digital transformation poses some opportunities for the EU and its Member States that could improve their socio-economic development. Enterprises must adopt a new approach to this, including enacting a social responsibility strategy. Some EU policies should be modernised in the near future, such as energy policy. Facing so many challenges, the EU, with the support of the new European Commission, must take steps allowing it to become stronger internally by creating a truly common area of prosperity and stability, and externally by developing important partnerships with its neighbours and others.

This book aims to show the complexity of the European Union through the variety of topics discussed in this study and interdisciplinary approach. Among the contributing Authors are researchers from Poland and abroad who approach the subject matter from their backgrounds in economics, finance, management, international relations, law, and others. Over the book's 13 chapters, they examine, among other things, the different approaches of the Nordic and the Baltic countries to European integration and security, Brexit's impact on EU policies and institutions, the role of the European Parliament in the negotiating process of next-generation Free Trade Agreements, the new FDI screening mechanisms in the EU, the importance of the rule of law in the Member States for access to EU funds, the achievements of the UK in the area of the digital economy and society, the concept of the sharing economy and EU actions undertaken in this field, companies' CSR strategies in the EU, the issue of cross-border healthcare in the EU, energy policy, sustainability as an essential part of European luxury brands, and South Africa's environmental sustainability policy in the context of cooperation with the EU.

The above-mentioned issues were discussed at the PECSA International Conference "Connecting the European Union of shared aims, freedoms, values and responsibilities" on 5 December 2019 at SGH Warsaw School of Economics (Poland). Both the conference and this book were prepared with the support of the Erasmus+ Programme of the European Union within the scope of the EUSHARE project "Connecting the European Union of shared aims, freedoms, values and responsibilities", which was implemented by the Polish European Community Studies Association (PECSA). This was only possible thanks to fruitful cooperation between many institutions and exceptional people. Therefore, we would like to express our very great appreciation to all of them, believing that this book is an important voice in the discussion on the EU today and in the near future.

Aleksandra Borowicz, Małgorzata Dziembała,
Anna Masłoń-Oracz, Ewa Latoszek

*Hilmar Þór Hilmarsson**

1.

Connecting in Europe: the different approaches of the Nordic and the Baltic countries to European integration and security

The Nordic-Baltic countries are closely linked via the trade of goods and services, investment, mobility of people, and the finance sector. Because of this integration, as well as political, cultural and historical ties, these countries are sometimes referred to as the Nordic-Baltic region. As will be discussed below, all the countries in this group have also pursued some form of integration with the European Union (EU). The level of economic and political integration varies among these eight countries, for several reasons. These include, for example, different economic policies, political priorities and different security concerns.

Externally, the Nordic and the Baltic countries are greatly influenced by non-EU members in Europe. Most notably, the five countries in this group that share borders with Russia. Countries in distant regions are also important, especially the United States, because of its role as the guarantor of security in Europe through its participation in the North Atlantic Treaty Organization (NATO, 2019) and its leadership within that alliance. The objective of this article is to answer the question: "Can the Nordic-Baltic countries as a group exercise collective authority in Europe?".

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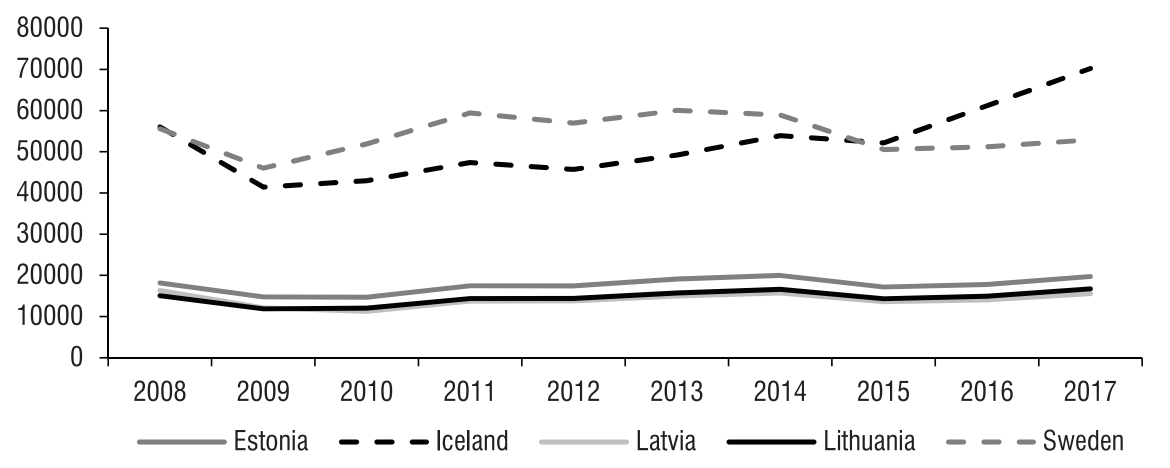
1.1. EU and NATO

European integration is important for the Nordic countries and the Baltic States as their economies depend largely, albeit to varying degrees, on the trade of goods and services with EU Member States (MS), and thus access to the EU internal market. Dependence on trade with other nations is typical of small states which have relatively small domestic markets, produce a limited variety of goods and need to rely on cross-border trade to achieve economies of scale in their production. Cross-border capital flows within the EU are also important to the Nordic countries and the Baltic States. This is especially true of the Baltic States, which are still in transition, catching up with richer EU MS. Access to the common labour market can be beneficial, especially if the flow of people is circular, that is, if it consists in people migrating to other countries and returning with more experience and education. Nevertheless, this can be a challenge for the lower-income Baltic States, where young people may not have an incentive to return once settled in higher-income countries with better living conditions, including more advanced welfare systems. GDP per capita remains higher in the Nordics then the Baltics (see Figure 1.1).

Figure 1.1. Gross domestic product per capita, current prices – U.S. dollars



Source: own elaboration based on IMF 2018.

Security issues also come into play as an important incentive to participate in European integration, and defence alliances are particularly important for small states that can be, and often have been, threatened, attacked and occupied by larger, more powerful neighbours.

While the levels of Nordic and Baltic European integration are different, all the Nordic countries and the Baltic States are within the European Economic Area (EEA) and participate in Schengen (European Commission 2018a). Six out of the eight countries are EU MS and two are European Free Trade Association (EFTA) MS. Four of the Nordic-Baltic EU MS are also euro area MS and have thus adopted the euro.

Among the Nordic countries and Baltic States, Iceland and Norway have the lowest level of European integration, being members of EFTA and parties to the EEA Agreement since 1994. While they are not EU MS, this arrangement provides them with access to the EU internal market critical to their export sectors. Denmark and Sweden have closer integration with the EU as full EU MS. However, neither country has chosen to enter the euro area and adopt the euro as their legal tender. Denmark has pegged its krone to the euro. Sweden, on the other hand, maintains a floating exchange rate regime with an inflation target (Gylfason et al. 2010, 167). Finland and the Baltic States have the highest level of EU integration among the Nordic countries and the Baltic States, being both EU and euro area MS.

All eight Baltic and Nordic countries participate in Schengen along with 18 other European countries, enabling free movement of their citizens within the Schengen area. In addition to economic and security benefits from European integration, all the Nordic countries and Baltic States except Finland and Sweden are members of NATO. Russia has warned it would respond to any move by Finland or Sweden to join NATO; see for example Borger (2016).

It is notable, but perhaps not surprising given their history and security concerns, that the Baltic States are the most internationally integrated countries in the Nordic-Baltic group. For the Baltics, EU membership was to provide prosperity. The NATO membership was to provide military protection and hard security. They want the closest possible connections with the West not only the EU, but also the USA.

1.2. EFTA and EEA

EFTA is a free trade area and represents the loosest form of economic integration, where all barriers to trade among member countries are removed. This is the route that Iceland and Norway have chosen and currently maintain in addition to access to the EU internal market via the EEA Agreement that came into force in 1994. Both countries have been reluctant participants in European integration and have so far chosen to stay out of the EU. The current arrangement pursued by Iceland and Norway does not require a common trade policy, such as a common external tariff, with respect to non-members, as do customs unions such as those in the EU. Nor does it require the surrender of numerous measures of their national sovereignty to supranational authorities in Union-wide institutions such as the European Parliament, the European Commission and the European Council. Nor, too, does it require participation in common agricultural or fisheries policies. Furthermore, Iceland and Norway do not take part in European Central Bank activities, as they are not part of the monetary union and have their own currencies.

Initially, the Nordic countries Denmark, Norway and Sweden were among the founding members of EFTA in 1960. Iceland became a member of EFTA in 1970, Finland did in 1986. All the Nordic countries thus decided to take part in this early regional integration effort led by EFTA. The Baltic States could not have participated in EFTA since they were occupied by the Soviet Union until their independence was re-established in 1991. To date, the only Nordic countries that remain members of EFTA are Iceland and Norway. Denmark left in 1973 to join the EEC, while Finland and Sweden left in 1995 to join the EU (see Table 1.2). Those Nordic countries were willing to surrender some of their national sovereignty to supranational authorities in Union-wide institutions and possibly hoped that they, as a like-minded group on many issues, would be able to influence the EU, that is, by being *systems-affecting* in the sense suggested by Keohane (Keohane 1969), as states that cannot affect the international system if acting alone but that can exert significant impact on the system if working through small groups or alliances or through universal or regional international organizations.

Currently, EFTA has four MS: Iceland, Liechtenstein, Norway and Switzerland. EFTA has three core tasks. The first is the liberalization of intra-EFTA trade. Second, the EFTA states have built networks of preferential trade relations throughout the world. Third, three of the four EFTA states: Iceland, Liechtenstein and Norway are parties to the European Economic Area Agreement, which ensures their participation in the Internal Market of the EU (EFTA 2014). Switzerland, also an EFTA MS, does not participate in the EEA Agreement, but has a bilateral agreement with the EU.

As EFTA/EEA MS, Norway and Iceland have no formal influence on the decision-making phase on the EU side. They cannot directly affect EU laws and regulations governing the EU internal market that they are part of. EFTA/EEA MS can, though, participate in what is called “decision-shaping”. This means that in the phase of preparatory work undertaken by the European Commission in drawing up new legislative proposals, the EEA Agreement contains provisions for input from the EEA EFTA side at various stages before new legislation is adopted.

Given how small the EFTA/EEA MS are compared to the EU, it is highly questionable if they can be classified as *systems-affecting* in the EU context. The reality is that Iceland, Liechtenstein and Norway receive the rules and laws governing the single European market via email without being able to directly influence the process of making them.

As Table 1.1 shows, EFTA has lost most of its members, who chose closer economic integration by joining the EEC and later the EU, including the Nordic countries Denmark, Finland and Sweden.

Table 1.1. European Free Trade Association (EFTA) membership through the years

1960	Austria, *Denmark*, *Norway*, Portugal, *Sweden*, Switzerland and the UK establish EFTA
1970	*Iceland* becomes a member of EFTA
1973	*Denmark* and the UK leave EFTA to join the EEC
1985	Portugal leaves EFTA to become a member of the EEC
1986	*Finland* becomes a full member of EFTA
1991	Liechtenstein becomes a member of EFTA
1995	Austria, *Finland* and *Sweden* leave EFTA to join the EU

Source: own elaboration based on: EFTA 2014.

1.3. EU and the euro area

The EU has been moving towards an economic and political union. This involves not only the abolition of tariffs and quotas among members, as in the case of a free trade area such as EFTA, but also a common tariff and quota system, the abolition of restrictions of factor movements, as well as the harmonization and unification of economic policies and institutions. While EFTA has lost membership, the EU has expanded its membership, with 28 countries at the time of writing. This has included three Nordic countries and all the Baltic States.

Denmark joined the then EEC in 1973, Sweden and Finland joined the EU in 1995, and the Baltics, Estonia, Latvia and Lithuania, in 2004 (see Table 1.2 below). Norway rejected EEC membership in a referendum in 1973, and rejected EU membership in a referendum in 1994. Iceland applied for EU membership in 2009, but in 2013, the Icelandic government requested that "Iceland should not be regarded as a candidate country for EU membership" (see Table 1.2 below). This decision was made without a public referendum, but by a cabinet coalition formed in 2013 (Hilmarsson 2017). Opinion polls show that support for EU membership immediately after the crisis evaporated in Iceland in light of the failure of the EU leadership in handling the crisis (see for example Hilmarsson 2015 and 2017; and Hannibalsson 2017). There are no signs of change, and the cabinet formed in 2017 is not seeking EU membership.

Table 1.2. The EU and the Nordic-Baltic region

1962	*Norway*, the UK, *Denmark* and Ireland apply for membership in the EEC.
1973	*Denmark*, Ireland and the UK become members of the EEC. *Norway* rejected EEC membership in a popular referendum.
1994	The *Norwegian* referendum rejects accession to the EU.
1995	Austria, *Finland*, and *Sweden* become members of the EU.
2004	*Estonia*, *Latvia* and *Lithuania* join the EU.
2009	*Iceland* applies to join the EU.
2013	The *Icelandic* government requests that "Iceland should not be regarded as a candidate country for EU membership"

Source: own elaboration based on EFTA 2014.

The formation of an economic union requires nations to surrender some measure of their national sovereignty to supranational authorities in union-wide institutions. Iceland and Norway have not been prepared to join the EU. Surrendering sovereignty is not controversial only in the Nordic region, as the recent decision of the UK to leave the EU demonstrates. The British exit was decided in a 2016 referendum whereby British citizens voted to exit the EU, commonly known as the Brexit.

EU MS clearly have different opinions on what regional integration should include and how far it should go. This has resulted in varying levels of integration among countries within the EU. Nineteen out of 28 MS have adopted the euro as their common currency and sole legal tender. Among the Nordics, Denmark and Sweden, both EU members, have chosen to stay out of the euro area.

The formation of a common currency area can bring economic benefits to the members of the currency union, particularly if there is a high degree of international trade among them – that is, a high level of trade integration. This is primarily because of reductions in transaction costs in trade and the reduction in exchange-rate uncertainty.

However, joining a currency union also involves costs, namely, the loss of independent monetary policy and the loss of the exchange rate as a means of macroeconomic adjustment. Among the Nordic countries, only Finland has adopted the euro. All the Baltic States have also done so (see Table 1.3 below). Denmark and Sweden rejected the euro area membership and the adoption of the euro in referendums. Iceland and Norway would not be eligible for membership in the euro area and could not become member without first joining the EU and then fulfilling the euro area criteria for at least two years.

Table 1.3. The euro area and the Nordic-Baltic region

1992	Denmark granted opt-outs from participating in the euro.
1999	Finland becomes a member of the euro area and adopts the euro.
2003	Sweden decides not to adopt the euro for the time being in a referendum.
2011	Estonia becomes a member of the euro area and adopts the euro.
2014	Latvia becomes a member of the euro area and adopts the euro.
2015	Lithuania becomes a member of the euro area and adopts the euro.

Source: own elaboration based on European Commission 2018b.

1.4. The lack of a common approach

Arguably, the lack of a common approach among the Nordic countries to European integration is unfortunate and is not in their best collective interest. The Nordics have rather homogenous populations and are often considered like-minded, with a similar social and cultural background as well as political traditions. A Nordic group with a coordinated approach could have become a stronger voice within EU decision-making bodies. This might help to further the interest of the Nordics in addition to influencing the future direction of European integration efforts (Gylfason 2010, 167).

On the other hand, the Baltic States have a common European integration approach, but are neoliberal, with their approaches in terms of both economic and social policies differing from the Nordics'. On this account, the Nordics and the Baltics are not like-minded countries.

The Baltic States made huge sacrifices to ensure euro area membership by implementing austerity programmes during the 2008/9 global economic and financial crisis. It would be hard, if not impossible, for the Nordics to implement such policies without social unrest. The level of tolerance for such radical government decisions is lower in the Nordics. Arguably, income and wealth inequality within the Baltic States has undermined democracy in those countries with divisions between the elite and the poor much sharper not only as compared to the Nordics, but also as compared with countries at a similar income level, such as the Czech Republic, the Slovak Republic and Slovenia (Hilmarsson 2014).

1.5. Security concerns

In addition to economic considerations when joining the euro area, Finland, and later the Baltic States, had political motives to settle their political identities once and for all. Finland has long lived in the shadow of either the Soviet Union or Russia. The Baltic States were occupied by the Soviet Union after the end of World War II, until regaining their independence in 1991. Finland, Estonia and Latvia have eastern borders with Russia, while Lithuania borders Kaliningrad, since 1945 part of the Soviet Union and then Russia. For those countries, EU and euro area membership are more than merely an economic integration arrangement. Security concerns are also of utmost importance for Finland and the Baltics. The EU could hardly ignore an attack on a MS without responding. In addition to EU and euro area membership, the Baltic States were also keen on NATO membership and all became members in 2004.

Of the Nordic countries, Denmark, Iceland and Norway joined NATO in 1949 and thus had been members for 55 years when the Baltic States became part of the organization. NATO still remains the primary actor in European collective defence. Since the Ukraine crisis, the Baltics have been increasingly concerned with the emerging security threat from Russia, looking to the USA to lead NATO for their protection. NATO can be viewed as the alpha and omega of their security, but EU membership and especially euro area membership is also important.

Recently, the US commitment to NATO has come under question. During the 2016 presidential campaign, Donald Trump stated that NATO may be "obsolete" and that the European allies would have to start paying their way in NATO (Parker 2016).

Regardless of Trump's views and intentions, Europeans may need to recognize that the USA may not be able – financially, politically or militarily – to play the role of a global policeman it assumed in 1945 (see, for example, Howorth 2017). The USA is faced with many challenges, most notably in the Middle East and in the Asia-Pacific region. The US economy represented about half of the world economy's GDP at the Bretton Woods conference, but this is now merely 25% (Nobel Perspectives 1987). Times have changed and Europe may increasingly be forced to take more charge of its own security. As Angela Merkel recently stated, Europe's fate is "in our own hands" (Bertrand 2017). There is a need to rethink relations between the EU and NATO and the EU may increasingly need to take over NATO operations.

* * *

Can the Nordic-Baltic countries, as a group, exercise collective authority in Europe? If all eight Nordic countries and Baltic States had a united position on European integration issues, they might be able to influence the other EU MS to a greater degree than they can today. The same level of integration within the EU could make the Nordic countries and the Baltic States systems-affecting, as states that cannot affect the international system if acting alone, but that can exert significant impact on the system if working through small groups or alliances or through universal or regional international organizations. Considering security, the Nordic and the Baltic countries are also divided vis-à-vis NATO, with six countries as MS while two countries, Finland and Sweden, remain out of NATO.

The Nordics are welfare states with economic and social policies that differ sharply from the neoliberal Baltics with minimal governments, low-tax regimes and weak social safety nets. How much benefit they could gain from cooperation is questionable, especially when the countries have different economic and social policies and continue to be at very different levels of economic development, with the Baltics still poorer than the Nordics now almost 30 years after regaining their independence.

External forces also continue to challenge the Nordic Baltic region, including revanchist Russian policies threatening Baltic sovereignty, unpredictable US policies towards NATO and a reduced military presence in Europe, as well as dismal economic performance of the EU and the euro area, post crisis. All point to a future of uncertainty, including both economic and security risks for the Nordic Baltic region. Within the Nordic-Baltic group, there are thus sharp divisions between hardcore EU/euro area MS (Baltics and Finland), EU members (Denmark and Sweden) and EU outsiders (Iceland and Norway). Common pathways for future cooperation in Europe are not obvious.

Abstract

The Nordic-Baltic region is now closely interlinked via trade, investment, mobility of people, and banking. All the countries in this group have pursued some form of integration with the European Union, are within the European Economic Area (EEA), and are Schengen members. Six of them are EU Member States and two are European Free Trade Association Member States. Four of them are members of the euro area. But can these small countries as a group cooperate more closely and perhaps exercise more collective authority in Europe? When it comes to European integration, the lack of a common approach may complicate their cooperation.

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*Miklós Somai**

2.

The Brexit process and its impact on EU policies and institutions

Since the EU membership referendum of 23 June 2016, the United Kingdom's withdrawal from the EU has generated considerable interest among both researchers and public servants. Literature on the consequences of Brexit started to surge even before the referendum, and the momentum continues to this day. A common feature of all these contributions is that they have been producing estimates without knowing anything about how the future relationship between the EU and the UK will exactly look like. Hence, their tendency to focus on some headline outcomes like an X or Y percentage fall in economic growth, household income, foreign trade or business investment by a given year (typically by 2030). These papers derive from the assumption that the UK will, under any scenario, inevitably suffer as a result of Brexit. They usually consider three different scenarios: a "soft" one (Norway or Swiss model); a "hard" one (a fall back to WTO terms); and a "semi-hard exit" lying somewhere in between the two extremes (Dhingra et al. 2016; Schoof et al. 2015).

Some early analyses of Brexit even contained guesses on both short- and long-term, the latter being devoted to the three above scenarios, while short-term guesses predicted economic uncertainties, holding back spending decisions and deterring FDI (Kierzenkowski et al. 2016). The least that can be said is that short-term guesses did not really come true. An illustrative example of the relationship between econometric models and reality was when the

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Bank of England had to upgrade its forecasts for UK GDP growth for 2017 significantly for the second time in just six months, mainly due to resilience of consumer spending following the vote for Brexit. We can also bring up the analysis made by the Treasury in 2016 about the "immediate and profound shock" a mere vote to leave was to represent to the British economy, which has actually proved to be completely incorrect.

Another type of literature that has developed since the Brexit vote consists of sectoral analyses, the authors of which (much like those responsible for general analyses) know nothing about the nature of the future relationship between the EU and the UK. But since they are based on the worst-case scenario, they have at least the advantage of giving serious warnings to decision-makers about the risks that a no-deal scenario would entail. For example, these papers reveal that among value-chains car industry would be one of the industries to be most seriously damaged by the introduction of WTO-tariffs in trade with the EU. Interestingly, it is not the British car industry that would suffer the most, but the German one which, by putting 18,000 jobs at risk, "would see a sharp decline in its profits due to the pronounced sales slump in its premium brands" (Deloitte 2017). To mention another example, for the European meat industry a hard Brexit could "result in the loss of at least 32,000 jobs". The UK being primarily a premium market, the magnitude of the shock could be much greater than the one caused by the Russian food import ban in 2014, as it would be more difficult to find alternative markets for the diverted products (UECBV 2017).

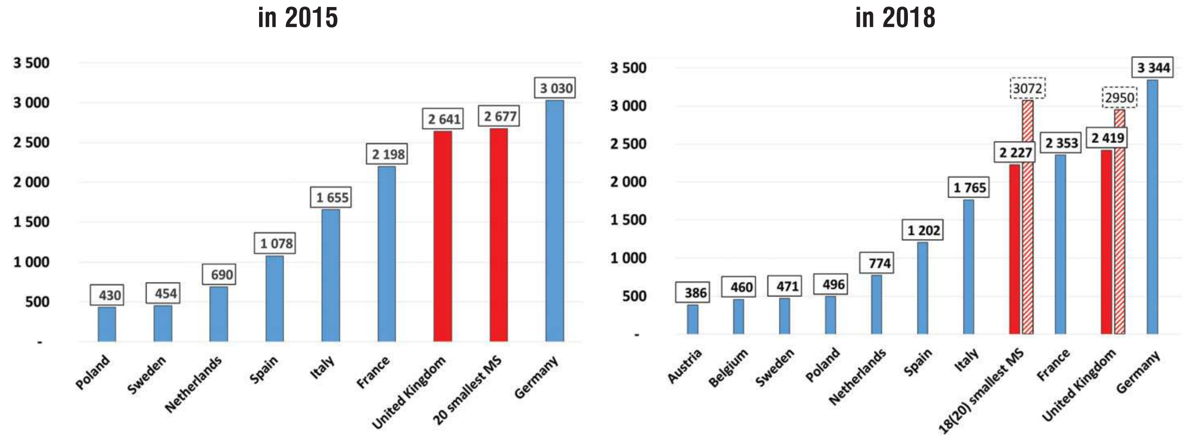
In a different approach, one can find that studies have first focused on the reasons and the outcome of the referendum, afterwards what would Brexit entail for the British economy as a whole, and finally sector-specific analyses. The area that has gained very little attention so far is the impact that the UK's exit may possibly make on the EU's institutions and policies. The aim of this study is to be a part of a remedy for this situation.

2.1. Brexit's possible impact on the EU

Acknowledging that in order to assess the impact of Brexit on EU policies, "it is inadequate to simply take the UK out of the equation", on the basis that the behaviour of other actors will not change (de Ville, Siles-Brügge 2019), and given the fact that, at the time of writing this paper, there is yet no valid final agreement between the parties which creates a huge uncertainty surrounding the UK-EU future relationship (especially concerning trade), we are trying to draw some conclusions from facts, and facts alone.

According to the data for the year preceding the referendum (2015), the UK was the 5th largest economy in the world, and the second largest in the EU (IMF online). Brexit does not simply mean that one of the Member States (MS) has made use of the opportunity offered by Article 50 of the Lisbon Treaty, and kicked off the process of quitting the EU. It means that a country with an economic size equal to that of the smallest 18 to 20 MS wants to leave the integration (Figure 2.1). Although the situation has changed by 2018 – mostly because of the quick depreciation of the pound sterling vis-à-vis both the U.S. dollar and the Euro in the run-up to and following the referendum – the departure of the United Kingdom would still cause significant economic damage and downsizing for the European Union.

Figure 2.1. GDP at current market prices (EUR bn)



Source: Eurostat 2019a (the striped columns indicate UK GDP in 2018 calculated at pound euro exchange rate 2015, as compared to the GDP of the 20 smallest EU MS).

With Brexit, the balance of power among the main groups of MS, and consequently, the orientation of the common policies will certainly change. Trade policy, in particular, may shift towards protectionism. While, under the Council's qualified majority voting system, currently both liberal and protectionist groups of MS are able to block decision-making, in the future, with the loss of the UK's vote, only the protectionist one will be able to continue to do so. Not only will this certainly affect Britain's future access to the single market, but it will also have implications on how liberal all of EU's future bilateral trade agreements with third countries would be. As one of the UK's main inputs to the European project has always been pushing for trade liberalization, it is feared that Brexit might make the EU less open (Booth et al. 2015).

The other main issue, apart from trade policy implications, is budget, i.e. how Brexit will affect the European budget (direct impact), and the common policies which are based on it (indirect impact). Even if some argue that "the financial savings for the UK would be negligible and the impact on Member States would be manageable" (Nunez-Ferrer, Rinaldi 2016), Brexit could have serious consequences for the EU finances. It should not be forgotten that the UK is the second largest net contributor to the common budget. Over the last 5 years (2014-2018), the UK's average annual net contribution (after rebate) was EUR 9.56 billion (author's own calculation based on Eurostat 2019b), representing circa one fifth of all net contributions and one fourth of the total of net benefits – i.e. that part of the redistributed resources that can be allocated to particular MS. This amount is close to EUR 67 billion when projected over the normal 7-year budget period of the EU.

Brexit's impact on EU policies can already be felt. The Commission's draft proposals concerning the next Multiannual Financial Framework (MFF) for 2021-2027, published in May 2018, are based on the assumption of a clean/hard Brexit – i.e. the UK not being part of either the customs union or the single market – and they do not include any contribution from the United Kingdom (European Commission 2018). In principle, there are two ways to make up for lost money – by cutting back expenditure on common policies or increasing MS contributions – and the draft proposals explore both. Spending on the two most important EU policies (agricultural and cohesion), which together currently account for more than 70% of the total, would be cut by 5% at current prices (i.e. approximately 15-20% in real terms). A change to make the less developed MS of the EU periphery unhappy, since so far they could easily make good use of such programs (unlike other kinds, like research and innovation). So, while the MFF negotiations are already difficult without taking Brexit into account, to make matters worse, the Commission (and the EP even more so) wants to increase the overall size of the budget. Nevertheless, the Germans (who's natural allies in this field are the Austrians, the Danes, the Dutch and the Swedes) were quick to indicate that the Commission's proposal would cause their annual net balance vis-a-vis the EU budget to rise by an average of circa EUR 15 billion, which they thought would be unrealistic (Federal Ministry of Finance 2018). Certainly the distribution struggles within the EU-27 over both funds and charges are getting even fiercer (Becker 2019).

Concerning other consequences of the UK's withdrawal from the EU on European, policies and institutions we can mention that the European Medicines Agency has already been moved to Amsterdam and the European Banking Authority to Paris. Also, the Council presidency order had been revised (i.e. brought forward by six months) after the UK's decision to relinquish the Council presidency in the second half of 2017. Furthermore, without the ability to rely on Britain's military power, diplomatic network, intelligence capabilities and other soft power competencies EU's foreign policy would be less influential at the world stage. So, Brexit is likely to undermine the EU's prospect for becoming a leading global actor (Patel, Reh 2016). Finally, there is a risk of "contagion", a dread of Brussels' bureaucracy. Hence, their strategy to avoid the precedent of an easy withdrawal, lest other MS follow suit. This leads us to our other main topic, the Brexit negotiations.

2.2. Lessons from the negotiation process

The decision to leave the EU made by the British people in June 2016 had caused panic throughout the (economic-political-media-scholar/adviser) elites of both Britain and the EU27, as they felt that Brexit, whatever form it would take, was going to hurt their interests. In order to avoid such a scenario they started by launching a widespread campaign to frighten people with the likely negative consequences of Brexit well before the referendum.

Part of this strategy was to develop a Brexit-related narrative. The notions of "soft" and "hard" Brexit have been widely used in the media – but also in the institutional and scientific community – the former referring to a combination of maintaining single market (and/or customs union) membership with UK control on migration from the EU, while the latter meaning leaving without a deal and falling on WTO terms concerning the future trade relations. In reality, it would be more accurate to call these scenarios as a “messy” or “clean” Brexit. A messy Brexit, apart from being totally unacceptable to the EU – as undermining the core principle of indivisibility of the four freedoms – would mean that the UK law remains under the jurisdiction of the European court of Justice, billions in annual payments to the common budget continue, and practically no meaningful trade agreements with third countries can be concluded. And, to crown it all, the UK would have no say in the future of the EU policies, rules and regulations. On the contrary, under a clean Brexit, the UK would regain control over laws, borders and money, and also the ability to conclude free trade agreements with third countries, including the EU (Halligan, Lyons 2018).

The negotiations followed the agenda set by the EU, first discussing issues which were of importance to the EU (citizens’ rights, Irish border, financial settlement). In other words, the British were to accept paying the EUR 45 billion exit check without even knowing what market access they would get in return. Even worse was the artificial magnification of the importance of the Irish border issue, which has become a trap: either Northern Ireland (or the UK as a whole) would remain in the EU customs union, or the permeability of the land border between Northern Ireland and the Republic of Ireland, and hence the peace process, would be jeopardized.

Subsequent delays in the Brexit process were eventually caused by a split within the Conservative Party, when a growing number of ministers (two of them chief negotiators) had realized they had been bypassed by the Prime Minister in her consultations with the European Commission. The deal brought home from Brussels by the May government has then been rejected three times by the House of Commons (on 15 January 2019, on 12 March 2019, and on 29 March 2019), especially because of the unacceptability of the so-called backstop arrangements. The arrangements were to come into force in the absence of a trade deal at the end of the transition period and would have created a single EU-UK customs territory from which the UK could not have withdrawn unilaterally (see Article 20 of the Irish Protocol). The absence of a clause allowing withdrawal on notice is unprecedented in trade treaties (Howe 2018). Indeed, the original protocol would have resulted in a trap: if there is no agreement, the UK could have remained indefinitely in the EU customs union which would have prevented her from benefiting from one of Brexit’s most important benefits, i.e. to conclude mutually beneficial bilateral trade agreements with third countries. Although the Johnson government, which replaced the May government in mid-July 2019, has, in this respect, significantly improved the deal, the uncertainty surrounding the Brexit process, especially the EU-UK future trade relations, has not yet disappeared.

* * *

The foundation of democracy is that the minority accepts to be ruled by the majority. The real problem with Brexit is that politicians and the establishment in general (both in the UK and the EU) have never accepted the verdict of the British people in the referendum. So far, they have done everything to frustrate, stop, reverse, or at least slow down the process.

The 2016 referendum on Brexit had the largest popular vote ever (17.4 million people voted to leave) in the UK. The constituency make-up of votes – 406 Leave constituencies versus 224 Remain constituencies – was even more astonishing. If this had been a General Election, a majority of 164 would have emerged, meaning a very strong government, like the first two Blair Governments were (majorities of 179, 167) and not rivalled by any other since World War 2 (Llewelyn 2019).

In the UK Parliament, however, Remainers have always outnumbered Leavers – just as in publicly broadcasted debates Europhiles have always outnumbered Eurosceptic panelists[1]. In today's Britain, Brexit is no longer about whether it is worth leaving the EU, but about restoring democracy. For the sake of both the UK and the EU, the best would be to compromise on a real, mutually advantageous deal on future trade relations.

Abstract

The present paper focuses on two main areas: first, it seeks to assess the impact of British withdrawal on various common policies (like trade policy and common budget) and institutions; second, it draws attention to the fact that the way in which Article 50 negotiations were conducted in itself provides a great deal of insight into

[1] An analysis of the composition of panels for two key BBC programmes (*Any Questions* and *Question Time*) found that Leave supporters had been greatly under-represented in the period from June 2016 to December 2017. Balancing on the basis of whether panellists voted for Leave or Remain, both programmes favoured Remain by about 68% to 32% (IEA 2018).

the very functioning of today's EU. The process suffers from a multitude of problems which have largely contributed to the fact that criticisms about the EU proved to be justified in the eyes of a significant part of the British society, ever more determined to quit. Against this background, the future of the EU depends, to a large extent, on the ability to draw the right lessons from Brexit and find the best ways to move forward.

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3.

The role of the European Parliament in negotiations on the EU's new generation Free Trade Agreements

The Treaty of Lisbon substantially reformed the CCP by granting the EU exclusive powers in the spheres of trade in services, intellectual property rights and foreign direct investment (FDI) (TFEU, Art 207). In the light of these amendments, the EU has pursued an ambitious trade agenda, by broadening and deepening its relationships with third countries. This resulted in significant expansion of the new-generation FTAs, which, according to the Commission's report, are the EU's international agreements concluded after 2006 that go beyond the mere reduction of tariffs and cover trade and areas directly linked to it (European Commission, COM(2018)728 final, 12). They contain rules on trade in services, public procurement, and, since 2010, trade and sustainable development. In some cases, they also include rules on investment protection[1]. At the moment of writing, the EU has concluded new-generation FTAs with South Korea, Japan and Vietnam and signed and provisionally applied agreements with Columbia, Peru and Ecuador, Central America and Canada. It finalised negotiations with Singapore, Mexico and Mercosur and commenced new negotiations with Australia, New Zealand, Chile and Indonesia.

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1 For example: Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L11 14.1.2017, 23-1079).

The expansion of the scope of the CCP, an area of EU exclusive competence (TFEU, Art. 3(1)(e)) had a potential of creating an accountability gap by diminishing the role of the national parliaments in ratification of the new-generation FTAs. The Treaty of Lisbon solved this issue by enlarging powers of the European Parliament to scrutinise the trade and investment treaty-making practice of the European Commission. Now, Article 207 of the TFEU requires that the European Parliament is regularly informed on the progress of negotiations conducted by the Commission (TFEU, Art. 207(3)). Furthermore, from an institution that did not possess any formal powers to influence the direction of the EU's trade policy, the European Parliament has become, alongside the Council, a co-legislator in the field (TFEU, Art. 207(2)), and its consent is required for the conclusion of any international trade agreements (TFEU, Art. 218(6)(a)(v)).

This chapter uncovers the constitutional practice in negotiating the new-generation FTAs that developed since the entry into force of the Treaty of Lisbon and evaluates the role of the European Parliament in the process.

3.1. Participation of the Parliament in the early stages of negotiations

The European Parliament has adopted a proactive attitude in negotiations of new-generation FTAs from the outset, despite the fact that the Treaty excludes it from decision-making on the opening of negotiations. Although this stage is controlled by the Council (TFEU, Art. 218(2)), which acts upon a recommendation from the Commission (TFEU, Art. 218(3)), the Parliament has made the most of the right to be fully and immediately informed (Santos Vara 2019), which has enabled its meaningful participation (TFEU, Art. 218(10), 207(3)). The Treaty obligations have been reinforced by the provisions of the Framework Agreement that require the Commission to inform the Parliament about its intentions to propose commencement of negotiations, and to transmit draft negotiating directives at the same time as this information is provided to the Council (Interinstitutional Agreement, OJ L 304/47). Furthermore, the Court of Justice reminded the Council of the duty to keep the Parliament informed in all international negotiations

(Parliament v Council (Tanzania), C-263/14, para. 73, Parliament v Commission (Mauritius), C-658/11, paras. 75-78).

The Parliament's Rules of Procedure provide that it may ask the Council not to authorise the opening of negotiations until it has had an opportunity to express its position (European Parliament, Rules of Procedure, Rule 114(3)). Even though the Rules of Procedure do not impose binding obligations upon the Council, they were effectively invoked in response to the commencement of trade negotiations between the EU and Japan (European Parliament, Resolutions OJ C 377 E/19, OJ C 332 E/44, OJ C 72 E/16; Council of European Union, Negotiating Directive 2017).

The significant amendments introduced in the Treaty of Lisbon to the provisions governing the CCP have required the Council and the Parliament to redefine their relationship, which posed some difficulties in the beginning. The main obstacle to the relationship between the institutions was the attitude of secrecy in the Council (Ott 2016, 1021). In the past, the negotiating directives issued to the Commission were kept confidential out of concern that their release would undermine the EU's negotiating position. This approach stood in the way of an effective involvement of the Parliament at all stages of the negotiating process. The issue was addressed in a Framework Agreement concluded in 2014 between the Council and the Parliament (Interinstitutional Agreement, OJ C 95/1).

However, the aforementioned interinstitutional arrangement, only regulates the handling of confidential information by the Parliament and does not provide for the declassification of negotiating directives. Enhancement of transparency in trade negotiations has been one of the Parliament's priorities, and in a number of resolutions, it called on the Council to make directives available to the public in good time (Parliament Resolutions, OJ C 337/113 and OJ C 346/219). Negotiations with Chile made a positive step towards transparency being guaranteed in trade negotiations from the very beginning, with the Council publishing the full mandate soon after its adoption (Council of European Union, Negotiating Directive 13553/17 ADD1 DVL 1). Since then, mandates were also published for negotiations with New Zealand (Council of European Union, Negotiating Directive 7661/18 ADD1) and Australia (Council of European Union, Negotiating Directive 7663/18 ADD 1 DCL 1).

It has become a standard constitutional practice for the Parliament to express its position in the early stages of negotiations, which was followed in negotiations with the US (European Parliament, Resolution, OJ C 55/108), Australia (European Parliament, Resolution, OJ C 346/212), New Zealand (European Parliament, Resolution, OJ C 346/219) and Chile (European Parliament, Resolution, OJ C 337/113). In all of them, the Parliament adopted nonlegislative resolutions that stated its objectives before the Council decided on the mandates.

In its contribution to negotiations on the new generation FTAs, the Parliament has made a visible effort to recognise their multifaceted nature. It took into account unique context of each agreement and made a visible effort not to overly politicise negotiations with non-trade-related aspects. Nonetheless, in some cases, the Parliament was not afraid to touch on sensitive political issues. For example, in the resolutions on the opening of negotiations with New Zealand and Australia, it called onto the Council to recognise, in the mandate, the obligations of the EU partners towards indigenous people (European Parliament, Resolutions, OJ C 346/219, para. 16, OJ C 346/212, para. 15). Although the Council did not follow these recommendations in the mandates (Council of European Union, Negotiating Directives, 7661/18 ADD1 and 7663/18 ADD 1 DCL 1), there is an added value in the Parliament bringing attention to these politically sensitive topics.

Although a position expressed by the Parliament in the early stages of the negotiating process binds neither the Council in its decision on the mandate, nor the Commission in negotiations, it has an impact upon the agenda setting. The early resolutions "cast a shadow" (Ripoll Servent 2014) over the entire negotiations, containing frequent remainders that each new-generation FTA requires the Parliament's consent (Ott 2016). It should be stressed, in this context, that the Parliament does not reject international agreements lightly, and it has never threatened to do so with regard to a new-generation FTA. However, the Parliament should exercise caution to prevent its cooperative attitude from weakening its mandate of scrutiny and from reducing its consent to a mere rubber stamp.

It has been suggested in the literature that the powers of the Parliament in the early stages of negotiations should be extended by imposing a requirement for parliamentary consent to the opening of negotiations alongside that of the Council and its formal approval of a negotiating mandate (Devuyst 2013, 290). Furthermore, in its recent resolutions, the Parliament has stressed that its role should be strengthened at each phase of the process leading up to the conclusion of the EU's trade agreements (European Parliament, Resolutions, OJ C 346/219 and OJ C 346/212). Since the Parliament is known for influencing Treaty changes by establishing constitutional practices and through interinstitutional agreements (Jacobs, Corbett, Shackleton 2011), its active involvement in the early stages could suggest a strategy of moving in that direction. However, such a Treaty amendment requires careful evaluation. Although the development would further democratise the processes of concluding international treaties that fall within the scope of the CCP, it could also reduce the Parliament's willingness to mention difficult political issues at the outset of negotiations because of the serious consequences that this would have on the process.

3.2. The negotiating stage

It is the Commission's prerogative to undertake negotiations on new-generation free trade agreements (TFEU, Art. 207(3)). In performing this duty, the Commission is required to keep both the Parliament and the Council fully informed (TFEU, Arts. 207(3), 218(4), 218(10)), which provides avenues for the Parliament's involvement. The cooperation between the Commission and the Parliament at this stage has been agreed on in and is regulated by the Framework Agreement (Interinstitutional Agreement, OJ L 304/47). The provisions of the Framework Agreement are intended to enable a meaningful participation of the Parliament in the negotiating process by giving it access to the same documents as the Council and allowing it time to formulate a position at each stage of negotiations (Interinstitutional Agreement, OJ L 304/47, 24). Furthermore, they oblige the Commission to take the Parliament's views into account (Interinstitutional Agreement, OJ L 304/47, 24, Annex III para. 3) and to explain if its suggestions were incorporated in the text of the negotiated agreement (Interinstitutional Agreement, OJ L 304/47, Annex III paras. 4 and 5).

The negotiating process is closely followed by the responsible committee of the Parliament, which, for the new-generation FTA, is the Committee on International Trade (hereafter the INTA Committee). In practice, the Commission shares a variety of information with the Parliament, including draft documents and reports on negotiating rounds, notes and internal working papers (Devuyst 2013). Moreover, the Commission and the Council provide answers to questions submitted by the Members of the European Parliament[2], who also have the option of participating as observers in negotiations (Interinstitutional Agreement, OJ L 304/47, para. 25) . The Trade Commissioner and senior Commission officials attend plenary debates at the Parliament, as well as meetings of the committee (Devuyst 2013). During the course of negotiations, the Parliament can adopt recommendations to the Council and the Commission, which normally takes the form of a non-legislative resolution (European Parliament, Rules of Procedure, Rule 114(4)).

The current framework, which offers a multitude of options for dialogue, has enabled the development of a constructive relationship between the intuitions, with the Commission embracing its new obligations and treating the Parliament as an equal partner in the process (Ott 2016, 1020). It has been reported that the Parliament's suggestions have made the difference in negotiations with South Korea and resulted in the inclusion of labour and environmental standards in the EU's standard text offered to negotiating partners (Devuyst 2013). The labour standards, in particular, have become an area of the Parliament's specific focus with regard to new-generation FTAs, and are often mentioned in its resolutions[3]. While the Parliament has adopted the role of reminding the Commission about the need for the EU's trade agreements to achieve broader goals, such as the protection of fundamental rights, high environmental standards, the promotion of the rule of law, democracy and other values of the Union, it has also recognised the need to achieve greater market liberalisation in third states and sought not to overly politicise the negotiations. Thus, in the overall assessment, the position of the

[2] Examples include: the EU-Vietnam trade agreement: European Parliament, Written questions by Members of the European Parliament, and their answers given by the European Union institutions, [2013] OJ C 248E/1; CETA: European Parliament, Written questions by Members of the European Parliament and their answers given by a European Union institutions [2013] OJ C 321 E/1; EU-Japan: European Parliament, Written questions by Member States and their answers given by European Union institutions [2013] OJ C 321 E/1.

[3] Increasingly mentioned in the recent practice of the Parliament; see for example: European Parliament, DRAFT REPORT containing a motion for a non-legislative resolution on the proposal for a Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (COM(2018)0691 – C8-0000/2018 – 2018/0356M(NLE)), 2018/0356M(NLE), nyr; European Parliament non-legislative resolution of 12 December 2018 on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership (07964/2018 – C8-0382/2018 – 2018/0091M(NLE)) P8_TA-PROV(2018)0505, nyr.

Parliament in trade negotiations has, to a large extent, been aligned with that of the Commission (European Commission, Report 2014).

* * *

The European Parliament has embraced its new powers in the CCP by developing a standard practice of actively contributing at each stage in the process of negotiating new-generation FTAs, since the entry into force of the Treaty of Lisbon. It has demonstrated a high level of engagement already at the opening of each negotiations, which has facilitated changes in interinstitutional relations, with visible improvements in the Council's approach to transparency. This has also brought positive developments for the citizens, with an increasing number of negotiating mandates being published soon after their adoption.

The practice that developed through the Parliament's engagement in negotiations of new-generation FTAs improves the way in which democratic legitimacy in the EU's external action is realised by facilitating inclusive and open discussion. However, any proposals for extending the Parliament's powers in the early stages of negotiations should be carefully assessed, with particular regard being paid to the impact of such a change on the willingness of the Parliament to bring sensitive political issues into the deliberations.

Abstract

The Treaty of Lisbon brought a number of changes to the Common Commercial Policy (hereafter the CCP), such as extension of the EU exclusive competences (Arts. 3(2)(e) and 207 TFEU), consolidated procedure for conclusion of international treaties (Art. 218 TFEU) and enhanced role of the European Parliament (Arts. 207 and 218 TFEU). These amendments enabled the EU to pursue an ambitious agenda in international economic relations, which has been implemented through so-called new-generation free trade agreements (FTAs). This chapter evaluates the contribution of the European Parliament to negotiations of these agreement and describes the new constitutional practice that has developed in this area.

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4.

FDI screening system in the EU – overlapping competences or mutual support between Member States and EU institutions?

In March 2019, the European Union (EU) implemented the so-called FDI Screening Mechanism. In the words of J.C. Juncker, the aim of the implemented regulation is to safeguard the key interests of the EU and its Member States (MS). According to Juncker, the EU cannot be naive in the area of trade or investment and therefore these fields require active policy-making (EC 2019 (a)). That is why, since 2017, the EU has been dynamically implementing measures aimed at establishing a mechanism that would allow for observation and possible response in the event that FDI from third countries is channelled into sensitive sectors related to public security.

The aim of this article is to discuss, firstly the involvement of foreign capital in the form of FDI in the EU and secondly the newly established mechanism of screening FDI in the European Union. Based on the available statistical data, the study will demonstrate the rationale for introducing FDI control measures in the EU. The analysis of the FDI screening mechanism in the European Union will show that it serves as an auxiliary instrument supporting the already existing control systems in several MS. The following research methods will be used: literature review, statistical data analysis and analysis

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of EU official documents. This article contributes to the debate surrounding the current issue of FDI screening mechanisms in the EU, as implemented in March 2019, with relatively few studies presently available in this field.

4.1. Why is foreign investment at the heart of the interest of the European Union?

Foreign investment is a manifestation of globalisation and, in the contemporary globalised economy, exerts an extensive impact on day-to-day reality. Foreign investment in the host country increases the volume of capital, may serve as a channel for technology transfer and has a positive impact on the level of knowledge of employees. However, it also affects the stakeholders of multinational corporations. For the local economy, the presence of a foreign investor means creating new jobs, and for smaller enterprises, it leads to development and growth stemming from cooperation as a sub-supplier of products or services. Lipsey (2002, 4) argues that the effects for the receiving country occur, in particular, in terms of assets, productivity, exports and the introduction of new industries (Lipsey 2002, 4). Forsgreen, when analysing the effects of foreign direct investment, pointed to its multidimensional nature. Depending on the role assigned to FDI, it may be the dominant entity in the environment, affect the structure and competitiveness of foreign trade or constitute a source of knowledge and technology. Studies have shown that the experience of multinational corporations and the emergence of cooperation they stimulate around them bring positive effects in the economy in which they are located (Golejewska 2001, Lipsey 2002).

The EU maintains its leading position in the global FDI in terms of inward stock (31.7%) and outward stock (37%)[1]. It is currently reported that foreign direct investment will experience a recovery in the global economy after the recession. Over the 2000-2016 period, the share of FDI stock increased from 22% to 35% of global GDP. The value of mergers and acquisitions (M&A) reached a record value of USD 1.2 trillion in the first quarter of 2018. Over the past few years, the dominant role of developed countries in

[1] Own study based on UNCTAD data [accessed on: 16.07.2019] and World Investment Report 2019.

terms of outward and inward FDI has continued to prevail, but it should be noted that both the role and share of emerging market economies have also increased significantly (Carril-Caccia, Pavlova 2018). Numerous studies point to positive effects of FDI on European economies in the form of new technologies, access to markets, creation of new jobs or wage growth, which, however, depends on the absorption capacity of a given economy (Blomström, Kokko 1998, 247-277; Dachs, Peters 2014, 214-232). Furthermore, research into the relationship between M&A and embedded value in exports has shown that FDI is complementary and supportive to the exports of the host country (Carril-Caccia, Pavlova 2018).

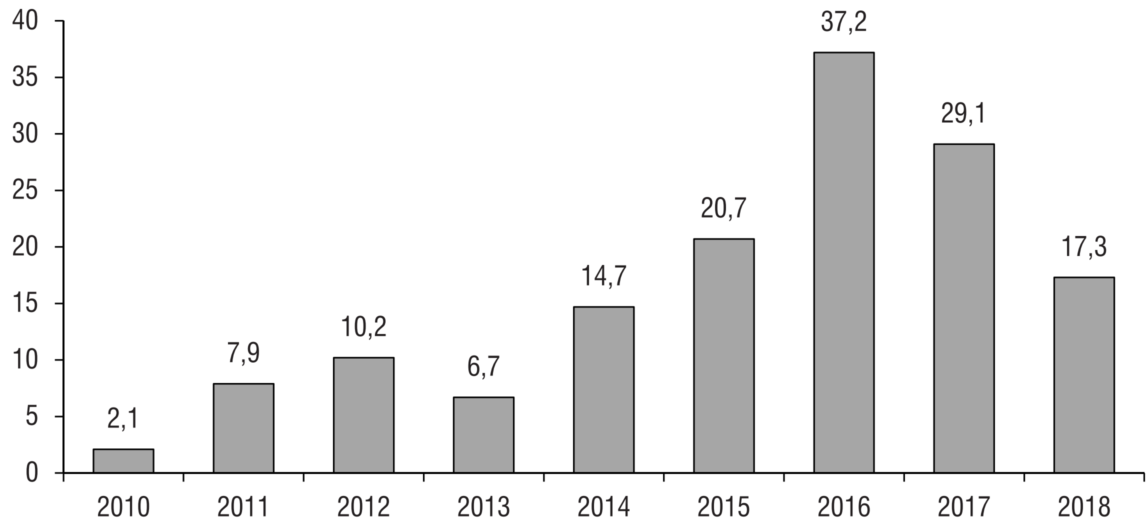
One of the major trends observed on the EU markets was a dynamic increase in the involvement of Chinese FDI. In 2016, Chinese FDI reached the level of EUR 35.9 billion, a 15-fold increase compared to 2010. In terms of geographical structure, the largest recipient of FDI originating from China is the UK, which between 2000 and 2018 achieved a 46.9% share. It was followed by Germany with 22.2% and France with 14.7%. In 2018 there was no strong accumulation of the FDI in specific sectors. No industry accounted for more than 20% of all investment (Hanemann, Huotari, Kratz 2019, 12). At the same time, the data also shows that this upward trend has halted since as early as 2017. The involvement of Chinese capital in 2017 and 2018 represents about 40% and 50% of the 2016 figures, respectively. Moreover, the value of completed mergers and acquisitions carried out in the European Union Member States has decreased, dropping to the level recorded before 2015 (see Figure 4.1).

It is pointed out that this may be attributed to the regulations being introduced to control FDI, as well as screening mechanisms of inward FDI to different countries. The suspension of mergers and acquisitions was particularly evident among the main recipients of Chinese FDI in the EU, namely France, Great Britain and Germany (Bickenbach, Liu 2018, 15-22; Hanemann, Huotari, Kratz 2019).

In EC documents, the rapidly growing involvement of public enterprises of certain countries in foreign investments and their potential targeting to those sectors of the economy that are considered of key importance in the era of digitalization and globalization has been identified as the main threat to the openness of the process of economic integration taking place in the EU and the European economy as a whole. It was these facts that caused the EC to propose an initiative to create a regulatory framework in the area of inward

FDI in the EU (EC 2017 (a), 4-5). Among the countries which are pointed by EC as supported by state capital are named China, Russia and Arab Emirates (EC 2019 (c), 2).

Figure 4.1. Annual value of completed Chinese FDI transactions in the EU-28, EUR billion



Source: own elaboration on the basis of: Hanemann, Huotari, Kratz 2019.

4.2. The place of FDI within the competences of the EU

FDI forms an integral part of today's economy and is one of the main manifestations of globalisation (EC 2017 (b); Baldwin & Martin 1999). In the theory of economic integration, the so-called "investment effect" can occur as early as during the customs union stage, with the possibility of economic activity being transferred to the customs union in order to avoid customs barriers (Salvatore 2001). FDI has an important role to play in the European integration process as a component of the EU's common market. Although the free movement of capital did not fully materialise until the 1990s, direct investment in the first phase of EEC liberalisation was already free (Borowiec 2011, 192-193).

FDI was included in the area of common commercial policy, which falls within the exclusive competence of the EU, as indicated by the provisions of Articles 206 and 207 of the Treaty on the Functioning of the EU. Thus, it was indicated in the Treaty that in this area, the EU shall legislate on behalf of the Member States. It should be noted that FDI is naturally included in this area of EU competence due to the fact that in most of the EU's trade agreements, including bilateral investment agreements (BIT), preferential trade and investment agreements (PTIA) and double taxation agreements, foreign investment occupies an important position. At the European level, the aim of measures introduced in the area of FDI is to reduce the risk for investors, facilitate and streamline the flow of capital in the form of FDI, but on such terms that safeguard competition and ensure equal treatment of business entities.

Article 206 of the Treaty points to the need for further liberalisation in the area of, inter alia, foreign investment. In turn, Article 207(1) of the Treaty refers to the commercial aspect of FDI, which in practice is related to the strong impact of foreign investment on various aspects of international trade. Although the Treaty of Lisbon clearly states that FDI is one of the competences of the EU, practice shows that investments under the common commercial policy are protected also on the level of Member States. The establishment of so-called mixed agreements, which are negotiated and accepted at the level of the EU and the Member States, suggests joint competences in this area (Reinisch 2013, 179-196). Some argue that this is a deliberate measure that will allow each situation to be assessed depending on its individual context (Meilinger 2014).

4.3. The concept of FDI screening mechanism

Work on the regulatory framework for FDI began in 2017. The materials from the EC reveal that 12 MS already had such mechanisms in place (Austria, Denmark, Finland, France, Germany, Italy, Latvia, Lithuania, Poland, Portugal, Spain and the UK). The same was true for some of the EU's key partners such as Australia, Canada, China, India, Japan and the US. In view of the diversity of the models used, the EC suggested that these mechanisms be complemented by an indication of the nature of these regulations. The EC's intervention is expected to relate to investments originating from third countries, in particular those which may affect security and public order, such as investments in research areas, space or trans-European networks. However, the mechanism itself should be based on cooperation between the MS and the EC. Member States will receive notification in the form of non-binding legal acts, i.e. opinions and recommendations. In practice, this means that they will decide on the future of FDI on their own. An interesting solution proposed by the EC is to consult other MS in each case (EC 2017 (c)).

As the implementation of an FDI screening mechanism in the EU was positively received by the European Parliament (EP), the European Economic and Social Committee (EESC) also supported it. However, the EESC indicated there was a need to clarify the mechanism and to carry out a comprehensive analysis of the effects of FDI on the EU. The Committee also stressed that the legal framework for these regulations requires the creation of a legal basis that guarantees legal certainty, as such monitoring systems already exist in some MS. (EESC 2018, 1-2).

The rapid pace of proceeding with respect to the EC's proposals led to the adoption of the regulatory framework for FDI in March 2019. It is also worth noting that the screening process is currently carried out by MS and as of 22 July 2019 there were 31 reported proceedings concerning foreign direct investments (EC 2019 (b)).

4.4. Consequences of implemented screening mechanism

The involvement of Chinese capital in the implementation of FDI in the EU has led top-level European politicians to conclude that the EU can no longer afford such a degree of openness to the inflow of capital from third countries. Investments made in strategic and high-tech industries posed a threat to the security of the European economy. Despite the swift proceedings as regards the mechanism in question, a heated discussion on the proposed actions of the EC continued. Countries such as Greece or Portugal argued that this could hinder the inflow of capital and weaken their economic condition. Also, the Scandinavian countries stressed that the mechanism is contrary to the idea of economic openness of the European Union. Experts say that all the political frictions in MS eventually watered down the hard and decisive character of the FDI screening regulations. This means that the EC will have to rely to a large extent on the actions taken by the MS (Kirschenbaum, Soula, Clohessy 2019).

Regarding the presence of Chinese FDI in the European economy, it may be noted that the years 2017-2018 brought some changes. China's share of FDI in the EU declined, along with the value of transactions with the country. This potentially stems from the activity of the MS which, through their commitment to the regulatory framework, have reviewed, supplemented and streamlined their FDI screening systems.

These regulations could be perceived as another kind of barrier and a symptom of growing protectionism in the EU in the area of capital movements. The introduction of this regulatory framework is not only aimed at China, which is why the EESC pointed out the need to ensure smooth negotiations of investment and preferential agreements with third countries, the scope of which also incorporates FDI, while guaranteeing equal terms of access for investors to their own markets.

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UNCTAD predicts that FDI has gone through a period of post-crisis recession and its share in global GDP will be increasing. In addition to the investors from developed countries traditionally involved in the European market, there has also been a new wave of investors representing developing countries. Over the past decade, emerging markets have been gaining prominence, which is particularly evident in the area of FDI executed in the form of mergers and acquisitions. This is where Chinese investors are particularly active in the EU. What is more, the number of takeovers by state-owned entities from Russia, China and the Arab Emirates tripled between 2007 and 2017 (EC 2019(c), 3).

Thus, making use of its competences stipulated in the Treaty of Lisbon, the EU has decided to propose a new instrument. The undisputed identification of FDI as an element of trade policy is a result of the practice related to the execution of international trade agreements, which also cover foreign investment issues. It must be acknowledged that the measures proposed by the EC have been formulated and implemented in such a way as to ensure that the MS have the power to decide. At this point it should be emphasized that the development of FDI on the global market will necessitate changes and indicate their course to the EC as regards the regulatory framework implemented in 2019. Therefore, it is imperative to continuously examine the area of foreign direct investment; regardless of the form it takes (greenfield or mergers and acquisitions). Globalisation and its nature will be of paramount importance for the future shape of cooperation and effective control mechanism of FDI influx from the rest of world. From a practical point of view, for the time being, the FDI regulatory framework implemented by the EC has an auxiliary function supporting the activities of a considerable part of MS, which already had their own national systems in place for controlling direct investments. For the remaining MS, this offers an opportunity to create their own system at national level based on best practice.

Abstract

Over the past few years the European Union has implemented an active investment policy to secure the European investors' position on external markets. The latest action undertaken by the European Commission which is the implementation of the FDI Screening Mechanism stresses the need to protect European interests in case of external FDI development on EU's internal market. The aim of this article is to analyse the foreign direct investment in the EU to investigate the motivation of the EC behind such actions like screening mechanism. It will be supported by an analysis of the division of competences between the EU and Member States in the area of FDI and contain a discussion of possible implications of the new Regulation establishing the Framework for Screening Foreign Direct Investment. This article will employ the following research methods: literature review, statistical data analysis and analysis of policy documents.

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5.

Conditionality of the EU funds. A tool to protect the Union's budget or an instrument to strengthen the rule of law?

On 2 May 2018 the European Commission (EC) submitted the so-called MFF package. According to the EC, the major innovation regarding the long-term budget proposal is actually not about the budget itself in a strict sense. It aims to introduce a legal mechanism linking EU funds and the rule of law principle (European Commission 2018a). The new instrument has been laid down in a Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (hereinafter: Proposal).

The Proposal's *ratio legis* is, as a matter of fact, a prerequisite for further political and legal analysis and discussion on the proposed mechanism. What is the primary aim of the Regulation – protecting the EU financial interests or strengthening the rule of law among Member States (MS)? The answer will ultimately determine the Proposal's interpretation in every single case. For this purpose, the paper will focus on that basic question arising from the ambiguity of the Proposal's provisions.

Article 3(1) of the Proposal stipulates that appropriate measures shall be taken where a generalised deficiency as regards the rule of law in a MS affects or risks affecting the protection of the financial interests of the Union. Assuming that the primary legal goal of the Proposal is to protect the UE

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budget, one could construe that appropriate measures should be taken only when deficiencies in the rule of law affect or risk affecting the EU funds management directly. Nevertheless, considering the second possible aim of the Proposal, one could conclude that the Regulation establishes a *de facto* automatic link between deficiency regarding the rule of law and a risk for the Union's financial interests (Bachmaier 2019, 122). It means that a violation of the rule of law does not need to affect the protection of the EU budget directly.

The paper consists of two parts. The first part will discuss arguments suggesting that the primary Proposal's goal is to protect the EU budget, as indicated by a *prima facie* intuition. The second part will focus on arguments advocating that the Proposal is *de facto* aiming primarily to strengthen the rule of law among the EU MS. For the sake of methodological correctness, it has to be pointed out that in the paper a preliminary view has been taken that there are only two possible answers to the question about the aim (*ratio legis)* of the Proposal. The paper does not claim there are no other possible aims that the Proposal is intended to achieve. Obviously, neither does it claim that, if the primary Proposal's aim was to strengthen the rule of law, protection of the EU budget could not be realised by means of the Proposal and otherwise.

5.1. Rule of law conditionality as a tool to protect the EU financial interests

In a Reflection Paper on the Future of the EU Finances, the EC presented a broader approach to the principle of the rule of law, stating that "Respect for the rule of law is important for European citizens, but also for business initiatives, innovation and investment (…). There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget" (European Commission 2017, 22). Such a concept was repeated in Recital 8 of the Proposal. Deficiencies in the rule of law increase business risk, which might discourage private entities from cooperating with a government in investments funded with EU resources. Such a concept advocates the idea that the protection of EU financial interests is the *ratio legis* of the Proposal. That is because the respect for the rule of law is, as a matter of fact, considered only as a tool to encourage business initiatives and investments financially supported by the EU. Concluding, if spending of the EU funds was affected due to rule of law limitations, the Union's financial interests would be at stake.

Assuming that the Proposal is not, in fact, intended to strengthen the rule of law directly, we need to discuss the Article 7 of the Treaty on European Union (TEU) procedure. In accordance to the Article 7(3) TEU, when a serious and persistent breach of (*inter alia*) rule of law is determined, the Council may suspend certain MS rights deriving from the application of the Treaties. In particular, suspension of the rights anchored in the Treaties (*ergo* deriving from the secondary law) might embrace e.g. suspending payments from the Structural Funds (Grzeszczak 2017). Arguably, receiving EU funds is a MS's right under the Treaties – there is literally no argument questioning such an interpretation (Łacny 2018, 19). To illustrate this point, one could mention that so-called ESI Funds (European Structural and Investment Funds), discussed above, are primarily covered by the provisions of the Title XVIII of the Treaty on the Functioning of the European Union (TFEU) as well as by the Common Provisions Regulation for the ESI Funds issued pursuant to Article 177 TFEU. To conclude, by resorting to the *argumentum a contrario,* as the Article 7 TEU procedure already provides similar sanctions to those specified in the Proposal, the mechanism introduced by the Proposal would be identical to the existing one, which would be pointless. *Ergo,* the Proposal's primary aim cannot be to counteract the rule of law backsliding.

In accordance with the Treaties, the Union is obliged to counteract fraud and other illegal activities affecting the EU financial interests (TFEU, Art. 325). In 1999, under a Commission's Decision, a European Anti-Fraud Office (OLAF) was established in order to carry out external and internal administrative investigations aiming to strengthen the fight against illegal activity adversely affecting the Union's financial interests. However, OLAF neither has authorization to conduct criminal investigations and prosecutions (Lilkov 2018), nor can it investigate corruption which does not involve EU administration staff (OLAF 2018). On-the-spot checks and inspections are carried out on economic operators only, not public officials (Regulation No 2185/96, Art. 5). For this reason, the EC is ultimately dependent on the MS's public prosecution services, supervisory authorities and judicial system (Lilkov 2018). Consequently, in case of generalised deficiencies as regards the rule of law, Commission lacks instruments to protect EU financial interests.

According to the Article 3 of the Proposal, appropriate measures provided in Article 4 thereof shall be taken when, among other issues, carrying out financial controls, functioning of public prosecution services, the effectiveness of judicial review or ability to sanction breaches of law like fraud and corruption (Proposal, Art. 3(1)) affects the protection of the EU budget. The discussed argument indicates that the Proposal's goal is to protect the EU financial interests, especially through ensuring an effective combat of fraud and other related adverse activities.

Moreover, the European Public Prosecutor's Office (EPPO) is expected to become operational by the end of 2020. It means that not only national authorities will have the competence to investigate and prosecute a fraud against the EU finances. Nevertheless, not all of the EU MS are participating, because pursuant to Article 86 TFEU the Regulation establishing the EPPO was adopted under enhanced cooperation. Furthermore, the group of 22 participating countries does not comprise Poland and Hungary, the MS against whom the Article 7 procedure has been triggered (Luxembourg: Publications Office of the European Union 2019). Thus, the argument that the Proposal is aiming to protect the EU budget, especially from economic offences, remains accurate.

5.2. Strengthening the rule of law – a primary aim of the Proposal

As the Recital (3) of the Proposal provides, "The rule of law is a prerequisite for the protection of the other fundamental values on which the Union is founded", while simultaneously one of the Union's aims is to promote its values (TEU, Art. 3). A long-standing EU policy tool applied to achieve its objectives is the principle of conditionality, particularly spending conditionality (Halmai 2018, 1). Major EU funding programmes have adopted specific objectives as conditionals. That is because conditionality, as opposed to unconditional equalisation of payments, is a defining feature of Union's policy (Heinemann 2018, 298). According to the Regulation establishing the Erasmus+ programme, "the Programme shall support only those actions which (...) contribute to the achievement of the general objective as referred to in Article 4 thereof"

(Regulation 1288/2013, Art. 3). The well-known Copenhagen criteria, requiring fulfilment of the rule of law, and convergence criteria also count as an example of the principle of conditionality. Arguably, the idea of establishing spending conditions not directly connected to the funding programme *per se* shall not be considered novelty. For instance, the Cohesion Fund is equipped with an excessive deficit macroeconomic conditionality since 1994 (Heinemann 2018, 298)[1]. Moreover, conditionalities aiming to promote and strengthen the rule of law have also been used previously, e.g. payments from the EU Home Affairs Funds were suspended due to human rights violations at the EU border detention centres in Greece financed by the Union's External Borders Fund (Viță 2018, 54). Concluding, the principle of conditionality introduced under the Proposal is, as a matter of fact, not a revolutionary approach. Linking EU funds to the rule of law is simply a new type of spending conditionality, whose objective is to strengthen the rule of law and, at the same time, to promote the EU aims, anchored in the Treaties. It implies that principally the Proposal's purpose is to enhance respect for the rule of law.

It is believed that the existing EU rule of law toolbox falls short of upholding European values. Heretofore, the rule of law framework, Article 7 procedure, and the infringement procedure have been accused of being, respectively, too weak, too narrow and too political (Israel 2018, 4). Conceivably, it might be a false assumption that the Copenhagen criteria could guarantee that every new MS admitted to the Union will be a liberal democracy based on the rule of law principle, which would be a sufficient condition to preclude "generalised deficiencies as regards the rule of law" (Pech, Kochenov 2019, 1). Hence one might imply that the Article 7 procedure was designed on the basis of a false assumption discussed above, being introduced by the Amsterdam Treaty as a safety valve before the Union's enlargement to the East with motivation to counteract "old habits [that] die hard" (Hervey, Livingstone 2016). However, regarding the Proposal, the European Parliament, in a legislative resolution adopted at first reading, suggests adding to the Proposal a new Recital stating that "The obligations incumbent on candidate countries under the Copenhagen criteria continue to apply to MS after joining the Union by virtue of Article 2 TEU (...)" (European Parliament 2019, Amendment 6).

In particular, comparing the sanctioning mechanism anchored in Article 7 TEU with the procedure of implementing appropriate measures foreseen in the

[1] See: Article 23 of the Common Provisions Regulation for ESI Funds (Regulation No 1303/2013, Art. 23).

Proposal, one could conclude that, in fact, the latter was expected to overcome the “inefficacy” of the Article 7 procedure (Georgiev 2019, 122). Indeed, pursuant to the Article 5(7) of the Proposal “The decision [implementing appropriate measures against a MS] shall be deemed to have been adopted by the Council, unless it decides by qualified majority, to reject the Commission’s proposal (...)”. It is worth noting that the European Parliament and the European Council play no role in the process. According to the Court of Auditors Opinion concerning the Proposal, released pursuant to Article 322(1) TFEU, the EC is provided with more discretionary power than in any other instrument intended to counter a breach against values stated in Article 2 TEU. It has been also pointed out that the proposed mechanism is faster to apply than the one envisaged in Article 7 TEU (Opinion 2018, 4). Difficulties related to executing the Article 7 TEU mechanism are revealed in the fact that heretofore the sanctioning mechanism has not been applied against any MS, which is, among others, because due to Article 7(2) TUE the European Council should act unanimously, which is regarded to be a huge political challenge. Given all of the above, one may conclude that the primary aim of the Proposal is to strengthen the rule of law in terms of introducing a new legal mechanism that seems to be much more efficient than the existing instruments.

Moreover, what also indicates such a conclusion is the current political climate among several MS, who stress the need of solidarity and complying with the European values by the EU funds beneficiaries. Hence, the new spending conditionality may be used by the EC as a bargaining chip for the ongoing MFF 2021-2027 negotiations (Lilkov 2018). The former Austrian Chancellor, Christian Kern, used to say that “solidarity is not a one-way street”, referring to the reluctance of some MS, being at the same time net recipients of EU funds, to contribute to the resettlement of migrants. It is also known that MS like the Netherlands, Denmark, Austria and Sweden are not in favour of the planned size of the budget (Lilkov 2018). Moreover, mostly due to the gap in the EU budget arising from Brexit, Germany is to contribute about 15 billion euro annually more to the EU budget (Becker 2019, 9), which may strengthen the Germany’s negotiating position regarding the next long-term budget negotiations.

Finally, the EU Regulation on the financial rules applicable to the general budget of the Union (hereinafter: Financial Regulation/FR) and the Regulation laying down common provisions on the European Structural and Investment Funds (hereinafter: CPR) already provide measures intended to protect the

EU financial interests, analogous to that one introduced by the Proposal. For instance, the Financial Regulation sets forth that the Commission and MS are obliged to respect the principle of sound financial management when implementing the budget under shared management. Such a management method applies to 80% of EU funding, including ESI Funds. Furthermore, the Financial Regulation confers on the EC a power to "exclude from Union financing expenditure for which disbursements have been made in breach of applicable law" in order to guarantee the aforesaid (FR, Art. 63(8)(b)). The EC may also "make financial corrections on MS in order to exclude expenditure incurred in breach of applicable law from Union financing" (FR, Art. 101(8)). All the measures specified above have also been provided in Article 4 of the Proposal. Concerning the ESI Funds Regulation, in case of a serious deficiency in the effective functioning of the management and control system of the funding programme, which puts at risk the Union's financial contribution, the EC may suspend the interim payments, which are one of the three types of payments that the EC can make when distributing ESI Funds (CPR, Art. 142(1)(a)). It is worth pointing out that ESI Funds cover a half of the EU budget. The flaws illustrated above are analogous to the one indicated in Article 3(1)(a) of the Proposal, which refers to proper functioning of the authorities when carrying out monitoring and controls. Concluding, the EU law already provides sufficient instruments designed to protect the EU budget in situations foreseen by the Proposal. It may indicate that the Proposal's primary aim is to promote the respect for the rule of law and not to protect the EU financial interests, as there are similar regulations which serve that end.

* * *

Article 1 of the Proposal sets forth that "This Regulation establishes the rules necessary for the protection of the Union's budget in the case of generalised deficiencies as regards the rule of law (…)". Although a clear statement putting the protection of EU budget first has been made, it is not excluded that the literal understanding of its aims may be wrong. As the provided arguments have shown, it is possible that the primary goal of the Proposal is to promote respect for the rule of law. Notwithstanding, one may realise, the legislative procedure is ongoing, while the EC, which has the right of legislative initiative, is only one of a few key players in an Ordinary legislative procedure. It leads to the conclusion that there is much ambiguity in determining the aim of the Proposal. Last, but not least, the Proposal will be ultimately interpreted by the law enforcement authorities, which may also actually determine the Regulations legal goal.

Abstract

Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law, submitted by the European Commission in 2018 as an element of the next MFF package, introduces a legal mechanism linking EU funds with the rule of law principle. The paper is founded on an assumption that identifying the Proposal's ratio legis is a prerequisite for further political and legal analyses and discussions on the proposed mechanism. The research problem focuses on the primary aim of the Proposal, determining if the Regulation's goal is to protect the EU financial interests, or to strengthen the rule of law among Member States.

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6.

Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law

Although modern management theories favour techniques of praising, new research, surprisingly, suggests that negative feedback, particularly of a financial nature, contributes to more improvement than positive affirmation. It appears that a punishment is thus more effective than a reward (Knapton 2015). Maybe this assumption inspired the EU institutions to apply "the stick is better than the carrot" approach to eliminate infringements of the rule of law committed by the EU Member States (MS). This tactic is evident in the Draft Regulation authorising the EU institutions to suspend the transfer of EU funds paid from the EU budget to the MS breaching the rule of law (hereinafter: the Draft Regulation, or Draft). This Draft, if adopted, would introduce a new legal mechanism into EU law under which regular transfers of EU funds to the MS to enable the implementation of different EU policies (mainly the agriculture and the cohesion policy) would be made conditional upon their respect for the rule of law (known as "the rule of law conditionality").

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6.1. The financial conditionality in EU regulations concerning the spending of EU funds

The conditionality is an EU policy tool which has been in use since the late 1980s. It is based on the assumption that the MS and third countries are prompted to comply with requirements established under EU law in return for the advantages obtained. Or in other words, they would adhere to EU provisions due to the risk of losing advantages, particularly financial ones.

In the debate on the Draft Regulation introducing a new conditionality to EU law it was rightly noted that there already existed a legal basis that the European Commission (EC) could apply to suspend transfers of EU funds to the MS violating the rule of law (Butler 2018; Scheppele, Pech, Kelemen 2018; Kelemen, Scheppele 2018). It has been claimed that such an opportunity is provided by the CP Regulation[1] containing rules on the European Structural and Investment Funds (ESIF) which finance implementation of the cohesion policy in the MS. Similar rules also allow for the suspension of EU funds transferred to the MS for implementation of Common Agricultural Policy (CAP) (Art. 58(2) no 1306/2013).

Under the CP Regulation, the MS spending ESIF must establish a management and control system and ensure its effective functioning[2]. This system is comprised of the bodies designated by the MS (e.g. the managing authorities, audit institutions), the tasks they carry out in relation to EU funds (e.g. carrying out controls, making payments, imposing sanctions) and the tools allowing for proper management and control (e.g. databases, computer systems). This system should guarantee that ESIF are spent in the MS in accordance with EU law and that the risk of their loss is minimised. If the EC finds a serious deficiency in the effective functioning of the management and control system in the MS, which has put the ESIF at risk, it is authorised to suspend the payments of ESIF transferred to this State (Art. 142(a) CP

1 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17.12.2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013/320).

2 Articles 72–74 and Article 122(1) CP Regulation. The same concerns the agricultural spending, see: Article 58 (2) 2 and Articles 67–73 Regulation No 1306/2013.

Regulation). It may also recover ESIF by imposing financial corrections on this State (Art. 144(1)(a) CP Regulation). It is claimed in the EU legal doctrine that systemic violations of the rule of law by a MS can be classified as a serious deficiency in the effective functioning of the management and control system in such State. In such a case, the EC could suspend the ESIF transferred to this State, or recover it. So far, the EC has not explored either of these possibilities (Kelemen, Scheppele 2018).

Another example provided by the CP Regulation relates to the national system of legal complaints. Under this Regulation, the Member States must ensure they have effective arrangements for the examination of complaints concerning the ESIF (Art. 74(3)). They thus must ensure the access of natural and legal persons to means of effective legal protection in cases concerning EU funds, including access to independent and impartial tribunals[3]. For a MS with an established record of breaching the rule of law, including capturing an independent prosecution and judiciary, it could be difficult to prove it fulfils this requirement.

So far the EC has not applied the possibilities offered by the CP Regulation to try to discipline the MS breaching the rule of law. Therefore, the real problem may be not the lack of adequate legal tools, but the lack of political will on the part of the EC to use the tools that already exist. Instead, the EC has proposed the Draft Regulation establishing the rule of law conditionality which is commented on in this paper.

6.2. The rule of law conditionality applied in case of breaches of the rule of law

The EU is a community of law and its values constitute the very basis of its existence. Respect for these values must be ensured throughout all EU policies, including the EU budget (EC 2018). Having this in mind the EC presented the Draft Regulation in response to the common opinion that the EU lacks effective legal instruments to stop systemic breaches of the rule of law by

[3] Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights. See: CJEU, Case C-562/12, *Liivimaa Lihaveis MTÜ*, ECLI:EU:C:2014:2229, paras. 67-75.

MS (Closa, Kochenov 2016; Jakab, Kochenov 2017; Schroeder 2016; Hatje, Tichý 2018; Costa 2017; Konstadinides 2017). It claimed that such breaches cannot be accepted any longer and that they damage the financial interests of the EU. Some authors point out a paradox: that the EU transfers the largest amounts of EU funds to governments of the MS with a history of long-standing violations of the rule of law (Kelemen, Scheppele 2018; Peel, Hopkins, Shotter 2019), for example to Poland – the largest overall recipient taking in EUR 86 billion from various ESIF in the MFF 2014-2020; and Hungary – the largest recipient of EU funds on a *per capita* basis, with more than 95% of all public investment in MFF 2014-2020 having been co-financed by the EU[4]. The rule of law conditionality proposed to be introduced by the Draft Regulation is supposed to remedy this situation.

A generalised deficiency as regards the rule of law, the existence of which in a MS is a necessary premise of launching the rule of law conditionality under the Draft Regulation, indicates a common conduct on the part of public authorities of the MS that violate the rule of law, which adversely affects or is likely to affect the EU funds (i.e. the financial interests of EU) or management thereof (the sound financial management of the EU).

This notion's definition is extremely broad and its scope is virtually impossible to determine. The general wording leaves the EC and the Council – the EU institutions that would launch the rule of law conditionality – with a wide margin of discretion, which is undesirable, especially from the point of view of the principle of legal certainty. This principle requires that any provision imposing sanctions on entities must be formulated clearly and precisely, so that they can determine with certainty the scope of their rights and obligations and take appropriate actions[5]. As required by the CJEU, this principle should be rigorously observed, particularly in the case of provisions that have or may have a financial impact. It may be stated that the notion of a generalised deficiency as regards the rule of law is neither clear nor precise. Its strict formulation is even more necessary if one takes into account the

4 It has been noted that the situations of Poland and Hungary differ, since there are no well-proven cases that breaches of the rule of law by the Polish authorities have led to the misspending of EU funds (Brauneck Von, 2019), which is the case in Hungary (Kelemen, Scheppele 2018) and Romania (Pech, Perju, Platon 2019).

5 CJEU Cases: 70-83, *Kloppenburg*, EU:C:1984:71; 325/85, *Ireland v Commission*, EU:C:1987:546, para. 18; C-143/93, *Gebroeders van Es Douane Agenten*, EU:C:1996:45, para. 27; C-177/96, *Banque Indosuez*, EU:C:1997:494, C-439/01, *Cipra, Kvasnicka*, EU:C:2003:31, para. 49; C-110/03, *Belgium v Commission*, EU:C:2005:223, para. 30; C-158/06, *Stichting ROM-projecten*, EU:C:2007:370, paras. 25-26.

oppressive nature that the rule of law conditionality may have on the MS and beneficiaries. It seems highly undesirable that EU institutions, in taking actions against the MS for breaching the rule of law, may themselves violate this rule by applying premises which are formulated (too) broadly. The wide scope of the competences conferred upon the EU institutions under the rule of law conditionality has also been criticized by the European Court of Editors (ECA), which recommended the EU legislator to establish precise criteria defining the concept of a generalised deficiency as regards the rule of law and to specify measures to be taken in this framework. The suggested clarifications of the Draft Regulation could limit the scope of the EU institutions' discretion (ECA opinion No 1/2018, paras. 12-16, 19).

6.3. Types of generalised deficiency as regards the rule of law

In their proposals of Draft Regulation, both the EC and the European Parliament (EP) provided for a broadly-worded definition of a generalised deficiency as regards the abovementioned rule of law and indicated specific types of such a deficiency. In this regard the EC established two lists of types of generalised deficiency as regards the rule of law. The first list includes the conduct of national authorities (administrative, investigative, and judicial) related to EU funds. The list is left open. Deficiencies included there do not have to be serious, since they include, e.g. practices on the part of a national authority affecting the effective and timely cooperation with the European Anti-Fraud Office (OLAF) or the European Public Prosecutor's Office (EPO) (Art. 3(1)(f)). Detection of these types of deficiencies as regards the rule of law in the MS leads to the launching of the rule of law conditionality (Art. 3(1)). The second list of deficiencies indicates conducts on the part of national administration that may be considered generalised deficiencies and thus lead to initiation of the rule of law conditionality (Art. 3(2)). In this case the deficiencies are related only to the national judiciary and concern its constitutional determinants (e.g. judicial independence), administration (e.g. lack of relevant financial and human resources), and actions performed (e.g. prosecuting, sanctioning). There is, however, no requirement that they must or may affect the financial interest of the EU.

The EP's approach was similar, because it also created two lists of types of generalised deficiencies as regards the rule of law. The first, open list, relates to the conduct of national administration and judiciary and includes, e.g., failing to prevent, correct and sanction arbitrary or unlawful decisions made by public authorities; limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules; lack of implementation of judgments or limiting the effective investigation, prosecution and sanctioning of breaches of law. This list includes *inter alia* "endangering the administrative capacity of MS to respect the obligations of Union membership, including the capacity to effectively implement EU law". Last but not least, measures that weaken the protection of confidentiality of communications between lawyers and clients were also included on this list (Art. 2(a)). The second list includes generalised deficiencies that endanger or pose a risk of endangering financial interests of the EU (Art. 3). This list includes general deficiencies included in the EC's first list (Art. 3(1)), as well as two new breaches concerning, among others, Copenhagen criteria[6] and fundamental rights.

6.4. Measures applied under the rule of law conditionality

The rule of law conditionality is a general term under which specific measures would be imposed on the MS breaching the rule of law. These measures would depend on which method of implementing the EU budget is used for spending the EU funds. These methods – namely direct, shared, and indirect management – consist of requiring the entities incurring expenditures financed from the EU budget (EU funds) to comply with related tasks and responsibilities established in EU law and authorising the EC to take supervisory actions to ensure their proper spending. What distinguishes these methods is the entity carrying out the tasks. In the case

[6] Distortion or risk of distortion of proper functioning of the market economy and effective implementation of obligations of membership, including adherence to the aim of political, economic and monetary union could constitute generalised deficiencies as regards the rule of law Art. 3(1)(aa) Draft Regulation).

of direct management, the tasks are directly carried out by the EC through its departments and executive agencies; in the case of shared management – by the MS; and in the case of indirect management – by third countries, international organizations, and other entities.

Here we focus on shared management (see Craig 2012; Hofmann, Rowe, Turk 2012; Schöndorf-Haubold 2011), under which the EU funds are spent for the implementation of the CAP and the cohesion policy, altogether constituting about 70% of the EU's budgetary expenditures (EC 2018). The following measures can be applied under the rule of law conditionality if the EU funds are spent under shared management: suspension of approval of programs or amendments thereof; suspension of commitments; reduction of commitments, including through financial corrections or transfers to other spending programs; reduction of pre-financing; an interruption of payment deadlines; suspension of payments (Art. 4(1)(b) Draft Regulation).

The Draft Regulation does not establish how these measures should operate in practice, or even provide their general legal characteristics. There is also no guidance as to which types of above-mentioned measures should be applied in the case of certain generalised deficiencies as regards the rule of law. The Draft simply refers to the names of particular measures, which may suggest the essence of the activities undertaken. Very general information is given in the preamble, which states that these measures should include the suspension of payments and of commitments, a reduction of funding under existing commitments and a prohibition on concluding new commitments with recipients (Recital 13 preamble).

The application of these measures requires recourse to the sectoral regulations, which provide rules for the spending of EU funds for specific EU policies, e.g. for the CAP. Unsurprisingly, the Draft Regulation does not mention such a reference. It must also be noted that, at present, a detailed and final assessment of these regulations is not possible since they are undergoing legislative processes in the EU institutions heading the new MFF 2021-2027. At this point in time, it can only be stated that these measures can be taken at various stages of the implementation of EU policies: from the stage of approval of national programs by the EC to the stage of making legal commitments by the EC, followed by the payments of the EU funds to the MS. It is clear, however, that one of these measures consists of suspending the payment of EU funds (ECA opinion No 1/2018).

It's important to note at the outset that the Draft Regulation provides rules which the EU institutions (the EC or the Council) should take into account when imposing measures under the rule of law conditionality (Art. 4(3) and Art. 5a). They would be obliged to ensure that these measures are proportionate to the nature, gravity, and scope of the generalised deficiency as regards the rule of law. These measures should also, insofar as possible, target the EU actions affected or potentially affected by that deficiency. The requirement of proportionality between the generalised deficiency as regards the rule of law that is the EU law infringement leading to launching of the rule of law conditionality on the one hand, and measures adopted under this conditionality on the other hand signifies that these measures are deemed to be sanctions imposed upon the MS for breaching the rule of law. Under EU law, the principle of proportionality is the *sine qua non* condition of adoption of any sanctions imposed as the result of an infringement of a law.

To sum up the Draft Regulation provides generally-formulated premises for launching the rule of law conditionality together with their very specific examples, which can lead to measures of an (as of yet) unknown nature.

6.5. The impact of the rule of law conditionality on the MS

According to the Draft Regulation (Art. 6(3)), if EU funds are suspended under the rule of law conditionality, the amounts corresponding to the suspended commitments are re-entered into the EU budget, subject to the Art. 7 Draft Multiannual Financial Framework Regulation (Draft MFF Regulation). Re-entry allows reallocation and future reutilisation of the EU funds in question. The aforementioned Art. 7 proposes that commitments suspended in year 'n' due to a generalised deficiency as regards the rule of law in a MS may not be re-entered into the EU budget later than in the year 'n'+2[7]. The Draft Regulation contains a similar provision, stipulating that suspended commitments for year 'n' may not be entered in the EU budget beyond year 'n'+2 (Art. 6(3)). On top of this, from year 'n'+3, amounts corresponding

7 Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027 (COM(2018) 322 final).

to the suspended commitments should be entered in the Union Reserve for Commitments (Union Reserve) (Art. 12 Draft MFF Regulation). This Reserve is a new financial instrument which would be financed from, *inter alia*, funds committed to the EU budget but ultimately not spent for the implementation of EU programmes and thus de-committed. Amounts of the Union Reserve would to be made available for the MS in the new MFF 2021-2027.

It follows that, contrary to the political declarations claiming that the rule of law conditionality is supposed to only lead to a temporary suspension of EU funds of those MS found to be breaching the rule of law, thus motivating them to eliminate the breaches promptly, according to the Draft Regulation and the Draft MFF Regulation this may relatively easily result in permanent loss of EU funds by this State[8]. This is so because the Draft authorizes the EC to enter into the EU budget only the amounts corresponding to the commitments suspended under the rule of law conditionality which were lifted within two years (year ‘n’+2) from the year they were suspended (year ‘n’). After the elapse of two years, the EC will have no legal basis to enter these amounts into the EU budget anymore. What’s more, from year ‘n’+3 these amounts would be entered to the Union Reserve and could be reallocated to the MS and spent in the MFF 2021-2027.

This means that a MS whose EU funds were suspended under the rule of law conditionality has two years from the year of suspension (year ‘n’) to remedy the generalised deficiency as regards the rule of law and to request the EU institutions to lift the suspension and re-enter the amounts corresponding to the suspended commitments to the EU budget (Art. 6 Draft Regulation). If the MS fails to undertake these actions during the said two-year period, it loses the possibility to benefit from the suspended EU funds. Conducting all these actions within two years can be extremely difficult, taking into account that the elimination of rule of law breaches is usually time-consuming and, in addition, further time is needed to complete the proceedings in the EU institutions to lift the suspension.

[8] Para. 8 ECA opinion No 1/2018.

6.6. The impact of the rule of law conditionality on the beneficiaries of EU funds

In principle, the rule of law conditionality should solely affect those MS breaching the rule of law, and the consequences of the suspension of EU funds should not in any way influence the beneficiaries of these funds (e.g. farmers, entrepreneurs)[9]. To achieve this objective, the EC foresees, in the Draft Regulation, that unless the decision adopting the measures imposed under the rule of law conditionality provide otherwise, their imposition does not affect the obligation of the MS to implement the programme or fund those affected by the measures, and in particular the obligation to make payments to the beneficiaries of EU funds (hereafter: beneficiaries) (Art. 4(2)). In other words, despite the fact that the regular transfer of the EU funds from the EU budget to the MS budget is suspended due to a generalised deficiency as regards the rule of law in a State, the State is nevertheless obliged to continue to implement programs financed from these funds and make payments to beneficiaries. It could be assumed that since the EC recognized the need to protect the beneficiaries against the possibility that the MS will cease to make payments to them due to the suspension of EU funds under the rule of law conditionality, it should also specify in the Draft Regulation the legal measures that beneficiaries could apply against the MS if this should occur. However, the EC has not done so[10].

The EP has tried to remedy this deficiency and strengthen the legal protection of beneficiaries against the misconduct of the MS[11]. It proposed that the Commission should provide information and guidance *via* a website or internet portal for beneficiaries on the obligations of MS to implement the programme, in particular to make payments to them. The EC should also provide, on the same website or portal, adequate tools allowing the beneficiaries to inform it of any breach of these obligations by the MS. The information provided by the beneficiaries may only be taken into account by the EC if it is accompanied by a proof they have lodged a complaint to

9 The EP formulated this assumption in its resolution of 14.3.2018 on the MFF (2017/2052(INI)). The EC also pointed out that beneficiaries of EU funding must not be affected by breaches of the rule of law by MS. See page 2 of the Draft Regulation.

10 See critics: ECA opinion No 1/2018, point 27.

11 Recital 14 preamble and Article 4 (3)(a) and (3)(b) Draft Regulation.

the competent national authority. Beneficiaries informing the EC would be protected under the proposed Directive on whistle-blower protection[12].

The aforementioned rules establish communication channels between the EC and beneficiaries enabling them to exchange information on any eventual negative effects experienced by the latter due to the MS stopping to make the transfers of EU funds. It is, however, doubtful whether such communication itself may effectively protect beneficiaries, without being accompanied by any formal legal actions. Two possibilities appear to exist for beneficiaries. Firstly, they could apply legal remedies established under national law to claim continuation of transfers of payments of EU funds from national authorities. This, however, may be unattainable in a MS in which a totalitarian-like regime has captured the national administration and independent judiciary. Secondly, the beneficiaries could initiate an action for damages against the MS, claiming the State has infringed its obligation, arising under the Draft Regulation, to transfer the payments of EU funds. The success of this claim may still, however, depend on the effectiveness and independence of the national judiciary, which could be troublesome in the case of a MS breaching the rule of law in this area. The EC's legal situation is more meaningful, as it could initiate a general infringement action against a MS who breaches the Draft Regulation by ceasing to make the transfers of EU funds to beneficiaries.

It is important to note that the Draft Regulation has equipped the EC with competences that may help to ensure that beneficiaries would receive EU funds if their transfer would be suspended on a national level. These competences depend on the method under which the EU budget is implemented. Two possibilities exist in this respect, since these funds may be spent under indirect management (Art. 62 (1)(c) of the Financial Regulation no 2018/1046) – by public and private law Member States' organisations – or under shared management (Art. 62 (1)(b) of the Financial Regulation no 2018/1046), i.e. by the MS, mostly for implementation of CAP and the cohesion policy. If EU funds are spent under indirect management (by public and private law Member States' organisations), the EC may recover the payments directly made to these organisations for an amount equivalent to the amount not paid to beneficiaries (Art. 12 draft MFF Regulation). When EU funds are spent under shared management (by the MS), the EC may impose a financial correction (Art. 98 of CP Regulation) on

12 Proposal for a Directive on the protection of persons reporting on breaches of Union law COM(2018)218 final.

them to recover the EU funds. In both cases amounts recovered by the EC are transferred to the Union Reserve (Art. 12(2)(a) draft MFF Regulation).

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Systemic occurring breaches of the rule of law in the MS are a new phenomenon for the EU; one which its legal framework was not prepared to deal with. The EU tries to challenge infringements of this rule under EU Treaty procedures – the Art. 7 TEU procedure and, with more success, the general infringement procedure (Art. 258 TFEU). For some (unknown) reasons, the possibilities offered by EU secondary law (CP Regulation), which allowing for the suspension or recovery of the EU funds from the MS infringing the EU law, have not been tested. Instead the Draft Regulation establishing the rule of law conditionality allowing for the suspension of EU funds of the MS breaching the rule of law was put on the table. Scrutiny of the Draft leads to the following conclusions.

The premises for applying this conditionality are set out very broadly, to the extent that their exact meaning and scope is extremely difficult to determine. What is known is that their essence is the generalised deficiency as regards the rule of law which affects or may affects the financial interests of the EU. This lack of precision in formulation of premises is problematic, if one takes into account that the CJEU requires that the principle of legal certainty should be respected particularly rigorously in the case of punitive provisions and provisions having financial implications. It is rather clear that the Draft Regulation provisions establishing measures imposed on the MS under the rule of law conditionality may be recognised as punitive provisions having financial consequences. Therefore the general phrasing of premises necessary to initiate this conditionality calls into question whether the principle of legal certainty is respected. This broad phrasing of the premises leaves the EC and the Council, which would apply the Draft Regulation, with a considerable margin of discretion in their interpretations.

All this leads as to a situation in which the rule of law conditionality almost at our door, but the premises of its application remain very vague. It is unknown in which situations it could or will be applied. Due to on-going legislative works on sectoral regulations, it is also unknown what the exact shape of measures imposed under it will be. Finally, it is also unknown how this conditionality would relate to other EU Treaty procedures. What is known is that the MS may definitely lose any EU money suspended under this procedure if they do not rectify the breach of the law promptly and obtain a decision confirming that the breach has been rectified. What is also known is that beneficiaries of EU funds are likely to be left all alone in the event if such a dispute with a MS arises. The issue to be tackled during further legislative works on the Draft Regulation would therefore be how to ensure the protection of the rule of law without compromising this rule and other values on which the EU is based.

Abstract

The European Union is a community of law and values among which the rule of law takes a prominent place. In recent years, though, some Member States systemically breach this rule and it is commonly diagnosis that the EU lacks effective legal instruments to stop these violations. Many believe that this may change by suspending EU funds earmarked to these States. In response the European Commission presented the Draft Regulation which intends to make conditional transfers of EU funds to the Member States upon their respect of the rule of law. This paper presents and comments this Draft.

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7.

The development of digital economy and digital society. Case study: the United Kingdom

The development of information and communication technologies and the associated process of digitising the economy and society are ones of the most dynamic changes of modern times. New digital technologies are spreading much faster in the world than the inventions of the industrial era. For example, in Kenya electricity was implemented 60 years after its discovery. But the introduction of a computer took to more mainstream use only 15 years for Vietnam, and mobile phones and the Internet only several years (DeGusta 2012). Digitisation as a continuous process of convergence of the real and virtual world becomes the engine of change, creates new opportunities for socio-economic development, raising competitiveness and innovativeness of the economy, and at the same time is associated with uncertainty and various types of threats, including social consequences of automation of manufacturing processes or safety.

This article refers to the example of the United Kingdom, a country which actively participates in the development of the digital economy and the digital society in the aspect of activities aimed at maintaining and strengthening the competitiveness and innovation of the economy. In IMD World Competitiveness Ranking 2018, the United Kingdom ranked 20th among the most competitive economies in the world in 63 countries surveyed (IMD

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2018a, 1-2), while in IMD World Digital Competitiveness Ranking 2018 – the UK was ranked 10th among the most competitive economies in the world in terms of digitisation (the adaptation and use of digital technologies in the public and private sphere) among 63 countries surveyed (IMD 2018b, 26-27). In the European Innovation Scoreboard 2018 published by the European Commission on June 22, 2018, the United Kingdom was included in the group of innovation leaders, ranking 5th among 28 EU countries, followed by Sweden, Denmark, Finland, the Netherlands and before Luxembourg (European Commission 2018a). According to European Patent Office data published in January 2018, in 2017 5,313 applications of European patents originated in the UK. The country took 4th place among EU countries with the highest number of applications (following Germany, France, the Netherlands) (European Patent Office 2018). The United Kingdom is also assessed as a country with a developed digital economy (7th out of 28 EU countries in the Digital Economy and Digital Society Index 2018) (European Commission 2018b). Since 2015, the European Union has been taking steps to create a digital single market under the adopted *Digital Single Market* strategy to enable citizens and businesses to use digital technologies on a pan-European scale (European Commission 2015). In connection with the UK leaving the EU, it is currently unclear whether this country will continue to participate in the implementation of the EU strategy related to the creation of a single digital space in the EU with the possibility of using financial resources from the European Union budget. However, taking into account the great progress of the UK in the development of the digital economy and society, the identification of conditions related to this process - including the directions and nature of actions taken by the British government may be useful to inform the process of searching for mechanisms supporting the development of the digital economy in less technologically advanced countries. It should be emphasised that the use of experiences from other countries relates to certain limitations resulting from various factors: economic, political, institutional-legal, technological, social and cultural. However, it can be an indication of how to approach the development of the digital economy and the digital society in the aspect of dynamic changes in the external environment.

It has been assumed in this chapter that the development of the digital economy and the digital society is fostered by a strategic approach and support from the state in creating an environment which encourages the society and other entities to actively participate in this process. Therefore, the following research questions were formulated:

1. What is the essence and main features of the digital economy and digital society?
2. What is the level of development of the digital economy and the digital society of the United Kingdom?
3. What is the role of state policy in supporting the development of the digital economy and digital society in the United Kingdom?
4. What are the barriers to the development of the digital economy and the digital society in the UK?

The structure of the article is subordinated to these questions. The first part covers the explanation of the essence and the indication of the main features of the digital economy and society, including the main trends associated with the digital revolution. The second part estimates the level of development of the digital economy and digital society in the United Kingdom. The third part includes the characteristics of key activities for the development of the digital economy and digital society in the UK, including institutional and strategic solutions. The article is based on the review of the available literature, the analysis of official documents and the results of research carried out by various institutions and research centres.

7.1. The essence and features of the digital economy and the digital society

The term "digitisation" refers to the changes in the external environment arising from the increasingly widespread and intensive use of digital technologies. Robert Wachal for the first time used the concept of digitisation in this sense in the essay published in 1971, analysing the social effects of the digitisation of the society (Wachal 1971, 30-33). According to the Oxford English Dictionary, the concept of digitisation should be identified with the adaptation and increase in the use of digital or computer technologies by organisations, sectors of the economy, countries, etc. (Peitz, Waldfogel 2012). The digital economy is a consequence of technological development and convergence of data processing methods, means of communication and accumulation of knowledge. It means the implementation of economic processes using electronic means of data exchange, and the Internet is an indispensable tool that constitutes the basic market infrastructure. Don Tapscott in *The Digital Economy*, published in 1997, identified the main features of the digital economy. They key one is knowledge, as an important intangible good, but also digitisation, virtualisation, integration, convergence, innovation, immediacy, globalisation and incompatibility (despite the expected unification, differences in income, opportunities for people with appropriate competences and those who do not possess them) (Tapscott 1997). These findings are still valid. OECD defines the digital economy as a broad spectrum of economic, social and cultural activities supported by the Internet and related information and communication technologies (OECD 2008), as comprised of markets based on digital technologies that facilitate the trade of goods and services through electronic commerce on the Internet (OECD 2013, 5). European Commission defines the digital economy as an economy based on digital technologies (sometimes called the internet economy) (European Commission 2013, 2). In the digital economy, the main values are intangible, and the use of them is treated as a source of development. This includes algorithms, software, big data repositories, patents, copyrights, business models, organisational capabilities, social capital, knowledge, competences, skills and strategic connections (Andersen 2015, 50). In relation to the digital society, the access to information and communication technologies as well as the ability to use them play an important role. The digital society is a knowledge-based society that makes use of available private and public e-services (including internet banking, the ability to pay bills, make purchases, bookings, arrange medical appointments, and facilitate public transport use – plans and timetables, purchase of tickets), draws from cultural goods and online entertainment (books, films, music), uses available educational materials (online learning, teaching resources online), communicates with others (uses instant messaging, social media, e-commerce) e-mails, etc.), is aware of the benefits and threats of digitisation in everyday life, but also at other levels (in the activities of enterprises, the functioning of the public sphere). The terms “digital economy” and “digital society” are some kind of a brachylogy – they are attempts to synthetically define multifaceted, complex and dynamic changes in the external environment among which the development of information and communication technologies becomes an increasingly important factor to take into account in socio-economic changes. Apart from the concept of the digital economy, there are several other terms defining a new model of the economy, such as a new economy, e-economy, network economy, a knowledge-based economy. The following related terms are often used interchangeably with the term "digital society": post-industrial society, information society, technological society, network society, virtual society, knowledge society, knowledge-based society.

The trends related to the dynamic development of information and communication technologies and factors stimulating the development of the digital economy and the digital society are the subject of numerous analyses and research. According to the authors of the *Digital Economy report. Key trends of the digital revolution. Diagnosis, forecasts, response strategies*, the main trends are:

- convergence of networks, bits and atoms;
- autonomy of electronic devices;
- cyborgisation (humans' interlock by more and more durable connections with the surrounding technical systems);
- increased mobility;
- information-based distribution;
- interchangeability of functions between devices;
- processing in the cloud (cloud computing);
- the evolution of business models towards services;
- declining intermediaries;
- platformisation;
- openness as a business model;
- progressive audience autonomy;
- globalisation of competition;
- change in the context of starting a business;
- increased importance of data and knowledge management;
- excess of information and lack of attention;
- prosumerisation and crowdsourcing;
- automation and replacement of human work – the work of machines;

- increased importance of information competences (Batorski, Bendyk, Filipiak 2012, 13-61).

In a 2015 report by Roland Berger, a consultancy firm commissioned by the Federal Union of German Industry, based on the results of key sectors for the German and European economy, four levers of the digital transformation process were identified: digital data, automation, connectivity and digital consumer access (Roland Berger 2015). According to Jana Pieregud, the main factors driving the development of the digital economy are the Internet of Things, ubiquitous communication, applications and services based on cloud computing, big data analysis, automation and robotisation. The Internet of Things is understood as an ecosystem in which, for example, household appliances, lighting and heating articles communicate (exchange data) with computers using various types of sensors. The huge progress that has been made in the field of mobile technologies has affected the development of the Internet of Things. In 2014, there was a so-called mobile revolution - for the first time the number of users using the Internet on mobile devices in the world has exceeded the number of connected desktop computers (Pieriegud 2016, 11). The ubiquitous communication called “hyperconnectivity” by Canadian scientists Anabel Quan-Haase and Barry Wellman, as part of their research on various interactions (man-human, human-machine) in organisations and network communities, means the availability of many means of communication (such as e-mail, instant messaging, mobile phone, Web 2.0 services) anywhere and anytime (Quan-Haase, Wellman 2005, 285). The services and applications based on cloud computing are constantly being developed. Cloud computing is a model of distributed data processing, based on the use of a service provided by external entities, which is available on demand at any time (Longbottom 2017). Cloud-based services make it easy to store and access digital products. Due to the rapid increase in the amount of data being created, transmitted and stored, the demand for advanced analytical tools for big data increases. Automation and robotisation are also being developed. The industrial robots’ market is growing the fastest, especially in China and Germany, and the industry using the most industrial robots is currently the car industry (Gao 2015, Graetz, Michaels 2018, 753-768: Cheng, Jia, Li, Li 2019, 71-88). The observed changes mean a digital revolution which permeates all aspects of socio-economic life.

7.2. Development level of digital economy and digital society in the UK

The Digital Economy and Society Index (DESI) is published every year since 2014 by the European Commission. The evaluation of the progress of EU Member States in the development of the digital economy and digital society takes into account five categories (components): 1) connectivity: fixed broadband networks, mobile broadband services, broadband speeds and prices; 2) human capital: Internet usage, basic and advanced digital skills; 3) use of Internet service: the use of online publications, communication and transactions by citizens via the Internet; 4) integration of digital technologies: digitisation of enterprises and electronic commerce, and 5) digital public services (e-government). In the DESI 2018 ranking, the United Kingdom took the 7th position (following: Denmark, Sweden, Finland, the Netherlands, Luxembourg, Ireland) among the most advanced digital economies and digital societies in the European Union (in 28 Member States) (European Commission 2018b). Table 7.1 presents the overall result of the index and results for the components of the index (the higher the score, the better the country's position) for the United Kingdom against selected EU countries (Denmark: 1st position in the 28 countries surveyed) and EU-28.

Table 7.1. Index of the Digital Economy and Digital Society – the UK against the background of Denmark and EU-28 countries

DESI – general result and results for the components of the index	Denmark result and [position in the ranking]	United Kingdom result and [position in the ranking]	EU-28 result
DESI 2018 - overall result	73.7 [1]	61.2 [7]	54.0
DESI 1: Connectivity	78.5 [3]	68.8 [7]	62.6
DESI 2: Human capital	70.4 [6]	71.6 [4]	56.5
DESI 3: Internet usage	75.1 [1]	62.4 [7]	50.5
DESI 4: Integration of digital technologies	61.3 [1]	40.0 [14]	40.1
DESI 5: Digital public services	73.2 [3]	56.2 [14]	57.5

Source: The Digital Economy and Society Index – DESI 2018, Country Reports.

Taking into account the components of the index, in four of them (human capital, communication, use of the Internet, digital public services), the United Kingdom achieved results above the average for all EU Member States (28), in one (integration of digital technologies) the result was lower, but similar to the average EU-28 result.

7.3. Activities for the development of the digital economy and the digital society in the UK

The development of the digital economy and the digital society is a part of the UK government's innovation policy. It is centralised and its main institution is the Department for Business, Energy & Industrial Strategy, which is subjected to the government agency: UK Research and Innovation (and its agencies: Research Councils, Innovate UK and Research England). The activities for the digitisation of the economy are also undertaken and supported by the Department for Digital, Culture, Media & Sport. It should be emphasised that in the UK economic system - a liberal market economy - state interventionism is not intended to interfere with the market mechanisms; on the contrary, competition and entrepreneurship are encouraged. Since 1990, spending on research and development (R&D) has been increasing in the United Kingdom, as well as spending on science and technology. According to the figures published by the Office for National Statistics for 2016, UK's expenditure on R&D amounted to 33.1 billion GBP (1.67% of GDP), and the structure of expenditure indicates the largest share in – enterprises (67%, 22 billion GBP), then: universities (24%), government (7%) and non-governmental organisations (2%) (Prescott 2018a). The government allocated 11.5 billion GBP to science and technology in 2016 (funds were transferred to the units responsible for their distribution: Research Councils: 3.4 billion GBP, Civil departments: 3.3 billion GBP, HEFCs – Higher Education Funding Councils: 2.2 billion GBP, Defence department: 1.6 billion GBP), and 0.9 billion GBP being the UK's share of the European Union's R&D spending (Prescott 2018b).

The activities of the British government are focused on determining directions and areas of development important from the point of view of strengthening competitiveness and innovativeness of the economy, creating an environment conducive to the involvement of various entities, such asenterprises, universities, non-governmental organisations, in the activities. The key documents related to the digitisation of the economy and society in the United Kingdom in the aspect of changes in the external environment, aimed at strengthening competitiveness and innovativeness of the economy are currently government strategy – UK Digital Strategy published on March 1, 2017 (UK Digital Strategy 2017) and related to it the Digital Economy Act (entered into force April 27, 2017) (Digital Economy Act 2017). UK Digital Strategy covers seven main areas of activity: 1) Connectivity, 2) Skills and inclusion, 3) Digital industries, 4) Inclusive economy, 5) Cyberspace, 6) E-government (*Digital government*), 7) An economy based on data (the data economy).Within each activity, there are instruments indicated to be used to further the implemented development policy based on stimulating innovation and the use of digital technologies.

The plan of spending 1 trillion GBP on investments in the new generation of digital infrastructure outlined in the strategy includes investments in the technology development and increasing access to high-speed Internet (including optical fibre and 5G), enabling residents to use the Internet at speeds of min. 10mb/s in most of the country, and for enterprises, especially smaller and from rural areas, to use the Internet at a speed of at least 30 Mb/s (Department for Digital, Culture, Media & Sport 2017). According to SQW Group's 2013 estimates, increasing the availability of broadband, high-speed Internet can contribute to UK GDP growth by an additional 17 billion GBP by 2024 (SQW Group 2013, 2).

The government, in cooperation with the industry and the non-governmental sector, conducts activities aimed at increasing the level of digital competence among citizens. For example, in the years 2014-2015, 85 million GBP was invested in training to increase digital competences to *Level 2* (skill level of efficient use of technology in problem solving). The United Kingdom is the first country in the world which in 2014 introduced the obligation to teach programming in primary schools and middle schools. It covered children and adolescents from 5 to 16 years of age (Government Digital Service 2014). Initiatives in the area of education are particularly important considering the impact of changes in the technological environment on the labour market.

According to Markus Trämer and Rolf Frankenberger's analyses from The Friedrich-Ebert-Stiftung, in the medium and long term, the dynamic development of information and communication technologies will affect, in particular, the British labour market leading to changes in forms and models of employment and employee relations. The education policy of the

United Kingdom only in the medium term takes into account solutions that meet new developmental challenges related to structural changes (Trämer, Frankenberger 2016, 5).

According to the latest available data for 2015 published by Eurostat, the size of the ICT sector in the United Kingdom is estimated at 5.9% of GDP (for comparison: in Poland: 3.14% of GDP) (Eurostat 2018). In terms of tax instruments supporting the development of new technologies, *The Patent Box was* introduced, which allows the application of a reduced, 10% CIT rate in the case of profits derived from innovations based on patented solutions. Another instrument is *Seed Enterprise Investment Scheme* (SEIS), offering tax reliefs to individual investors planning to buy shares in small enterprises at early stages of their development (HM Revenue&Customs 2017). Another initiative was the creation of the so-called *Digital Catapult* – the centres supporting cooperation between business and the academic world in the area of research, development and promotion of innovations related to advanced digital technologies. The centres are being opened since 2011 (currently there are about 17 of them), and each of them at the time of creation received 10 million GBP a year for 5 years. In August 2018, the British government spent 780 million GBP on the development of the centres in the next five years (Postles 2018). In addition to public funds, the centres raise funds from the private sector and as part of public-private partnerships. *The Small Business Research Initiative,* implemented since 2009, engages small and medium-sized enterprises in organised competitions aimed at finding innovative solutions, new products and services for the public sector (Innovate UK 2015).

The conviction about the necessity to spread digital solutions which have a positive impact on the productivity of enterprises is one of the main targets of British policy on digitisation. In 2016, 13 million GBP were allocated to the development of a new institution – the UK Productivity Council established to support start-ups, small and medium-sized enterprises in the area of improving management skills and increasing their productivity (Gough 2016).

Building the economy and society which is safe and resistant to cybercriminal attacks was included in the first *National Cyber Security Strategy* in 2011. 860 million GBP (until 2015) were invested in the implementation of its assumptions, including investments in new technologies. The government has started close cooperation with the private sector and universities in the sharing of research results, innovations used to counteract and fight threats in cyberspace (HM Government 2015, 40). In November 2016, the government published another strategy: *National Cyber Security Strategy* for 2016-2021 (HM Government 2016). The British government allocated 1.9 billion GBP to implement the assumptions of the adopted strategy (more than twofold increase in funding compared to financing activities under the previous strategy) (Mazur, Rożen, Syliwoniuk 2017, 7).

The United Kingdom is the leading country in the world in the field of e-government solutions. In the United Nations Development of E-Government Development Index (EGDI 2018) published on July 19, 2018, the UK took fourth place (following Denmark, Australia and South Korea) out of 193 countries studied (United Nations 2018, 231-232). The EGDI index consists of three components including the level of development: online services, telecommunications infrastructure and human capital. The United Kingdom continues to improve the quality of e-government services available, their structure, functionality and usability, to better answer the needs of citizens.

The ongoing digitisation of the economy and technological development have contributed to the access to a huge amount of data. In the opinion of the British government implementing the proposal to provide large data sets, in order to be able to use the opportunities associated with big data, it is necessary to ensure the following: good infrastructure, appropriate legal regulations and a qualified labour force. In June 2016, the British government adopted the *Data Ethics Framework* document setting out the principles to follow when working with big data collections (Department for Digital, Culture, Media & Sport 2018). The goals, tools and enterprises within the framework of government activities for the development of the digitisation of the economy and society are well-coordinated and coherent. Instead of individual initiatives isolated from each other, the activities are carried out according to the strategy and are grouped into priority areas. In connection with beneficial legal and administrative solutions and openness to cooperation, it facilitates the involvement of various entities (private enterprises, universities, non-governmental organisations, etc.) in the development of the digital economy and the digital society, also from the financial side.

* * *

The research on the digital economy and digital society are at the development stage in the world. The main reason for the increase of the interest and the development of research on these issues are changes in the socio-economic relations taking place in the modern global economy. Digitisation as a continuous process of convergence of the real and virtual world refers to the changes in the external environment arising from the increasingly widespread and intensive use of digital technologies. The observed changes mean a digital revolution which permeates all aspects of socio-economic life. The time of adaptation to new conditions is shortening, which are also subject to constant transformations. Digitalisation creates new opportunities for socio-economic development, raising competitiveness and innovativeness of the economy, but also is associated with uncertainty and various types of threats, including social consequences of automation of manufacturing processes or safety. The effects caused by digitisation are complex. It can be expected that in the future, as the development progresses, this complexity will grow. The scale and impact of the effects of digitisation are difficult to predict at this time.

The United Kingdom is an advanced country in terms of the development of the digital economy and the digital society. Nevertheless, it continues its activities aimed at further development, which is related to the conviction that the competitiveness of the economy and social well-being depend on it. Continuous and accelerating economic and social transformations mean that the state's approach to the development of the digital economy and the digital society should also be dynamic. With regard to the United Kingdom, this condition can be considered to be achieved. The UK Digital Strategy, which is a part of the country's innovation policy, addresses the changes taking place as a result of the influence of the digital revolution in economics and society.

The administration in the UK is active in the process of exchanging experience and knowledge, both in the form of advisory bodies gathering representatives of various groups of entities, and through supporting the creation of places that provide room for innovative solutions that enable cooperation at a local level. Closer connection of digitisation strategies and, more broadly, innovation policy with educational policy and labour market policy require attention. The dynamics resulting from the technological revolution are faster than social change. The investments in improving digital literacy should be permanently included in all activities. One should agree with the opinion of the Digital Economy Lab team (DigLab UW) that "for effective actions, it is necessary to take into account the connections between (...) the changing character of many professions, the education system, new solutions tested by entrepreneurs and the need to support experimental initiatives and the competence of employees to fully use and implement them" (Digital Economy Lab 2018). In connection with the UK leaving the European Union, a number of questions have not been answered, for example: Whether British companies can have free access to the EU digital markets? Will the companies from the EU Member States have free access to the British digital market? What consequences may arise for the British economy, its competitiveness and innovativeness, including the development of the digital economy and the digital society? Will a possible withdrawal from the United Kingdom of foreign enterprises operating in the ICT sector, as well as employees of the sector from other EU countries affect the economy considerably? The answers to these questions are important, as unfavourable trends in these areas may contribute to the weakening of the ICT sector in the UK, and with it the enterprises operating within it, which, to a large extent, stimulate the dynamics of the development of the digital economy and the digital society.

Abstract

The development of information and communication technologies and the resulting digitization process of the economy and society constitute one of the most dynamic changes in the external environment in modern times. Digitisation, which involves uncertainty and various types of threats, is the main engine of changes creating new opportunities for socio-economic development, thus, enhancing the competitiveness and innovation of the economy. The aim of the article is to analyse the conditions and key factors of the development of the digital economy and the digital society in relation to the actions taken in the United Kingdom (research environment).

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8.

Which EU institutions matter for the race of the sharing economy?

In the last few years, there has been a very dynamic race of the sharing economy, mainly due to the spread of Internet access (Ericsson 2015) and the success story of two online platforms, Uber and Airbnb[1] (Martin 2016). According to Slee (2015), sharing economy is "a wave of new businesses that use the Internet to match customers with service providers for real-world exchanges". Moreover, in the European Union (EU), the total value of transactions carried out in 2015 via online sharing-economy platforms in four main sectors (accommodation, transport, crowdfunding and labour market) exceeded EUR 28 billion (European Parliament 2017a). However, the rapid development of the sharing economy brings many threats and risks connected with the lack of institutional adjustment to the new models of doing business. Furthermore, according to experts, the sharing economy may generate a lot of new jobs or increase the level of undistorted competition in many sectors (Botsman and Rogers 2010; Allen and Berg 2014; Sundararajan 2016; European Parliament 2017b), and it may lead to a new form of precariat or distorted competition in many other sectors (Standing 2011; Slee 2015).

In addition, the European Committee of the Regions (ECR 2016) stresses that the sharing economy often has a destructive impact on many sectors at the local and regional level. Moreover, according to the European Parliament,

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[1] There is a dispute in the literature regarding whether Uber and Airbnb are online sharing-economy platforms or are players in a traditional economy model. See for example Botsman and Rogers (2010) or Sundararajan (2016).

the institutions[2] of the EU have crucial importance for the implementation of the sharing economy concept into the European Single Market (European Parliament 2016). That is why the EU's institutions should adapt their regulations to the specifics of online sharing-economy platforms or create new regulations dedicated to these platforms. There is a huge risks of massive litigations connected with having not adjusted regulations to the specifics of online sharing-economy platforms. According to Gross and Syverud (1996), litigation should be avoided at any reasonable cost. Moreover, one of the biggest problems of the EU is outdated law, which is not suitable for solving the threats and risks connected with the sharing economy.

The aim of this paper is to investigate which EU institutions matter for the race of the online sharing-economy platforms like Uber or Airbnb. This paper explores case study research concerning judgments of the Court of Justice of the European Union (CJEU). Particular focus is given to ascertaining whether the EU's institutions will protect contractors, as well as undistorted competition, in support of the development of sharing economy. The paper investigates two main areas of research: what can we learn from the judgments of the CJEU, and are the EU's institutions ready for the race of the sharing economy. In line with the aforementioned foci of the study, the author investigates whether the EU's institutions consist of regulations that are adoptable to a new model of doing business. The conclusions presented in this paper were derived on the basis of a review of the current literature and research on European law, as well as the judgments of CJEU. The primary contribution that this article makes is to advance the stream of the research into establishing how the EU's institutions are prepared to address the legal issues connected with online sharing-economy platforms.

8.1. The Treaty on the Functioning of the EU vs the judgments on the free movement of services

The EU institution which matter the most for the race of the sharing economy is the CJEU. Institutions are of crucial importance for the protection

[2] In order to find out about the variety of institutions, see for example Hodgson (2006) or Godlewska and Morawska (2019).

of consumers and contractors, and for maintaining undistorted competition against the risks connected with the economic activities of online sharing-economy platforms like Uber or Airbnb.

The Treaty on the Functioning of the European Union (TFEU), one of the most crucial legal document of the EU, establishes the free movement of services within the EU (TFEU, Art. 56). This means that any restriction on freedom to provide services within the EU should be prohibited "in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended" (TFEU, Art. 56). That is why online sharing-economy platforms may compete with one another and with their traditional-economy rivals, which means that the actions taken by these online platforms to achieve their goals may hinder, or even prevent, achieving the same goals by their traditional-economy rivals (Godlewska 2019). Importantly, according to the TFEU, the EU is responsible for launching the rules of competition (TFEU, Art. 3) and for guaranteeing fair competition (TFEU, Preamble) in the EU's single market. Furthermore, the Consumer Protection Cooperation (CPC) regulation (EU) 2017/2394), forces EU MS authorities to work together to enforce the EU's institutions, which regulates consumer law, such as the Consumer Right Directive 2011/83/EU, the Unfair Commercial Practices Directive 2005/29/EC, the Unfair Contract Terms Directive 93/13/EEC and the Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Institutions such as the CJEU protect consumers, contractors and undistorted competition through judgments, which establish legal principles. These legal principles are the guidance for the laws, regulations and administrative provisions of the MS on unfair commercial practices which otherwise may harm consumers' economic interests, like previous practices of Airbnb Ireland (CPC Network Authorities 2018). Airbnb Ireland, one of the leading online sharing-economy platforms, used unfair commercial practices by presenting prices without Airbnb's mandatory service fee and without local taxes, or by displaying search results without distinguishing between accommodations offered by private individuals and professional providers (CPC Network Authorities 2018). In the literature, scholars (Scott and Eddy 2014; Slee 2015; Frenken and Schor 2017) highlight that online sharing-economy platforms like Uber or Airbnb use unfair competition against the representatives of traditional economy, as these online platforms transfer regulation costs to their contractors (the service providers for the online platforms).

Moreover, according to Article 1(1)(b) of Directive 2015/1535 on Information Society services, services, like intermediary services of the real-world exchanges provided to peers[3] by the online sharing-economy platforms, are defined as "any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". However in practice, services delivered to peers by Uber (one of the leading online sharing-economy platforms) were excluded "from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce" (CoJEU, C-434/15 or C-320/16). Uber services were classified as a transport services, not as an information society services. This allowed EU MS to regulate the conditions under which such services may be provided in conformity with the TFEU.

8.2. The Treaty on the Functioning of the EU vs the judgments on the right of establishment

In addition, the TFEU guarantees the right of establishment and states that "within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State" (TFEU, Art. 49). Moreover, any discrimination on the grounds of nationality within the scope of application of the Treaties is prohibited (TFEU, Art. 18). However, in practice, the legality of Airbnb Ireland services, according to French national legislation laying down restrictive rules for the exercise of the profession of real-estate agents, is questioned (CoJEU, C-390/18). Nevertheless, the Opinion of Advocate General Maciej Szpunar delivered on 30 April 2019 highlights that "Member State other than that in whose territory a provider of an information society service is established" cannot restrict the free movement of those services "by relying on its own initiative and without an examination of the substantive conditions being necessary" (CoJEU, C-390/18).

[3] Peers are the users of online sharing-economy platforms, like service customers and service providers.

8.3. The Treaty on EU vs the judgments

The Treaty on European Union (TEU), which is also one of the most crucial institutions of the EU, highlights that the EU should establish an internal market as well as implement a highly competitive social-market economy, aiming at full employment and social progress (TEU, Art. 3). However, online sharing-economy platforms may lead to a new form of precariat, due to the growing army of self-employed contractors who provide a service for the customers of online platforms like Uber or Airbnb. In practice, in the USA, there has been a lot of litigation, such as cases brought against Uber by their current or former contractors, like *Razak v. Uber Technologies Inc., U.S.* or *Fusco v. Uber Technologies Inc., U.S.*, where the contractors wanted, without success, to obtain the status of Uber employees instead of Uber contractors. So far, there have been no such cases before the CJEU.

Furthermore, according to the TEU, the EU should promote the "scientific and technological advance" (EU, Art. 3). Nevertheless, so far, the EU has not adopted any legal acts which could properly regulate the civil and criminal liability of robotics and artificial intelligence-based products. The European Parliament, based on Article 225 of the TFEU, announced a resolution on 17 February 2017 which called upon the European Commission to table a legislative proposal of civil-law rules on robotics and artificial intelligence (European Parliament 2017c). In the EU, artificial intelligence per se can not be sued. Only the manufacturer, importer, retailer or distributor of artificial-intelligence-based products may by sued, due to the system of strict liability based on the Defective Products Directive 85/374/EEC. Moreover, now, in US courts, cases are brought against the manufacturers of autonomous vehicles, programmers and artificial intelligence per se, for example, in *Lommatzsch v. Tesla et al*. (2018).

The sharing economy is based on the system of ratings and assessments of online platforms' users and service-providers (Slee 2015). The rapidly growing number of service providers and users requires online platform to comply with data protection standards that arise from institutions like the General Data Protection Regulation (EU) 2016/679. However, in practice, like in case of Facebook (CJEU, C-311/18), online platforms may transfer the data to a third country for a commercial or national security purpose or for the purposes of law enforcement.

* * *

Online sharing-economy platforms like Uber and Airbnb may significantly transform our lives over the next decade. This study investigated which EU institutions matter for the race of the sharing economy. The outcome suggests that institutions such as the CJEU is crucially important for the protection of consumers, contractors and undistorted competition against the risks connected with the economic activity of online sharing-economy platforms. The legal principles established by the judgments of the CJEU are the guidance for the laws, regulations and administrative provisions of the MS on unfair commercial practices or consumer protections.

Moreover, the analysis of the EU's institutions shows that the European framework is not prepared to address the legal issues (such as the civil and criminal responsibility of artificial intelligence or artificial intelligence liability) that will arise when the sharing economy begins a large-scale use of artificial intelligence-based services like self-driving cars or drones.

Accordingly, the recommendation is to introduce a common regulation for AI-technology-based services or products at the EU level, in order to avoid the distortion of the free movement of services or the freedom of establishment. An agreement at the EU level should be proposed on the damages and personal injuries, based on the liability concept, caused by AI-technology-based services or products. AI liability may be regulated according to the civil codes of the MS as that of a legal entity, a company, an agent, a means of transport, a product, a wild animal or a dangerous thing (Godlewska et al. 2020). Absence of the common concept of AI liability in the future may cause distortion of the free movement of services or the freedom of establishment.

Abstract

In the EU, there has been a change of paradigm from ownership of assets to access to them. The aim of this paper is to investigate which EU institutions matter for the race of online sharing economy platforms like Uber or Airbnb. This paper explores case-study research concerning judgments of the Court of Justice of the European Union (CJEU). Particular focus is given to ascertaining whether the EU's institutions will protect contractors, as well as undistorted competition, *in support of the development of the sharing economy. The paper investigates two areas of research: what can we learn from the judgments of the CJEU and are the EU's institutions ready for the race of the sharing economy. In line with the aforementioned foci of the study, the author investigates whether the EU's institutions consist of regulations that are adoptable to a new model of doing business. The primary contribution that this article makes is to advance the stream of the research into establishing how the EU's institutions are prepared to address the legal issues connected with online sharing-economy platforms.*

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9.

Corporate social responsibility as a strategy of corporations in the EU

Activities of global corporations have a huge impact on the technology market, creation of innovative solutions and on the development of new management concepts. Such companies apply different strategies when entering the regional markets, including the market of the EU, and adapt their activities to the changing environment. Nowadays they could adopt the corporate social responsibility (CSR) approach in their strategies. CSR is related to the relationship between society, entrepreneur and state regulations. Increase of social expectations and regulations applied towards entrepreneurs in the EU countries is caused by the progressive degradation of the environment, use of aggressive marketing, dominance of the democratic system in most countries and wider consumer awareness concerning products and services.

In recent years the CSR strategy is more and more popular in corporations. Social responsibility determines how a given business entity is perceived and evaluated on the market. CSR becomes an opportunity for enterprises to generate competitive advantage and implement innovation. In connection with the above, many companies decide to use CSR strategies (Porter, Kramer 2006, 1-2). There are also corporations operating in the EU such as PricewaterhouseCoopers and Toyota. The main aim of this article is to present the strategy of CSR applied by transnational corporations in the EU. PricewaterhouseCoopers and Toyota are the examples in this regard.

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9.1. CSR applied by corporations in the EU

A corporation is a subject, association of persons or an organisation that is recognized as a legal person. The goal of such enterprises is to implement joint tasks, build connections and achieve economic, political or social goals (Łąkowski 1984, 571). Transnational corporations carry out production, commercial or service activity, operate in at least two countries and have branches in at least two separate countries. The subsidiaries are wholly or partly controlled by the parent company (Rymarczyk 2006, 383). Corporations constitute a very important element in the global economy because their income often exceeds the value of GDP of medium-developed countries. However, their trade turnover fluctuates above 1/3 of world trade (Puchalska 2012, 203-212). Therefore, they have a formal and informal impact on the activities of other business entities, as well as domestic and international economic policy (Bożyk 2001, 472).

The issues of injustice, corruption, greed, collusion of silence, unfair competition and dumping applied by corporations are widely discussed. The above activities are a failure in relation to business operations and the global economy. Conducting unfair market practices generates social costs and destroys the ecological system. Many of the unethical activities and behaviors in the activities of economic entities are covered up. Employees usually try to hide the truth because they are afraid of possible consequences on the part of the employer. Unfortunately, due to the lack of knowledge related to dishonest activity, the costs associated with the lack of CSR and incompetent management are difficult to estimate. Entrepreneurs wanting to avoid negative opinions in the society apply the CSR strategy (Kietliński 2005, 131).

CSR is the relationship between society and the entrepreneur. The expectations of society towards entrepreneurs are constantly growing. This is due to the progressive and rapid degradation of the environment, ongoing globalization processes, the use of aggressive marketing, the dominance of the democratic system in most countries and an increase in the level of consumer knowledge of products and services purchased (Polok 2011, 76).

Entrepreneurs are increasingly paying attention to the need to apply CSR strategies. It is very important in running a business, especially for service providers. The use of standardized, socially responsible practices in business generates positive ratings of recipients (Polok 2011, 75). This strategy makes companies more sustainable and innovative, and that implies a more sustainable economy. CSR offers a set of values for people that build a coherent society. Moreover, the adopted standards create a balanced economic system (European Union 2019a).

The choice of strategy and organisational structure is of fundamental importance for corporations. In order to build a competitive advantage, the entrepreneur must carefully prepare strategic goals. The very issue of strategy selection and building organisational structures is a focus of interest for researchers. Initially, there was a belief that all changes in the organisational structure are closely related to the strategy used by economic entities. The above elements are associated with the evolution of external market conditions, also on an international scale (Zorska 2013, 171).

One of the types of strategy used by corporations in the EU is CSR. It is implemented in both smaller enterprises and international corporations. The above strategy consists of three basic elements of strategic thinking: social intelligence, knowledge of strengths, specific goals (Berniak-Woźny 2015, 5). The application of the CSR strategy is a specific way to build the image of a responsible and trustworthy organisation towards clients, contractors, investors and potential employees (Lance 2001, 1-2).

The EU corporations are closely linked to the CSR strategy. This is manifested through initiatives taken by the EU, such as the European Employment Strategy, the implementation of the European Pillar of Social Rights, labor law in the EU, education and training falling within the competence of countries in the EU, financing and many others (European Union 2019d).

The European Commission (EC) promotes CSR in the EU and encourages entrepreneurs to comply with international standards. The policy in the EU is based on the new version of the CSR strategy, which is shown in *A renewed EU strategy 2011-14 for Corporate Social Responsibility*. Its goal is to introduce, normalise and adapt the European approach to CSR strategy. The strategy is to be disseminated by introducing good practices in education, training and research. The CSR strategy improves self-regulation and co-regulation processes and implies the disclosure of social and environmental information by entrepreneurs (European Union 2019a).

In 2011, the EC adopted a renewed CSR strategy which aims to promote responsible business and a detailed approach to democratic policy principles. The Commission published a working document *Corporate Social*

Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress (SWD (2019) 143) in March 2019. The above document provides an overview of progress in implementing the CSR program and Responsible Business Conduct. The activities of the EC promote the CSR strategy and offer assistance in its implementation. Through the document cited, the EU plays an important role in supporting and encouraging entrepreneurs to implement socially responsible activities (European Union 2019b, 2-6).

9.2. Toyota as an ecologically responsible corporation

Toyota's history began at the end of the 19th century. The inventor Sakichi Toyota began his activity with the textile industry. A son of Sakichi – Kichichiro, like his father, was an innovative visionary. In the 1920s, Europe and the US invested in the emerging automotive industry. It was Kiichiro who laid the foundations for the Toyota Motor Corporation (TMC), which was founded in 1937. Currently, Toyota is the largest car manufacturer in the world and is the largest player in the automotive industry, its value is estimated at USD 42 billion (Toyotabank 2020).

Since the foundation of Toyota, its employees have been the main reason for success. Requirements for both high-profile production workers and high-level workers were high. Each employee was to undergo a specialist training. It is thanks to the commitment of employees and building their high competences that Toyota products are of high quality (Liker 2008, 25).

Toyota's policy focuses on commitment to CSR and business ethics. At the company's European headquarters, several dozen people coordinate the CSR program. Individual branches in Europe can freely choose the form of CSR strategy which could be applied (Grzędzińska 2010, 81). The CSR program has been a distinguishing feature of the Toyota corporation for many years in the automotive industry. Toyota's goal is not only to make a profit, but also to promote the environmental education (for example eco-driving), safety and support for people with disabilities. In Poland, Toyota invests in local communities, ecology, education and safety (Grzędzińska 2010, 87).

In 2019, Toyota promoted the 16th edition of its “Toyota Green Month” campaign. The first activities related to environmental protection were announced in 2016 as part of the “Toyota Environmental Challenge 2050”. One of the challenges posed was “A society of the future living in harmony with nature”, in which the company proposed to raise the problem of using plastic products. In addition, in 2019, Toyota organized he 34th edition of the “Ecological Knowledge Olympiad” (Toyota 2019b). Toyota announced on its official website a strategy for the next 12 years regarding ecological responsibility towards the products sold. By 2030, Toyota plans to form sales at the level of 5.5 million electrified cars per year, including one million zero-emission cars. By contrast, in 2025 Toyota and Lexus models will also be available with alternative drives. The corporate strategy includes all vehicle electrification technologies, i.e. plug-in hybrids and uncharged, as well as electric cars with fuel cells and battery-powered cars (Toyota 2019a).

At the beginning of 2020, Toyota will launch 10 electric cars. The new models will go first to China, then to Japan, India, the USA and Europe. Other electric passenger and utility models will also appear on the market with a built-in hydrogen fuel cell drive. In addition, the hybrid range will be significantly expanded. Due to the high energy consumption of traction batteries, Toyota is working on a new generation of lithium-ion batteries. Electric cars allow the use of renewable energy sources in the automotive industry. Therefore, they do not pose such a threat to the environment as combustion cars, generating global warming, air pollution and depletion of non-renewable resources (Toyota 2019a).

9.3. PricewaterhouseCoopers as a corporation focused on employees

PwC’s key areas activity includes CSR, people and their diversity, social commitment and care for the environment. PricewaterhouseCoopers corporation operates in 157 countries. The company employs 276,000 people from other countries. Specialists provide the company’s clients with business, technology, tax and legal consulting services as well as auditing. In Poland, PwC operates in eight cities and has a Financial Crime Unit in Gdańsk and two Shared

Service Centers in Katowice and Opole. Its subsidiary in Poland currently has employment of over 6,000 people (PricewaterhouseCoopers 2019a).

The principles of responsible business are introduced by PwC in their daily work. When making key decisions, the company focuses on four key areas, in accordance with the company's strategy. The first of these is responsible business, i.e. striving for services, products and delivery to be reflected in corporate social responsibility, ethics and transparency. People and diversity are the second element of the company's CSR strategy. They are manifested by supporting employee development and respecting differences among employees. The third element is social involvement, i.e. the use of employees' potential to strengthen social development. Lastly, the fourth element of the social responsibility strategy is care for the environment, which is used in the daily activities of the corporation (PricewaterhouseCoopers 2019c).

As an international corporation, PwC employs people from various countries. Employees are of key importance for the company, whether the employee is a foreigner coming from EU MS or from outside the EU. EU citizens, in accordance with the principle of free movement of Union's workers, have the opportunity to work in member countries without a work and residence permit (PricewaterhouseCoopers 2014). The company supports diversity and individuality by employing people from different EU countries, with different skills, knowledge and experience. Employees take part in numerous trainings, coaching and learn through experience gained in the workplace (PricewaterhouseCoopers 2019b). The above action is related to the policy of employing foreigners (PricewaterhouseCoopers 2019c). People from non-EU countries also have the right to work in the EU, under the same conditions and on the same terms as nationals of EU MS (European Union 2019f) provided they fulfill the criteria to enter the labour market. Such people can work in Poland if they receive work and residence permit. Further relations depend on the form of the contract with the migrant (PricewaterhouseCoopers 2014). One of the many examples of CSR practices used at PricewaterhouseCoopers is the Diversity Charter. The company is one of its initiators and co-creators in Poland. Confirmation of the application of the Charter means acceptance of the values included in the Code of Conduct, which refers to pride in cultural diversity, having different experiences, as well as equal qualifications and key professional skills constituting the competitive advantage of the company on the global market (PricewaterhouseCoopers 2019b). The Diversity Charter is an initiative supported by the EC to implement an equal treatment policy and to manage diversity in the workplace. Organisations implementing this instrument operate within the framework of cohesion policy and social equality (European Union 2019c).

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The dynamic development of the world economy is changing along with international economic relations. Transnational corporations are the main players of international business in the EU. The strategy of CSR relates directly to the relationship between the employee, employer and society. Increasing awareness among people generates the cloak of applying the most thought-out strategies for corporations. That is why they try to conduct business in accordance with the CSR strategy and business ethics. Examples of such transnational corporations are Toyota and PricewaterhouseCoopers which apply CSR strategy. Toyota is a production company, while PwC is a service company. Due to the different nature of their business activity, their CSR strategies may vary. In addition to the strategy aimed at maximum employee development in all positions, Toyota Corporation also focuses on environmental protection. The automotive industry generates a huge threat to the environment through exhaust emissions and toxic waste associated with the disposal of old car models, i.e. car batteries. Therefore, the concern decided to focus on a breakthrough in this field. The company has built a strict strategy for the next decade, which aims to sell new green vehicles to potential customers. PwC Corporation is a service company specialized in the field of audit. Its CSR strategy is directed towards employees. The best specialists create the overwhelming value of the company. In connection with the above, the corporation focuses on building human capital.

Abstract

The main aim of this article is to present the strategy of corporate social responsibility (CSR) implemented by transnational corporations in the European Union. PricewaterhouseCoopers and Toyota are the examples of companies operating in the EU which have adopted the CSR strategy. Its application builds the brand image and streamlines management processes in companies.

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10.

Assessing the impact of a new regulation at the EU and Member State level – the example of cross-border healthcare

This paper provides an overview of impact assessments carried out before introducing new laws pertaining to cross-border healthcare and patients' rights. The analysis focuses on comparing approaches and methods that were used by the European Commission and the Polish Ministry of Health (MH) in their Impact Assessments (IAs) with regard to: the diagnosis of the problem, analysis of options and the scope of cost-benefit analyses, particularly in the public finance sector.

The regulations on social security systems coordination establish common rules to protect social security rights when moving within the EU as well as Iceland, Liechtenstein, Norway and Switzerland. Beneficiaries are guaranteed that they will be covered for healthcare when they get sick in another EU country. The regulations also provide for patients to be able to seek healthcare in another EU country, subject to prior authorization from their own system. That authorization must be granted if care cannot be provided within a medically justifiable period of time, and the patient will not have to pay more if the costs of treatment in the other Member State are higher than in their own country. In addition to those regulations, the European Court of Justice of the EU has ruled in the specific cases brought to its attention that patients can, under certain circumstances, use the free movement rights provided by

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the Art. 30 of the Treaty establishing the European Community directly to have access to healthcare abroad (Decker, C-120/95).

In 2007 the EC prepared a proposal for legislation that addressed the concerns about free movement of patients and access to healthcare abroad, i.e. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare. The EU Member States (MS) had until October 25 2013 to pass their own laws implementing the directive and were given 30 months to implement the directive's provisions to assure that they have enough time to prepare and pass national regulations, if needed. The national regulation in Poland was adopted in October 2014, after over a year and a half of legislative process and entered into force two weeks later.

10.1. Impact assessment at the EU level

The aim of the impact assessment is to consider the need for and the potential impact of different options for EU action in the field of cross-border healthcare. For this purpose, consultations with stakeholders and experts are an important stage of the IA development. The EC proposal was broadly consulted with stakeholders, internal and external expertises were provided. Consultations formally began in 2006. In order to address the problems with crossborder healthcare, the scale of migration needed to be estimated. There was no data available to provide reliable basis for further assessments, therefore the EC decided to conduct a survey. The Eurobarometer survey covered all 27 MS of the EU on a randomly selected sample of over 27,200 individuals of at least 15 years of age. The survey asked a very general question about the top of mind willingness to obtain medical treatment in another MS. On average, 53% of the EU citizens would be willing to travel abroad for medical treatment (European Commission 2008, 11). There was a significant difference in the preparedness to travel to another EU country to receive healthcare service between the citizens of individual MS. The responses ranged from 88% of Cypriots who were willing to travel to just 26% of Finns. 57% of Poles stated they would be willing to travel abroad for medical treatment (Eurobarometer 2007, 8).

The impact described in the IA only concerned the impact of options for the European Community action and did not describe the impact of cross-border care as a whole. The EC indicated that spending on cross-border healthcare will reach 9.7 billion Euros per year or approximately 1% of public expenditure on healthcare (European Commission 2008, 9). The main economic impact of this proposal manifested itself in the areas such as: additional cost and additional benefits from cross-border healthcare, overall cost of compliance, cost of specific administrative burden.

In economic terms, the additional cost connected with introducing the cross-border regulation is the difference between spending funds at an earlier or later point in time. It can be represented by the interest applicable to the funds in question. To get a general impression of these costs, a simple model was used with a combination of the estimated number of people, cost of care and time in comparison to domestic treatment. To estimate the number of people for whom it is potentially faster to seek treatment abroad, the estimates of unmet medical needs due to waiting for treatment provided by the SILC survey data were used.

Being treated quickly abroad brings not only costs but also additional benefits. In order to put a quantified value on such benefits for the purposes of cost-utility analysis, health improvements are typically measured in quality-adjusted life-years (QALYs). The quality adjustment is based on a set of references or weights called utilities, one for each possible health state. The experts opted for relatively conservative estimates with a disclaimer that they present only indicative figures to enable rough modelling of the potential benefits of cross-border healthcare.

Apart from the direct costs and benefits of treatment provided in another MS, there are also the associated costs of compliance. Health insurance organizations in each MS, such as the National Health Fund in Poland cover the cost for implementing the necessary systems to administer cross-border care, such as additional systems for paying for such care, estimating how much the care in question would have cost had it been provided domestically and ensuring appropriate monitoring of care and continuity between domestic providers and providers in other MS. Data about the size and nature of such compliance costs for health systems is largely lacking. Moreover, the size and nature of costs will vary across different organizations of health system within different MS. Any estimation of such compliance costs is thus merely an approximation. Subject to these qualifications, however, and based on the experience of existing cross-border cooperation projects, the experts estimate that the total additional compliance cost due to health care being obtained in a different EU country is 5% of the total cost of the care involved - current compliance burden was therefore estimated to be approximately 5% of the total of EUR 10 billion, or EUR 500 million per year (European Commission 2008, 48).

Administrative burden has a specific definition, being the costs incurred in meeting legal obligations to provide information. As with overall compliance costs, data about the size and nature of this administrative burden for health systems is largely lacking; and again, the size and nature of these costs will vary across healthcare systems of the different MS. The standard cost model has been used to calculate the administrative burden although, due to lack of robust data, in a simplified manner, resulting with the total costs around EUR 100 million per year (European Commission 2008, 38).

The EC also conducted analysis of social impact and presented impact on inequality in healthcare, which can come from a variety of sources including lower expectations of good health or the potential benefit of treatment by people in lower socio-economic groups, leading to lower healthcare usage.

Different options involve different assumptions about how many people are likely to seek cross-border healthcare in practice which is crucial in estimating cost and benefits. All of the policy options therefore involve some costs of compliance for MS, including the option of no further action. For each option, the experts estimated the direction of information provision activities change and prepared a highly theoretical example of figures involved. First policy option meant not taking any further Community action on health services. According to the second option the EC would, in addition to existing mechanisms, provide guidance on cross-border healthcare issues, but would not propose additional binding legal measures. The third policy option, which was considered by the EC, was about establishing a general legal framework for health services in the EU through a specific legislative measure – a directive on health services. This option could be combined with some of the soft actions described under the second option. The third option comprised two parallel systems for financial aspects of cross-border healthcare (both hospital care and non-hospital care). Under this scenario the existing framework for coordination of social security schemes would remain in place in its current form. The new directive on health services would put in place an alternative mechanism based on the principles of free movement and building on the principles underlining decisions of the Court of Justice. This would allow patients to seek any healthcare abroad that they would have been provided at home without any prior authorization and be reimbursed up to the amount that would have been paid had they obtained that treatment at home. The patient bears the financial risk of any additional costs arising. Within this option, the possibility of introducing a prior authorization for hospital care was also considered. The last – fourth policy option – was a detailed framework of harmonizing legal measures under the Community law for all cross-border healthcare issues: information to enable informed choices, financial issues and limits to healthcare abroad, quality and safety of healthcare and issues concerning harm arising from healthcare and compensation. It would also contain detailed requirements of information provided to patients and its format, explicit criteria for authorization, standards for quality and safety, patients' rights (legal entitlements), and so on.

The IA facilitated decision makers to choose the third option with the ability for MS to introduce prior authorization mechanisms. The directive stipulates that patients have the right to reimbursement when receiving care abroad, up to the value which the same care would have cost in their home health system. Crucially, health systems may not require patients to obtain prior authorization before seeking treatment abroad, unless the intended treatment is highly specialized and cost intensive or involves an overnight stay in hospital. In these cases, authorization may only be refused if the same treatment can be received at home without "undue delay". The concept of undue delay is not, however, precisely defined in the directive.

10.2. Impact assessment in Poland

The key issue in assessing the impact of implementing the directive in Poland was projecting the public expenditure for the national budget, as almost all people are insured and waiting time is perceived to be too long (OECD 2019, 171). Based on data from executing coordination of social security systems by residents insured in Poland, the scope of healthcare services was defined. It included outpatient care, hospital care (mainly 1 day care), treatment in health resorts (physical therapy), medicinal products. It was estimated that 23% of Polish residents would benefit from cross-border healthcare provided on the basis of the directive. Patients from Western and Southern border regions are assumed to use cross-border healthcare to a greater extent than those from the other parts of the country (35% of residents from Dolnośląskie, Opolskie, Śląskie, Zachodniopomorskie; 20% of residents from Małopolskie, Pomorskie, Świętokrzyskie, Warmińsko-Mazurskie; 10% of residents from other regions) (Ministry of Health 2013).

The cost for the National Health Fund to implement the directive was estimated to amount to approximately 1 billion PLN annually (Ministry of Health 2014, 4-5). This amount includes the cost of treatment abroad and the cost of establishing the National Contact Point with a proper website and telephone service for answering patients' queries as well as ensuring adequate number of employees responsible for taking care of the patients claims (administration of patients applications, invoices and reimbursement).

Administrative cost is generated by the National Contact Point and claim administration. Estimations for these cost elements were based on the cost of providing website dedicated to information on cross-border healthcare along with a telephone line and a service to reach out to patients using different media, number of queries and applications to be reimbursed. Each of 16 regional offices of the insurer provides information on cross-border healthcare and processes the claims for reimbursement. The coordination of the regional offices is provided by the National Health Fund – the headquarters in Warsaw.

Benefits for patients were described and calculated based on demand for particular treatments and availability of public resources. The average waiting time for those procedures may slightly shorten in Poland. MH also assumed that healthcare providers may benefit from additional cash flow as they potentially have room for resources to be allocated in a more efficient way and to use resources that are not fully exploited by the public insurer due to contract limitations. Providers may be interested in extending the range of their services and promoting their high quality healthcare in other countries.

When it comes to regional development – the regulation may influence the development of healthcare services in the regions situated next to borders as patients may travel in both directions, depending on the type of healthcare they need, its accessibility and affordability.

The National Health Fund publishes financial results for each year on its website. They show that in 2015, the first full year in which patients could use cross-border healthcare on the basis of the directive in Poland, the impact on public payer was smaller than expected, amounting to app. 8.2 million PLN. However, the cost of cross-border healthcare on the basis of the directive is increasing each year, and in 2018 it amounted to approximately 33.6 million PLN (NHF 2019).

* * *

The aim of preparing an impact assessment report is to ensure that the legislative initiatives are prepared on the basis of transparent, comprehensive and reliable evidence. The impact assessment report's role is to supports political decision making but it is cannot a substitute for it. The recommended option should follow the principle of proportionality that states that no action should go beyond what is necessary to satisfactorily achieve the policy objectives which have been set. The action should be as simple as possible.

One may observe similarities in assessing the impact of cross-border healthcare in extensive consultations on both the EU and the national level. Another similarity was acknowledging the importance of projecting the scale of migration and using data from the coordination of social security systems for estimations. Administrative burden (with respect to providing appropriate information) and social impact in terms of influencing patients where similarly approached as well, however, there was no separate analysis of the impact of the regulation on inequalities in healthcare. The ability of paying upfront for healthcare can affect those patients who cannot afford doing that, but would benefit from cross-border healthcare.

The significant difference between assessing impact of new regulations on cross-border healthcare is that while there is a variety of options considered at the EU level, at the national level analysis of options came down to choosing the way of adjusting the chosen option to the national healthcare system (e.g. deciding about the scope of medical treatment that requires prior authorization). Another difference is the scope of the analysis of options in Poland. For example, the cost of compliance was not estimated, modelling was carried out in financial terms rather than economic. That leads to another difference – in the national IA there is a strong focus on public finance and implementing mechanisms to monitor the expenditures, for example by examining the data on demand for cross border medical treatments, projecting their value and volume and setting out a list of procedures for which prior authorization is required. At the EU level the benefits and costs for healthcare providers were not analyzed with as much attention as in Poland. However, both structures assessed impact at the early stages of the initiative to address patients' problems with executing their rights in the cross-border healthcare.

One of the premises of the proposal for cross-border directive was to facilitate patient migration. Estimation of willingness to travel to another country was researched for the purpose of impact assessment in 2007 but the EC requested a similar survey in 2014. The survey reached 27,868 respondents from 28 MS. The findings show that EU citizens still have only partial knowledge of their rights regarding cross-border healthcare. However, the majority of respondents are knowledgeable in some aspects at least, including the right to be reimbursed (Eurobarometer 2015, 5 and the following).

Five years of having new regulations on cross-border healthcare seem to be an appropriate length of time to determine if patients are truly able to enjoy their rights. In order to evaluate the impact of the cross-border regulations in practice and explore utilization of cross-border healthcare at the MS level, e.g. in Poland, the Polish MH would have to analyze patient data. The National Health Fund uses paper forms to recoup the cost of medical treatment received in another MS on the basis of the Directive. Data on individuals included in those forms is processed and analyzed neither by the NHF, nor by the MH. This results in insufficient data to estimate the scale of migration of Polish residents, so it is impossible to analyze individual resident cases. To make such estimations possible, the Healthcare Act needs to be amended in accordance with personal data protection laws.

Abstract

This paper discusses the costs and benefits of the cross-border healthcare introduced by Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare. The author analyses impact assessments prepared by the European Commission and the Polish Ministry of Health. The analysis focuses on comparing approaches

and methods that were used in the impact assessment as well as its key elements, including: the diagnosis of the problem, identification of stakeholders, analysis of options, and the scope of the cost-benefit analyses with a particular focus on the public finance sector.

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11.

Common energy policy of the EU – origins, objectives and stages of development

For many years, energy policy was considered rather insignificant. Countries of the European Community did not place much emphasis on this matter; in practice this meant that relatively few steps were taken with a view to creating a common energy policy. In fact, the majority of European countries maintained their own energy reserves; in addition, imported raw materials were inexpensive and it was not expected that energy policy might ever become an important element of foreign policy. Nevertheless, following the oil crises of the 1970s, the depletion of locally sourced raw materials, the growing dependence of European countries on external suppliers, as well as the continuously increasing demand for energy, the latter has become a major issue in discussions about national security and the need for a common energy policy. The aim of this article is to recount the process of building a common energy policy, its genesis, objectives and subsequent stages of development. Only properly conducted EU energy policy based on renewable energy sources can guarantee secure energy supplies and allow Member States (MS) to maintain their economic competitiveness, without causing unnecessary harm to the environment.

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11.1. Genesis of the common energy policy of the EU

The origins of the EU energy policy can be traced back to the founding treaties of the European Communities. Upon its establishment in 1952, the European Coal and Steel Community (ECSC) began to control the coal sector of the MS. Its mission was to supervise coal and steel resources, but also to boost competition in order to stimulate the development of the sector. In that period, coal mining was the focus of attention, mainly owing to a significant surplus of this raw material in the late 1950s. It became evident that the sector needed a restructuring programme. In addition, nuclear power research was gaining momentum. In 1957, the two Rome treaties were signed; they entered into force on 1 January 1958. The first treaty established the European Economic Community (EEC)[1], and the second – the European Atomic Energy Community (Euratom). The aim of the latter was the rapid development of nuclear energy, which was to guarantee future energy security and to increase energy self-sufficiency of the MS. However, the high supply of oil in global markets in the period until the 1970s increased its supply to Europe and, at the same time, contributed to a reduction in the use of coal for energy production, as well as a slowdown in research on nuclear technologies (Ruszel 2016, 17-19).

Due to the high demand for energy in the 1970s, members of the Organization of the Petroleum Exporting Countries (OPEC) (Modrzejewska-Leśniewska 2016, 185) found it difficult to respond to the global demand for oil. In addition, the Arab-Israeli war of 1973, after which Saudi Arabia decided to impose an embargo on oil exports to certain countries and to limit the volume of exports, brought about a surge in oil prices. The energy crisis of 1973 and the subsequent fourfold increase in the price of oil sold by OPEC countries took Europe by surprise, but also provided a strong impulse for creating a framework for a common energy policy (Tatarzyński 2007, 109). During the crisis, oil prices increased from approx. USD 2.7 to USD 11 per barrel. As a result of this sudden rise in oil prices, the cost of other fuels also increased (Soliński 2004, 461). By the end of 1980 and in the early 1981, the price of oil and oil products increased again. It is known as the second energy crisis. In 1980, a barrel of oil was sold for USD 36, which meant that the price

1 The EEC Treaty does not refer to energy issues.

had increased more than twelve-fold since 1972, when the price was USD 2.7 per barrel of oil (Soliński 2004, 461).

Energy crises proved to the authorities of the European Community countries that the supply failure is a real threat not only for the energy sector, but for the Community's economy as a whole. Crises have brought about several negative phenomena in Western economies, including inflation, rising unemployment and a general economic slowdown. In addition, they brought into light energy barriers to economic growth within the European Community. MS began to realize that they need a common energy policy as a guarantee of energy security and a factor that may contribute to the rational management of fuels and energy.

In 1980 and 1986, the EU Council adopted the programme entitled *Towards a New Energy Policy Strategy*. It contained the following guidelines for the energy policy of the Community that were to be implemented by 1995:

- reducing the share of crude oil in the total Community's energy consumption to 40%;
- increasing the efficiency of use of energy sources by 20%;
- reducing the share of crude oil in electricity generation to a maximum of 15%;
- increasing the share of solar and wind energy and other renewable energy sources in the energy balance (Zajączkowska 2011, 88).

The Green Paper entitled *The Internal Energy Market* (COM (88) 238 final) adopted in 1988 proved a breakthrough moment in the development of the energy sector. It was the first document that referred to the need to establish a single energy market (Ekstowicz 2010, 156). The White Paper *An energy policy for the European Union* (COM (95) 682 final) adopted by the European Commission (EC) in 1995 was another important step forward in the development of energy policy, mainly because in this document, the Commission confirmed the objectives of the energy policy, namely economic competitiveness, energy security, and added a new goal – protecting the natural environment against the harmful effects of energy production and supply.

Actions taken resulted in the establishment of a legal basis for the liberalization of the energy market, mainly on the basis of two energy directives: Directive 96/92/EC concerning common rules for the internal market in electricity (OJ L 027, 30.01.1997) and Directive 98/30/EC concerning common rules for the internal market in natural gas (OJ L 204, 21.07.1998).

The increase in oil prices and the dependence of EU MS on external suppliers (mainly Russia and OPEC countries), along with the imminent global warming threat, have fuelled the debate about the need to develop a European energy policy. However, a direct impulse for action came in early 2006, when gas supplies to Ukraine were cut off. Russia's decision also affected many EU countries. It came as a great surprise to MS, as they had considered Russia the most reliable and unfailing energy supplier. The Russian-Ukrainian energy conflict provided clear evidence that the absence of a common external energy policy exposes MS to real risk (Cziomer 2008, 283).

The first major step towards the establishment of a common EU energy policy was the publication of the Green Paper: *A European Strategy for Sustainable, Competitive and Secure Energy* (COM (2006) 105 final) in March 2006. In the process of preparing this Green Paper, the European Commission was guided by three basic principles: ensuring sustainability, competitiveness and security of supply. Six priority areas were identified in the strategy:

- completing the internal energy market (electricity and gas);
- solidarity between MS;
- security and competitiveness of energy supply;
- tackling climate change;
- innovation in energy technologies;
- coherent external energy policy (Zajączkowska 2011, 91).

After less than a year of intergovernmental consultations on the proposals included in the Green Paper, the Commission announced further action plans in January 2007.

11.2. Climate and energy package – prospects for the development of an energy policy of the EU

In January 2007, the Commission presented the European Parliament (EP) and the European Council with a communication entitled *An Energy Policy*

For Europe (SEC(2007)12). It outlined a number of steps that could be taken with a view to establishing a common energy policy. It was emphasized that measures taken by the EU to date did not guarantee a reduction in greenhouse gas emissions. If the existing energy policy was to be maintained, it would contribute to a 5% growth in CO_2 emissions by 2030. In addition, the EU's dependence on energy imports would increase from the current level of 50% to 65%; in the case of oil, the rise was expected from 82% to 93%. The Commission referred to the IEA's stance and stressed that by 2030, global oil demand would increase by 41% (European Commission COM 2007, 3-4). Given the above, the Commission identified three challenges that the EU would have to face in the near future:

- climate change;
- increasing dependence of the EU on energy imports;
- high energy price and mutual energy dependence of EU MS (European Commission COM 2007, 3-5).

During an EU summit that took place in March 2007, heads of MS accepted the majority of proposals formulated by the Commission. In December 2008, the EP adopted the Climate Change and Energy Package (CCEP) with specific targets to be met by MS by 2020:

- reduction of greenhouse emissions by at least 20% below 1990 levels;
- 20% of EU energy consumption to come from renewable sources;
- 20% improvement of energy use efficiency as compared to 1990 levels (Gheorghe, Muressan 2008, 366).

The strategy and objectives of the climate and energy package should not be considered separately. The reduction of greenhouse gas emissions cannot be analysed in isolation from the two remaining goals, i.e. greater energy efficiency and increased share of renewable energy sources. It is important to strive to attain these goals concurrently, as they are clearly interconnected.

In 2011, the Commission issued a communication entitled *Energy roadmap 2050* (COM(2011) 885 final), in which long-term scenarios are discussed. According to demographic forecasts, by 2050 the human population will reach 9 billion. If we wish to preserve the current standard of living of the population, the consumption of raw materials must be limited. Authors of the *Energy roadmap* call for action aimed at reducing CO_2 emissions, while boosting competitiveness and increasing the security of supplies in Europe. This goal is to be attained by implementing the adopted policies and directives, and by implementing measures aimed at reducing greenhouse gas emissions further after 2020 (Paska, Surma 2013, 13).

During a meeting of the European Council held on 26-27 June 2014, the energy security strategy was adopted (EUCO 79/14, 9), which forms an integral element of the EU's energy policy until 2030. Its aim is to increase the resilience of the EU to energy crises, to reduce dependence on fuels and on energy suppliers, and to increase energy generation in MS.

At the European Council meeting held in Brussels on 23 October 2014, a number of binding climate and energy policy targets, to be met by the EU by 2030, were defined:

- reduction of greenhouse gas emissions by at least 40% below 1990 levels;
- increasing the share of energy from renewable sources in the EU to at least 27%;
- improving energy efficiency compared to the existing energy consumption forecasts by 2030 (an indicative target of at least 27%) (EUCO 169/14).

In addition, approximately half of the pollution reduction target is to be met through the Emissions Trading System (EU ETS). By 2030, greenhouse gas emissions covered by the EU ETS should be reduced by 43% compared to 2005 levels.

On 15 December 2015, the EP adopted a resolution entitled *Towards a European Energy Union* (2015/2113 (INI)). The European Parliament highlighted in this document the importance of the five pillars of the Energy Union defined by the EC:

- security, solidarity and trust;
- fully integrated European energy market;
- energy efficiency contributing to reduced demand;
- decarbonising the economy;

- research, innovation and competitiveness (Energy Union Package, COM(2015) 80 final).

The EP pointed out that the strategies implemented under these pillars must always affect the security of supply, decarbonisation and long-term sustainability of the economy. They must also guarantee affordable and competitive energy prices.

In 2018, the European Commission, the European Parliament and the EU MS revised decisions setting the objectives of the EU's climate and energy policy until 2030. The target of renewable energy share in gross final energy consumption was raised to 32%, while the target energy efficiency increase to 32.5% (Directive (EU) 2018/2001; Directive (EU) 2018/2002).

On 11 December 2018, the *Regulation on the Governance of the Energy Union and Climate Action* (Regulation (EU) 2018/1999) was adopted. Pursuant to this document, national energy and climate plans are to be prepared for 2021-2030, followed by progress reports. The Regulation provides for the creation of national and EU registers and inventories of greenhouse gas emissions beyond 2020. They are to allow assessing progress towards the achievement of the goals set by the Paris Agreement on climate change. The Regulation obliges each MS to develop an integrated national energy and climate plan for 2021-2030 by 1 January 2019.

Increasing renewable energy resources and improving energy efficiency have an impact on reduction of greenhouse gases. EU has set an indicative energy efficiency target of 1483 Mtoe of primary energy consumption and 1086 Mtoe of final energy consumption. Table 11.1. presents the level of reduction of energy consumption in the EU. In 2018, EU's primary energy consumption reached 1551,92 Mtoe, exceeding its 2020 indicative target. Final energy consumption reached Mtoe 1124,14 exceeding the 2020 indicative target.

The EU seeks to ensure that 20% of its gross final energy consumption shall be generated from renewable sources by 2020. The share of renewables in gross final energy consumption stood at 18.9 % in the EU in 2018, compared with 12.6 % in 2008. Target 20% is distributed between the EU Member States with national action plans designed to trace a pathway for the development of renewable energy sources in each MS. Many EU-28 countries have already achieved the required goal for 2020. Sweden had by far the highest share energy from renewable sources in gross final consumption among all EU MS in 2018 (54.6%), ahead of Finland (41.2%) and Latvia (40.3%). At the opposite end of the scale, the lowest proportions of renewables were registered in the Netherlands (7.4 %) and Malta (8%) and Luxembourg (9.1 %) (Eurostat 2020a).

Table 11.1. Energy efficiency: reduction of energy consumption in EU-28

Reduction of energy consumption in EU-28 in Million tonnes of oil equivalent (Mtoe)							
	2008	**2010**	**2012**	**2014**	**2016**	**2018**	**2020 target**
Primary energy consumption	1 700,93	1 663,86	1 593,34	1 512,35	1 544,93	1 551,92	1 483
Final energy consumption	1 184,78	1 166,71	1 115,71	1 067,58	1 110,02	1 124,14	1 086

Source: own elaboration based on: Eurostat 2020.

* * *

Formulating a common energy policy culminating in the establishment of an Energy Union is a long and complex process. Initially, little was done to facilitate and advance the idea. It was not until the 1990s that the process gained momentum; it sped up considerably following the energy crisis of 2006. It can even be posited that energy crises accelerated the EU's work on key documents pertaining to energy security and the common energy policy.

An obstacle in the process of implementing the common energy policy is the fact that, when pursuing their energy policy, MS are guided in their endeavours by national interests instead of acting together on behalf of the entire EU. Nevertheless, this problem is increasingly being addressed, and is now becoming one of the EU's top priorities. In addition, a growing number of the Member States understand that the attainment of common goals (i.e. energy security, common market, or energy efficiency) will require the adoption of a common low-emission energy policy of the EU.

Abstract

The demand for energy has been increasing along with the development of human civilization. Energy is the driving force of the economy and many governments perceive it as an asset of strategic importance. Energy crises in the 1970s made EU Member States (MS) aware of the urgency of creating a common energy policy. The

aim of this article is to recount the process of building a common energy policy, its genesis, objectives and subsequent stages of development. Only properly conducted EU energy policy based on renewable energy sources can guarantee secure energy supplies and allow MS to maintain their economic competitiveness, without causing unnecessary harm to the environment.

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12.

Sustainability as an essential part of European luxury brands

After analyzing scientific literature and public discourse one could draw a conclusion that there is something contradictory between luxury products and sustainability (Bendell, Kleanthous 2007; Givhan 2015; Kapferer 2010; Carcano 2013). The luxury business is often perceived as irresponsible, resource wasting, and its consumption as conspicuous. This article aims to prove that sustainability and luxury actually have a lot in common and taking a closer look, one may indeed observe a close relationship. In the article only a part of the personal luxury goods segment is analysed – haute couture.

To show the link between haute couture and sustainable development the following research questions will be answered:

1. What kind of sustainability approach can be observed in different business models in the fashion sector?
2. What kind of sustainability practices are conducted in the haute couture at different stages of the production cycle?

To answer the aforementioned research questions desk research was conducted. Moreover, since 2010, multiple individual unstructured interviews with consumers of luxury goods and employees in the luxury sector were

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conducted. Another employed method was external observation of evolution of sustainable practices in haute couture industry across the years. The article consists of three parts. In the first section some basic terms have been defined. In the second part business models in mass fashion and haute couture sectors have been compared. Finally, sustainability practices introduced in the haute couture at different stages of production cycle have been described.

12.1. Luxury market characteristics, haute couture and sustainability

The luxury market comprises of 10 segments led by luxury cars, luxury hospitality and personal luxury goods, which together account for about 80% of the total luxury market in 2019 (D'Arpizio 2019). In 2015 the overall luxury industry was worth more than EUR 1 trillion in retail sales value. Haute couture is part of the personal luxury goods segment that together surpassed EUR 250 billion in retail sales in 2015 (D'Arpizio, Levato, Zito, de Montgolfier 2015). Haute couture plays a crucial role in shaping economies, being a strategic economic sector in France, Italy, United States, China and Brazil (Gardetti, Muthu 2015). Haute couture refers to uniquely designed pieces of clothes and accessories, handmade using high quality, expensive, often rare fabrics, sewn by the most talented artisans with extreme attention to details. Among the best known European haute couture houses are Chanel, Dior, J.P. Gaultier, Valentino (Berry 1994; Bendell, Kleanthous 2007).

Sustainable development is a global concept in which the society lasts over generations due to the development model that allows it to meet its present needs, without compromising the ability of future generations to meet their own needs (United Nations 1987). It promotes the thoughtful use of natural resources, protection of societies and preservation of their cultural heritage (Mierzejewska 2011).

In the literature and professional journals the opinion that luxury and sustainability are incompatible terms is predominant. Various authors suggest that due to the numerous points of significant differences between luxury and sustainability values and their role in the world, there is a weak association between the two concepts, and they cannot coexist (Bendell, Kleanthous 2007;

Givhan 2015; Kapferer 2010; Carcano 2013; Jones 2016; *PETA accuses 2013*). According to them, luxury equals excessive consumption and it puts at risk the life of next generations, therefore it is seen as unsustainable. On the other hand, Kapferer highlights that luxury and sustainability are strongly linked. Haute couture value is based on the image of exclusivity but also on durability and uniqueness – rare skins, exotic leathers, sophisticated craftsmanship. He concludes that luxury is resource-dependent, therefore it has to be obsessed with sustainability to ensure its own existence Consequently, sustainability together with luxury have durability and care for resources as their most important objectives (Kapferer 2010; Kapferer 2015; Lochard, Murat 2011).

Gardetti and Muthu (2015) confirm that among the more affluent part of the society luxury is becoming more about helping people to express their deepest values than about money and splendour. One of these values and aspirations is to create a more sustainable world where the credibility of haute couture brands will be evaluated by their actions focused on generating well-being, not only for their clientele, but also for those being affected by or involved in their production, consumption, reuse and disposal.

12.2. Haute couture and mass fashion brands sustainability approach. Comparison of the two business models

The rarity of raw materials and the need for the most skilful artisans in haute couture business forces this industry to think long-term and take the utmost care of these resources. This makes haute couture brands' priorities similar to the priorities important for sustainable development. Such approach is in line with the values promoted today by the European Union, which shows that sustainable development is not only a temporary fashion, an idea of EU bureaucrats, but a value deeply rooted in European culture.

Haute couture brands do not communicate much about the constant improvements that they implement in the sustainability area (Givhan 2015). However, the raising consumer awareness pushes these brands to get competitive advantage over the mass fashion brands in this territory, especially that with their last decade massclusivity[1] trend, they struggle with appealing to consumers based only on exclusivity. Nevertheless, due to the sensitivity of their brand value relying on the highest quality and exclusive brand perception, haute couture brands have to search for the right balance between "going green" and keeping the luxurious image. On the other hand, they are able to match deeper elements of value such as high ethical standards in sourcing, efficient use of materials, low impact manufacture, assembly and distribution, and the provision of repair and upgrade services[2]. All these elements make them stand class apart from the mass brands and it is possible due to their low volumes and high margins. Contrary to the mass fashion, which focuses on increasing the demand and production scale, the haute couture with its price barrier keeps the demand under control ensuring the protection of their scarce resources. As mentioned before, by designing the clothes with durability in mind, haute couture is the enemy of the disposable society. Its essence is to create value by designing unique and rare singular pieces of clothes, with no aim of cost reduction through outsourcing to developing countries, but on the contrary, with the aim of adding value and featuring the local elements of uniqueness in local production.

Kapferer and Bastien have differentiated the luxury business model created by the companies like Louis Vuitton, Hermès, Chanel, from the fashion business model followed by mass fashion brands (Kapferer, Bastien 2009). The luxury business model highlights the importance of craftsmanship and of carefully chosen, unique materials that are produced exclusively for one brand. It celebrates skills and attention to details of its artisans, their knowledge, *savoir faire* which has to be sustained and passed to the next generations. Chanel's attempts to recreate schools to revitalize curricula that are disappearing is a proof of the industry care for sustainable development in its social aspect. The generations of highly trained artisans in their elaborate ateliers create one-of-a-kind products. It is time-consuming, thus limiting the availability, but the very high quality makes them worth the wait, even for several years as it is in case of Hermès bags. The risk of labour exploitation is minimized, and strict quality control is possible as most ateliers are in the neighbourhood of the *maisons* of the haute couture houses, located in Italy and France (Ho, Choi

1 Haute couture brands launching cheaper lines of, for example, accessories to attract less affluent consumers.

2 According to an interview with an employee in luxury sector.

2012). What is more, Chanel, Hermès and Luis Vuitton work with only two, three suppliers for their most precious and rare raw materials to keep control of sustainable sourcing of the raw materials as well as to ensure the highest standards of animal treatment.

The mass fashion brands do not need skilled workforce as all production is first, delocalized and sent to the cheapest possible production country, then each worker specializes in one part of the production process, which is maximally simplified. This way it is easy to replace any worker and the labour conditions are raising the concern of being close to sweatshop operations (Kapferer 2015).

Further difference between luxury and fashion business model is the approach to durability. The crucial role it plays in haute couture brand story eliminates the pressure of keeping up with always changing trends, focusing instead on adapting and reinventing traditions to design products that will last, bringing the brand's heritage into the future. The after sale and repair services offered by most of haute couture brands for all products, no matter when they were bought, are the best proof of the long-lasting quality guarantee. At the same time, mass fashion is based on short production cycles, new styles smoothly overtaking the old ones, making the previous one unattractive in a matter of few weeks (Joy et al. 2012).

12.3. Sustainability practices in the haute couture production cycle

The textile industry is one of the biggest polluters of the planet and it leaves negative environmental footprint through water pollution, the use of fertilizers, pesticides and chemicals in the production stage as well as because of the large volume of waste it generates (Achabou, Dekhili 2013, 1896-1903). Moreover, there are many concerns about its labour conditions especially in Third World countries with the factories exploiting workers and their negative impact on local societies.

Growing presence in the digital world enabled brand transparency and information exchange as well as closer control of the production challenges, such as ground water pollution in leather processing, avoiding animal cruelty in fur farming or trapping endangered species, supervising the labour conditions for precious stones' or pearls' extraction. Sustainability requires deep changes and incorporation of environmentally friendly practices across the whole supply chain. These changes have been happening at a faster pace for a few years. Especially when the biggest luxury conglomerates such as Kering[3], and LVMH[4] started to take numerous steps in order to diminish their environmental footprint. In the clothes' life cycle, there is some impact on the environment practically at every stage, from the manufacturing of fibres, through actual consumption to the disposal of garments. In 2013 Kering released its first Environmental Profit and Loss Report, examining where in its supply chain is the largest impact on the environment[5]. Its report confirmed that 50% of the environmental impact came from the production of raw materials, 25% from their processing and only 7% was at its boutiques, headquarters and warehouses (Bigliardi, Bottani 2012)[6]. The new approach to sustainability is to incorporate sustainable thinking already in the design phase rather than only research how to minimize the negative impact of production and distribution. The environmentally conscious companies focus on product design that enables durability and also facilitates recycling. A new term "green purchasing" was created, enabling the companies, already in design phase, to demand from suppliers environmentally friendly raw materials such as organic textiles and materials coming from ethical sourcing (Bigliardi, Bottani 2012). After the design stage, the focus is to reduce the energy and material consumption during the manufacturing process and to choose environmentally friendly production techniques. The most common leather tanning technique requires the usage of heavy metals, most notably chromium, and the resulting waste is a health hazard, so the companies move to organic tanning techniques. Gucci since 2013 has been using organic tanning techniques in the production of special-order bamboo-handled bags and Louis Vuitton's Gaia Monogram Cerise handbags use vegetable-tanned leather. Bottega Veneta launched limited edition of bags produced from

3 It owns brands such as Gucci, Bottega Veneta, Stella McCartney, Boucheron, Saint Laurent.

4 It owns brands such as Dior, Givenchy, Fendi, Loewe.

5 Looking at all its labels Gucci, Puma, Saint Laurent and others, the company measured water consumption, air pollution, greenhouse gas emissions and land use. It recalculated these findings into euros to estimate how much the production of, say, a single leather handbag costs the environment: EUR 11.85 last year.

6 The biggest impact included the greenhouse gases from cattle ranching and the land and water dedicated to traditional sheep farming.

vegan materials with the usage of environmentally-sensitive dyeing and finishing (Carr 2016). Another favoured component in bags, PVC is also an environmental contaminant, so Gucci launched Dionysus shoulder bags made of polyurethane in their design rather than PVC (Givhan 2015). At the retail stage, even steps that may look insignificant, are important – In 2004 Luis Vuitton stopped wrapping products in plastic for customer deliveries; this action alone reduced the company's consumption of plastic by 20 tons per year (Bendell, Kleanthous 2007). On the other end of the supply chain, due to the low rate of post-consumer textile product recycling, 85 % of clothing and textile products are thrown away to landfills with no further reprocessing (Hiller Connell, Kozar 2014, 41-60). These numbers urge to take actions and limit the uncontrolled production and consumption of clothes.

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Most haute couture brands have been engaging in sustainable development for a very long time and not only recently because of the new consumers' requirements. The new aspect of sustainability among the haute couture brands is that they start to extend their environmental practices to their suppliers and customers[7]. In the future, haute couture industry will be expected to generate positive impact for all stakeholders involved in the production, trade and usage of its product. It is to have the greatest positive environmental and social contribution which means it has to start providing value through benefits to the local communities and taking even more care about environment during the production process and distribution. Communication of these benefits to the customers will define their elite experience and prestige positioning that the society decides to ascribe to them. The society will perceive the luxury consumer as a person who has both the means and the motivation to ensure that others do not suffer (Bendell, Kleanthous 2007). In order to achieve that, the brands will need to offer "deeper luxury" by offering guidance in shaping sustainable lifestyle and responsible living. Brand's social and environmental depth will become an important source of competitive advantage against mass fashion brands. The quiet changes at Kering, LVMH, Hermès are big steps towards a more sustainable textile industry approach.

7 Gucci produces a line of accessories every year, with 25% of profits going to the UNICEF. In France, some luxury companies, such as the Hermès, have adopted recycling practices.

Abstract

While analysing scientific literature and public discourse one could draw the conclusion that there is something contradictory between luxury products and sustainability. This article aims to prove that sustainability and luxury actually have a lot in common. Desk research and individual unstructured interviews were conducted to achieve the research goal.

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13.

Following the EU footsteps: environmental sustainability in South Africa

South Africa is the most advanced and industrialised economy on the continent, the only African member of G20, and an important member of the BRICS group of emerging economies. However, it is also a country with deep inequalities inherited from apartheid decades of negligence. On its way to inclusive sustainable economic growth, the government in Pretoria has to tackle many problems, including eradicating poverty, narrowing the economic and social gaps dividing the society and the shift from resource intensive to green economy.

13.1. South Africa and sustainable development

Since the 1960s, the idea of sustainable development has made its way to the most important concepts of economic development. The Brundtland Commission defined sustainable development as the "ability to ensure that development meets the needs of the present without compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development 1987, 17, 43). Sustainable development has three interconnected dimensions: economic, social and environmental,

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where sustainability refers to the capacity of biological systems to maintain their functions and processes over time (Markulev, Long 2013). As natural resources are neither infinite nor renewable, economic development cannot proceed unchanged without the danger of depleting natural deposits (Dernbach 2003). Therefore, the focus of environmental sustainability is placed on irreplaceability of natural capital understood as biodiversity, as well as natural resources. Countries grow aware of importance of environmental sustainability (International Council for Science 2017), as international cooperation increases and all societies adjust to new requirements (Campagnolo 2018).

South Africa is one of the most biologically diverse countries in the world, comprising three vegetation landscapes declared global biodiversity hotspots (South African Government 2019b). Biodiversity has long been threatened by human actions, connected with the drive to economic development. Along with climate changes and subsequent natural disasters, the government in Pretoria has taken steps to include the concept of environmental sustainability in the process of economic development. The National Strategy for Sustainable Development (NSSD), implemented since 2011, is a long-term commitment, encompassing the task of protecting and enhancing environmental assets and natural resources, building green economy, and response to climate change (South African Government 2011). The task focuses on green buildings enhancement, eco-transport and infrastructure development, clean energy advancement and energy efficiency promotion, natural resource conservation and management, sustainable water and waste management, dissemination of sustainable consumption and production knowledge, as well as increased sustainable food production and forestry maintenance (South African Government 2019a).

Simultaneously international cooperation was developed. South Africa has ratified the Kyoto Protocol (1995) and the Paris Agreement (2016), and remains active in multilateral cooperation, holding a regular dialogue on climate change within the African Ministerial Conference on the Environment (AMCEN). Multifaceted cooperation framework has connected South Africa and the European Union by the means of various bilateral and multilateral programmes and projects. An important instrument to stimulate cooperation are annual EU-South Africa summits, where the most urgent problems are dealt with. In its Intended Nationally Determined Contribution (INDC) to the Paris conference, South Africa decided to take efforts in order to achieve progressive approach and adapt to climate change (South African Government 2015). Various measures are taken, including the continuation of the national Renewable Energy Independent Power Producer Procurement Programme (REI4P), focusing on increasing renewable energy in South Africa's energy mix, as well as pursuit of decarbonised electricity by 2050, promotion of electric vehicles and hybrid electric vehicles, a long-standing plan for the introduction of a carbon tax and the development of a national adaptation plan (South African Government 2015).

13.2. Environmental sustainability

As the environmental, economic, and social dimensions are complementary, the environmental goals are targeted indirectly in many SDGs, though directly expressed in six. Despite difficulties, partly owing to foreign aid, many tasks are dealt with increased success.

SDG 6: Ensure availability and sustainable management of water and sanitation for all

South Africa is a semi-arid country where freshwater resources are depleted due to excessive extraction, mismanagement, drying or pollution: approximately 40% of water reservoirs had poor water quality (2018). According to Muller (2019), mismanagement threatens water supply more than climate change. Recently, access to safe water and sanitation services in South Africa has increased, as 92% of population uses at least basic drinking water services: 98% in cities and 80% in rural areas (2017). Sanitation remains a challenge, as in 2018, only 83% of South Africans had access to improved sanitation facilities. Meanwhile 4% of population in rural areas practiced open defecation, mostly due to lack of sanitation facilities or persisting habits (Statistics South Africa 2019a, 48).

Inadequate and poor management of infrastructure threatens the sustainability of water resources, as in 2017, only 52% of wastewater was safely treated and discharged. As agriculture has the highest annual freshwater withdrawal of 62.5% (2013), while households have 27% and industry has 10.5%, water-use efficiency should be strengthened in agriculture and domestic use.

The government wants to assure that urban areas and industrial centres have sustainable access to clean water, more efficient use of water resources in agricultural sector, and all citizens have access to clean water and sanitation by 2030. Frameworks, policies and strategies have been adopted to reach the goals. South Africa has been cooperating with neighbouring countries to work out strategies to share water resources, avoid water losses and conduct sustainable water management. In 2017, the high-level South Africa-EU Circular Economy Seminar discussed the opportunities created by the circular economy model, minimising resource input and waste generation in order to optimise the use of resources (Department of Environmental Affairs South Africa 2017).

SDG 7: Affordable and clean energy

In South Africa 95.3% of population has access to electricity (2017), though the rate is lower for rural areas. Increased access to electrical power is a big success, though impediments include high prices of energy, insufficient rate of connectivity in remote rural areas, and problems with getting electricity, as waiting period extends to 109 days (2019).

Despite the efforts to change the energy mix, the use of renewable energy resources remains low: renewable energy covers only 2.8% of primary energy consumption (2018) (BP 2019). South Africa has put much effort in increasing the output of renewable energy from wind, solar, water and biomass, due to its favourable coastal geographic location.

South Africa is the world's 14th largest emitter of greenhouse gases (GHGs), mostly due to high reliance on coal (The Carbon Brief 2018). The government in Pretoria has introduced measures to restrain CO_2 emissions in industry until 2050 and curb pollution especially from transportation by tax incentives for electric and hybrid cars.

SDG 11: Make cities and human settlements inclusive, safe, resilient and sustainable

Cities have a key role in accelerating sustainable development, due to its raising population and voice in international organisations (Zinkernagel, Evans, Neij 2018, 1). With a high rate of urbanization in South Africa, the black majority lives on the outskirts of cities and towns, without access to basic services as water, sanitation or electricity: in 2017, over 27% of urban population was living in informal dwellings. As the basic services have improved, over 92% of population in cities have access to clean water, 78% to electricity, and about 60% to sanitation, and waste removal services (Statistics South Africa 2019b, 188).

Yet, cities need more investment in mass transit services. Forthcoming task is to integrate transport communication systems as well as lower spatial inequality between city centres and outskirts. The government should also concentrate on upgrading the poorest districts, starting with proper urban planning development.

SDG 13: Take urgent action to combat climate change and its impacts

Environmental sustainability is directly connected with natural disaster prevention. As many other countries, South Africa is suffering from climate change, with higher temperatures, land and ecosystems degradation, especially in eastern provinces. South Africa has introduced a comprehensive set of strategies and policies to prevent future changes. Poor planning and management should be addressed, as well as financial assistance to affected households in poor districts and rural areas.

SDG 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development

As South Africa has a coastline of 3924 km and manages an exclusive economic zone larger than the land territory, its marine policy is crucial to the economy. Launched in 2014, Operation Phakisa for the Oceans Economy aims to open the oceans and shores to economic development and cooperation. The marine strategy stresses the importance of coastal communities and aquaculture sector with special focus on increasing fish supply and consumption on the domestic market, increasing the area of marine protected area network by 2030, and management of the fisheries resources in order to prevent the depletion of stocks. Communities are supported to take responsibility for sustainably managing the nearby fisheries resources. Systems were installed to monitor algae threats and illegal fishing. South Africa has successfully developed the maritime transportation system, along with smaller ports for the needs of local communities.

SDG 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss

Through the National Biodiversity Strategy and Action Plan 2015-25, South Africa has continued efforts to support environmental sustainability, protect biodiversity and sustainably manage land resources and ecosystems. Programmes of rehabilitation for woodlands and indigenous forests were introduced. Improvements were made in protection of terrestrial and freshwater ecosystems. The government should also stimulate cooperation between communities and the private sector to promote eco-tourism.

13.3. EU-South Africa Partnership for Environmental Sustainability

Efforts towards environmental sustainability are supported by bilateral cooperation with foreign partners, the EU included. The EU-South Africa Strategic Partnership, established in 2007, was the first and the only strategic partnership the EU has with an African state. The Partnership enhances dialogue and cooperation in various fields, with direct references to sustainable development (Council of the European Union 2007, 5).

Financial resources deficiency and the scale of the challenges, as well as the EU's experience in sustainable development have induced bilateral cooperation. Nowadays, the EU is South Africa's most important development partner, providing 70% of all external assistance funds. The donors encompass the European Commission (25%), the European Investment Bank – EIB (20%), and Member States (25%) (European Commission 2013). Since the end of apartheid, the European Commission has provided development assistance amounting to circa EUR 2.6 bn, while the EIB has supported development and economic activity in South Africa with loans and equity investment worth over EUR 2.5 bn (2004-16). The EU partners have been particularly active in energy infrastructure development. In South Africa the EIB has conducted over 60 projects in energy (EUR 800.8 m) and water and sewerage (EUR 395 m) in 1959-2019 (European Investment Bank 2020).

A successful cooperation example is the Urban-LEDS project, addressing environmental sustainability by accelerating urban low emission development and climate change resilience. South Africa was involved in the Urban-LEDS I phase in 2012-15, when two Model cities and five Satellite cities received support to develop Low Emission Development Strategies, GHG emissions inventories, climate commitments, and implement a variety of low-emission development solutions (UN-Habitat 2019). SWITCH Africa Green programme supports private sector led inclusive green growth. The EU provided EUR 19 m during 2014-18, fostering transformation towards green economy by training students on sustainable consumption and production patterns, and integrating green business development (European Union External Action 2018).

The objective of the Atlantic Ocean Tropical tuna Tagging Programme (AOTTP), where the EU financial contribution equals EUR 13.48 m, is to provide food security and economic growth of the developing Atlantic coastal states by ensuring sustainable management of tropical tuna resources within 2015-20 (European Union External Action 2017). The All Atlantic Ocean Research Alliance, launched in 2017, aims to deepen scientific knowledge of marine ecosystems and interrelations with oceans, climate change, and food (European Commission 2019a, 109). The EU-SA Forum on Environment and Sustainable Development, set up in 2007, concentrates on climate change, waste management, sustainable consumption and production, biodiversity, technical assistance, environmental governance, as well as North-South and multilateral cooperation (European Commission 2019b).

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As other developing countries, South Africa is facing huge challenges connected with economic development, further magnified by environmental sustainability dimension. Future efforts of bilateral cooperation should concentrate on increased water and sanitation infrastructure development and modernization, as well as popularizing the efficient consumption of natural resources, water included. Renewable energy remains a challenge, though South Africa has exceptional natural endowments. The government should increase efforts to reduce environmental footprint of its mining and industrial activities, and continue to support biodiversity. Other goals include carbon emissions reduction and diversifying the energy mix, as well as enhanced protection of biomes. The tasks ahead are demanding, yet cooperation with the European Union should increase the chance of success.

Abstract

Environmental sustainability has become an important challenge for all developing countries. After the end of apartheid, South Africa has undertaken numerous measures in order to achieve economic growth and eradicate poverty in a sustainable way, without depleting its biodiversity and natural resources. The efforts were strengthened by multifaceted cooperation framework with the European Union through the means of bilateral and multilateral programmes and initiatives. The paper aims to analyse South Africa's environmental sustainability policy and current achievements in the field.

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