Proportionality and Subsidiarity of European Law and Issues of "Over - Regulation" and "Under-Regulation"

Proporcionalita a subsidiarita európskeho práva a otázky "nadregulácie" a "podregulácie"

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PUBLIC PROCUREMENT DIRECTIVE AND COMPETITION LAW - REALLY UNITED IN DIVERSITY?[1]

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Abstract: At first sight it seems that the European regulation of Public Procurement uncontestedly must pave a path for high level of competition across Europe. However detailed view on some features of the Directive on Public Procurement can show that they can weaken effectiveness of enforcement of competition law. Thus there is a question of such detailed regulation of public procurement is proportionate and necessary for achieving aims of the EU and if there is sufficient legal basis for it. The presentation will focus mainly on three problematic issues: participation of companies of the same economic group in public procurement procedure, disqualification for cartel infringement, attractiveness of leniency programme.

Key words: competition law, public procurement, penalties, European law, cartels, bid rigging

1. INTRODUCTION

Till 18 April 2016, Member States must transpose Directive of the European Parliament and Council Directive 2014/24 / EU of 26 February 2014 on public procurement and repealing Directive 2004/18 / EC1 (hereinafter "PPD") which, inter alia modified and clarified the provisions on the exclusion from public procurement process. Therefore, the question arises whether the current legal status allowing the parties to the agreement restricting competition excluded from the procurement process stands in the transposition process, respectively, and will be replaced by a suitable alternative.

Furthermore in preparation of act transposing the PPD, the Slovak legislator mainly relied on the very text of the directive without trying to find solutions that would enable it maintain national regime that considered effective, or improved it.

The following article focusses on two issues representing interconnection between competition law and public procurement regulation: exclusion from public procurement after being convicted for competition infringement (bid rigging) and possibility of participation more undertakings from one economic group in one public procurement procedure.

Thus, here appears question of proportionality and subsidiarity of PPD since it at leas partially limits or removes national instruments designed to achieve legitimate goal. This situation is much more peculiar in context of competition law and public procurement since both policies have some common aims and goals – effectiveness of economic environment in favour of consumers/public bodies/citizens.

2. PUBLIC PROCUREMENT AND COMPETITIVE ENVIRONMENT

Relationship of healthy competitive environment and efficient public procurement is two-way: on the one hand, only a healthy competitive environment can generate achieving efficiency in public procurement, on the other hand, properly designed and pro-competitive procurement processes can promote the competitiveness of the private sector on the supply side. Therefore, the deformation of the private sector (such as cartels) can be transferred to decrease the efficiency of the public sector and vice versa, deformation procurement can promote cartelization of the private sector.

Loss of public sector efficiency due cartels in public procurement (bid rigging) can be substantial since the cartel may increase the price by more than 10% or even 30-70%.2 The measure of the intensity of competition in public procurement can be an average number of bids

[1]Article was prepared within the project APVV-0158-12 Efektívnosť právnej úpravy ochrany hospodárskej súťaže v kontexte jej aplikácie a praxi.

[2]Cf. ZEMANOVIČOVÁ, D. – BLAŽO, O.: Kartelové dohody vo verejnom obstarávaní – prečo a ako sa brániť. Verejné obstarávanie. Právo a prax, 3-4/2014, s. 5-7

submitted in a procurement procedure. Therefore, it appears necessary to introduce in addition to the preventive arm of the fight against bid rigging (here is given the responsibility of the contracting authority to properly design the procurement procedure) is sufficiently effective repressive mechanism to deter businesses from potential collusion, and should also include a public-component (penalties) as well as private component (damages).

3. PLURALITY OF PARTICIPANTS

The public procurement procedure is effective only of there is several bidders. Furthermore, inevitably we can talk on plurality of bidders if they are not interconnected to each other, via, e.g. their parental company – subsidiary relationship. Under Article 2 paragraph 1(10) "'economic operator' means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market".

The competition law does not provide legal definition of notion undertaking and it was defined by case law of the Court of Justice of the European Union as any entity engaged in economic activities. Hence taking into account this definition of undertaking under competition law, one or more legal person can form single economic entity, i.e. undertaking. Therefore if several companies, that in fact form single economic unit, agree on common behaviour on market, such behaviour is not considered agreement restricting competition under Article 101 of the Treaty on Functioning of the European Union. In particular, if such company participate in one public procurement procedure and each submits separate bids, they cannot be punished for cartel infringement even if they prepared their bids together.

On the other hand public procurement is silent of such situation. Effective situation form the point of view of public procurement law would be to prohibit participation of companies that can be considered part of single economic unit in the same tender. This prohibition can be enforced via several means, e.g exclusion from tender procedure, financial penalty or cancellation of contract.

Aforementioned solution is, however, limited by the PPD. First of all, grounds for exclusion from tender procedure represent nummerus clausus. In *Michaniki* case the court limited this nummerus clausus only to professional qualities: "The first paragraph of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective."3 In further analysis let's do not discussed this "reversed" proportionality test when member state shall test proportionality of national legislation vis-a-vis complementing European directive. *Michaniki* judgment clearly allows further restriction of participation in tender in order to maintain "equal treatment and transparency". Dealing with several companies that may have formed single economic unit, the Court of Justice explained this "additional" grounds for exclusion in *Assitur* case.4 First of all the Court affirmed that "[i]t is clear that a national legislative measure such as that at issue in the main proceedings is intended to prevent any potential collusion between participants in the same procedure for the award of a public contract and to safeguard the equal treatment of candidates and the transparency of the procedure."5 On the other hand the Court refused automatic exclusion forming one economic group: "However, it would run counter to the effective application of Community law to exclude systematically undertakings affiliated to one another from participating in the same procedure for the award of a public contract. Such a solution would considerably reduce competition at Community level"6 and therefore found automatic exclusion as contrary to European law: "Community law precludes a national provision

[3]Judgment in Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias, C-213/07, EU:C:2008:731.
[4]Judgment in Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano, C-538/07, EU:C:2009:317.
[5]Assitur, par. 22.
[6]Assitur, par. 28.

which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure."

It seems that PPD appears as "over-regulation" and "under-regulation" in the same time in this context: it does not solve problem of participation of several companies forming of one economic group in one tender procedure and on the other hand outlaws their automatic exclusion. Despite is prohibitive nature, *Assitur* judgment together with prohibition of automatic exclusions gives a possible solution: "Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure." A contratio, prohibition prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another will not be contrary to European law if:

(1) it is not absolute;

(2) allows them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

It is necessary to stress that the Court shifted burden of proof to economic operators: public body is not obliged to prove that relationship between undertakings influenced their conduct in the course of that tendering procedure. It is the potentially excluded undertaking that is obliged to prove otherwise. Based on this analysis, the national legislator can solve problem of participation of several undertakings forming single economic unit by regulation similar to following:

"1. The participation of several economically or personally linked persons in a public procurement procedure if their relationship of dependency can affect their behaviour in the respective public procurement.

2. For the purposes of this [Act] economically or personally linked persons means following persons:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).7

3. A contracting authority may require candidates / tenderers submit a list of related economically or personally linked persons .

4. The contracting authority may invite the candidate / tenderer to provide evidence that the participation of more of its economically or personally linked persons shall not affect their independent behaviour in a given procurement.

5. If the tenderer / candidate fails to demonstrate that the participation of more of its economically or personally linked persons may not affect their behaviour in a given procurement procedure, authority will consider prohibited the participation of all economically or personally linked persons in the tender concerned." .

[7]Based on definition and understanding common in competition law, particularly merger regulation.

4. DISQUALIFICATION FROM PUBLIC PROCUREMENT OWING TO PARTICIPATION IN CARTEL

4.1 Current regulation

The original text of Act no. 25/2006 Coll. on Public Procurement amending and supplementing certain acts (hereinafter "PPA") established in § 26. 1h) due to personal status may participate in the procurement procedure only who "has not committed serious professional misconduct in the last five years, that a contracting authority knows to prove." The amendment to the PPA (Act no. 232/2008 Coll. amending and supplementing Law no. 25/2006 Coll. on Public Procurement amending and supplementing certain acts, as amended, and on amendments to certain laws), with effect from 1 July 2008 modified that provision. First, the procurement can be participated by person that have not been proven of serious misconduct in the previous three years that could contracting authority prove8, and it has been explicitly stated that serious professional misconduct means in particular participation in an agreement restricting competition in public procurement demonstrated by the final decision of a competent public authority. The period of exclusion shall run from the date on which the decision becomes final9 Following shall be considered final decision (a) the final decision of the competent administrative body, against which it is impossible to bring an action, (b) the final decision of the competent administrative body, against which the complaint has not been lodged (c) the final court decision by which an action against a decision or action of the administrative body was rejected or proceedings stopped, or (d) another final judgment of the court.10 From participation in public procurement procedures is not excluded undertaking who successfully qualified for the leniency program (immunity as well as fine reduction.11 .

The scheme excluding entrepreneurs who have been convicted of a cartel in public procurement applies automatically, therefore there is no need to issue any other disqualification decision. It is also a compulsory system , thus the contracting authority authority shall be obliged to exclude such an undertaking ex officio, and the law does not allow any way to alleviate such sanctions. Only the undertaking who takes part in an agreement restricting competition in public procurement can avoid exclusion from public procurement, its cooperation with the Antimonopoly Office in leniency program.

4.2 DPP and new Public Procurement ACT

The original proposal for a new directive on public procurement adopted in 2011 contains many elements toward elimination cartelists of procurement: affidavits by tenderers that did not participate in collusion with other tenderers (Art. 22) and the obligation to exclude undertaking who submit such a statement falsely (Art. 68).121 This proposal was, however, replaced by a system that eventually became the final text of the PPD Art. 57: "Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: [...] d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition". The PPD also introduced a so-called. self-cleaning mechanism, after meeting following conditions an undertaking is not excluded from public procurement "as paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. "

Thus, the directive does not expressly mention leniency program as an exemption from exclusion. The PPD leaves determination of the period, during which exclusion applies, for national regulation, but the possibilities of the national legislator are restricted: "Where the period of

[8]PPA, § 26.1g)
[9]PPA, § 26.5.
[10]PPA, § 26.6.
[11]PPA, § 26.7.
[12]SANCHEZ-GRAELLS, A.: Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement In G RACCA, G. & YUKINS, C (eds), Integrity and Efficiency in Sustainable Public Contracts (Brussles, Bruylant, 2014). SSRN: http://ssrn.com/abstract=2053414 or http://dx.doi.org/10.2139/ssrn.2053414

exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4. " Given that the regulation of the possibility or obligation of exclusion undertaking who has participated in a cartel in connection with public procurement, hardly represents a tool of the common European fight against bid rigging.
If the contracting entity wishes to establish an infringement using a final decision of competition authority (or judgment dismissing the action against such a decision), it is almost unrealistic to have these documents available within three years from the infringement, or the time for which the undertaking can be excluded from public procurement will be very short.

It is obvious that word-by-word transposition of the PPD into Slovak legal order eliminates current patterns punishment of undertakings for bid rigging and replaces it with a system that does not constitute a sufficient threat of sanctions, which would have preventive effects against cartels in public procurement. Furthermore even in case of effective application of this system, it may discourage leniency applicants and thus undermine effective public enforcement of competition law.

Finally, in Slovakia13 this limiting content of the PPD was solved by additional power of competition authority (Antimonopoly Office – AMO). This solution has several new aspects comparing to previous regulation as well as PPD:14
(1) a ban on participation in public procurement operates automatically from the PPA, but a prohibition is based on the decision of AMO, that is issued mandatory when the AMO imposing a fine for bid rigging, and violation of this prohibition in participation in tenders shall result in the imposition of fines of up to 10% of turnover;
(2) the bid rigging is means an agreement restricting competition, which is to coordinate activities in public procurement, private tender or other similar contest in respect of public procurement, private tender or other analogous competition, i.e. is not only in relation to procedures under the PPA;
(3) takes into account the leniency program (no prohibition) and settlement (reduction of the prohibition from three years to one year)
(4) disqualification period starts from the date of the legal force of the final decision.
The prohibition is qualitatively different from the non-fulfillment of conditions for participation by the PPA, since the prohibition under the Competition Act that does not mean the exclusion of the subject of the procurement process, but entails “merely” into financial penalties.

5. CONCLUSIONS

In order to asses proportionality and subsidiarity of content of the PPD it is necessary to look at the goal of the public procurement – obtain the best value for money. Contrary, the European Union has no power to harmonize national laws in order to “force” member states to get best value for money. Although the European Union designed complex set of rules of almost whole public procurement procedure, it was implementing its power to harmonize laws in extent necessary for

[13]The author of this article co-authored these provision of law.
[14]“§ 38h
(1) Unless this Act provides otherwise, the Office shall ban undertaking to participate in public procurement for three years, if it has imposed a fine for violation of the prohibition of agreements restricting competition, which consisted in the coordination of business in public procurement, public tender or other similar competition with regard to public procurement, public tender or other analogous competition.
(2) The Office shall not impose a ban on participation in public procurement to undertaking, if it reduced the fine imposed to undertaking under § 38d(2).
(3) The the Office shall ban undertaking to participate in public procurement for one year if it has imposed a fine for violation of the prohibition of agreements restricting competition, which consisted in the coordination of business in public procurement, public tender or other similar competition with regard to public procurement, public tender or other analogous competition, and the fine was reduced according to § 38e.
(4) The period referred to in paragraph 1 and 3 shall start to run on day of legal force of the final decision; [...]“.

functioning of internal market, i.e. free movement of goods, transparency and equal treatment.15

Question of subsidiarity and proportionality was assessed in Explanatory Memorandum16 to the proposal of the PPD quite formally: "This objective could not be sufficiently achieved through action by Member States which would inevitably result in divergent requirements and possibly conflicting procedural regimes increasing regulatory complexity and causing unwarranted obstacles for cross-border activities." Furthermore, assessment of proportionality has nothing to do with teal proportionality test: "Compared to the current public procurement Directives, the proposal will considerably reduce administrative burden related to the conduct of the procedure both for contracting authorities and economic operators.". "Reduced" directive does not mean that it is proportionate since previous directive could have been totally disproportionate. However, on the other hand, would it be possible to challenge subsidiarity and proportionality of PPD after several generations of such directives?

Peculiarity of PPD is that it is "over-regulation" as well as "under-regulation" vis-a-vis competition law itself as well as proportionality a subsidiarity in this field. On the one hand it is too restrictive and outlaws certain national regimes and rules aimed to achieve competitiveness of the public procurement, on the other hand it does not solve problems described in this article, enough. Finally, due to ints content and overreaching complexity and limited manoeuvring space for member states, the PPD looks more like instrument of unification that instrument of harmonization.

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[15] Cf ARROWSMITH, S: Understanding the purpose of the EU's procurement directives: the limited role of EU regime and some proposals for reform. In: KONKURRENSWERKET (SWEDISH COMPETITION AUTHORITY): The Costs of Different Goals of Public Procurement, Stockholm, 2012.

[16] http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/COM2011_896_en.pdf.

UNDER-REGULATION COMPLEMENTED BY INTERGOVERNMENTALISM. A NEW WAY TO SAVE THE EU?

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Abstract: The last five years were a period of continuous challenges to various EU domains like stability of euro, EU external relations, free movement of persons etc. It is therefore not surprising that the EU response was sometimes lacking behind the cause. Even where the EU action was adopted, it was sometimes perceived as only partial (under-regulation). But this under-regulation was not caused by the absence of political will of EU co-legislators to adopt relevant legislation, but absence of EU competence. Hence the only way to fill the gap was an intergovernmental action. The aim of this contribution will be to point to the cases, where EU action was needed, but was replaced by intergovernmental action. A thought will be also given to possible affectation of EU law by intergovernmental action, and judicial endorsement.

Key words: ESM Treaty, Fiscal Compact, Patent, IGA Agreement, UPC Agreement, under-regulation, intergovernmentalism

1 INTRODUCTION

The EU Treaties contain a whole set of legal basis empowering the EU to adopt legally binding rules in various policies, such as transportation, energy, monetary union, economic policy etc. This may give impression that the EU was sufficiently equipped in order to deal with the challenges it had to face in recent years. The reality is however not so clear-cut. As Piris rightly points out, many important areas of state activities, such as police, education, health care, social security or fiscal policy remain outside EU competence.[2] It is therefore obvious that the EU legislators had in some instances tied hands when trying to face the challenges from recent years. The result was under-regulation flowing from the constraints related to the principle of conferred powers. In the next parts of this contribution I will try to analyze the cases of mixed EU/intergovernmental action by pointing to the limits and EU competences, possible impact on EU law and relevant judicial decisions. The focus will be laid on four international agreements – Fiscal Compact, ESM Treaty, Agreement on the transfer and mutualisation of contributions to the Single Resolution fund (IGA Agreement) and Agreement on a Unified Patent Court (UPC Agreement). Due to the fact that I analyzed the first two agreements in my previous contributions,[3] I will try to provide more in-depth analysis to the last two agreements.

2 INTERGOVERNMENTAL AGREEMENTS COMPLEMENTING EU ACTION

2.1 ESM Treaty and Fiscal Compact

Following the escalation of the sovereign debt crisis in the euro area in early 2010 the EU and its Member States launched a process aimed at both stabilizing the situation (crisis mechanisms) as well as ensuring responsible fiscal policies in Eurozone by strengthening budgetary discipline (preventive measures). Both crisis mechanisms and preventive measures were adopted by means of combination of intergovernmental and EU methods and measures.

As far as the crisis mechanisms (EFSF, ESM) are concerned, the intergovernmental method was used mainly due to the budgetary constraints of the EU as well as the absence of EU

[1] The views expressed in this contribution are solely those of the author in his private capacity and do not represent the position of any institution.

[2] PIRIS, J. C.: The Future of Europe: Towards a Two-Speed EU?, p. 145.

[3] BUCHTA, T.: The Sovereign debt crisis in Eurozone and Limits of EU Law. BUCHTA, T.: Zmluva o stabilite, koordinácii a správe v hospodárskej a menovej únii ako nástroj a prejav užšej medzivládnej spolupráce medzi členskými štátmi EÚ.

competence to establish a Eurozone rescue mechanisms. The only EU crisis mechanism EFSM was based on a shaky legal basis – Article 122 TFEU. This provision refers to situations in which the difficulties of the Member States were caused *by natural disasters, or exceptional occurrences beyond its control.* It is beyond the scope of this contribution to analyze to what extent was this provision correct legal basis for the EFSM regulation. Besides that, the lending capacity of EFSM was much lower than that of ESM and EFSM due to EU budgetary constraints.

In case of strengthening the fiscal discipline by means of preventive measures there were several reasons for the use of combination of intergovernmental and EU method. Given the lack of EU powers, the subject-matter of the Fiscal Compact was intended to be part of a larger Treaty change to be agreed by the European Council in December 2011. However as no political consensus was reached, it was decided that the subject-matter of the proposed Treaty change will be transposed into international agreement concluded by most EU Member States. This intergovernmental measure was complemented by various EU acts, inter alia two so called six-pack and two-pack. Despite being intergovernmental act, the Fiscal Compact involves in its process of implementation EU institutions. This is done in three ways – through primary and secondary law, through additional commitments for representatives of the Member States acting in the Council meeting and through primary law provisions enabling involvement of the Court of Justice.[4] In other words, the Fiscal Compact is intergovernmental measure implemented by EU methods.

But what is the logic behind adopting of intergovernmental measures that are implemented partially by EU institutions? Certainly the slowness of EU procedures plays a role. In addition to this the story of Fiscal Compact was a particular one. The intention was to have its content in the Treaty change, which was to be agreed on the European Council in December 2011. Indeed measures like modification of excessive deficit procedure (Article 126 TFEU), higher intrusiveness of EU Institutions into national budgets in case of excessive spending, change in the Eurozone governance as enshrined in Protocol 14 or common debt issuance were a key elements of the so-called interim report of the President of the European Council. Given the absence of consensus among the Members of the European Council, these ambitious changes were not transformed into the primary law, but became only part of international agreement concluded by a group of the Member States.

2.2 Agreement on the transfer and mutualisation of contributions to the Single Resolution fund

This agreement is another example of combination of intergovernmental and EU measures. In other words it is a partial under-regulation caused by lack of competence complemented by an intergovernmental measure. In order to understand this package of euro-international mélange it is necessary to explain its rationale. With the view of creating the banking union, the EU decided to base it on two pillars - a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM) for banks. The purpose of SSM comprising ECB and national banks is to safeguard the European banking system and ensure its stability. Its role is therefore primarily preventive. On the other hand the role of SRM is mainly to resolve problems of a banks being subject to SSM. The SRM Regulation complemented by the Bank Recovery and Resolution (BRR) Directive provide inter alia for a mechanism of collection of contributions to SRM, being raised from credit institutions, parent undertakings and investment firms and financial institutions. Article 67 of the SRM Regulation contains an obligation for national resolution authorities to raise the contributions to SRM. And this is where the EU law finds its limits and under-regulation caused by lack of EU competences comes into play.

While the obligation for the Member States authorities to raise the contributions to SRM are stemming from SRM Regulation and BRR Directive, this is not the case for obligation to transfer the collected contributions to SRM. Indeed, these obligations are not to be found in EU law, but in international obligations of the participating Member States. The system of EU budget and own resources is unambiguously set and the contributions of the Member States raised within the implementation of SRM Regulation and BRR Directive are not part thereof. That is why the EU may not impose on its Member States obligation to transfer the contributions to SRM and the only way is additional commitment of the Member States beyond EU law using the track of international law.

[4] BUCHTA, T.: Zmluva o stabilite, koordinácii a správe v hospodárskej a menovej únii ako nástroj a prejav užšej medzivládnej spolupráce medzi členskými štátmi EÚ, s. 153.

The IGA Agreement is therefore third recent example where the combination of EU and intergovernmental method was used.

2.3 Agreement on a Unified Patent Court

A discussion about the EU patent was on the table for decades and it was only in 2012 when the solution was found on a new Unitary Patent valid in participating Member States, almost in the whole EU. The only two non-participating Member States were Italy and Spain. Only in September 2015 Italy joined the participating Member States. The solution resulted in two legislative acts, which implemented some elements of the Unitary Patent, notably Regulation 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and Regulation 1260/2012 on translation arrangements for the unitary patent. However these two legislative acts do not cover the whole domain of Unitary patent, not surprisingly due to the lack of EU competence. Therefore intergovernmental cooperation had to step in again, this time through the Agreement on a Unified Patent Court (UPC Agreement). It is therefore important to explain the relation between the two regulations and the UPC Agreement.

The subject-matter of the UPC Agreement was not covered by Regulation 1257/2012 and 1260/2012 due to the fact that the competence for establishing the patent court and definition of its jurisdiction belongs to the Member States, not the EU. The UPC Agreement is on the other hand closely intertwined with the two regulations as explained by the recitals 24 and 25 of the Regulation 1257/2012. These two recitals indicate that the agreement creates a procedural tool for unitary patent protection established by the regulations. A close relation of EU regulations and international agreement is therefore obvious and it is also possible to observe parallels with previously mentioned cases of EU-intergovernmental mélanges.

3 EFFECTS ON EU LAW, IN PARTICULAR ON APPLICATION OF PRINCIPLE OF SINCERE COOPERATION

The first effect on EU law to be noted is an incentive for a future revision of EU primary law. Indeed, the Fiscal Compact contains in one of its final provisions, namely Article 16 and obligation to take necessary steps within five years of the date of its entry into force with the aim of incorporating its substance into the EU law. The only way to do it would be through a revision of primary law. Nowadays any revision of primary law is not very likely as many Member States declared a need to have a referendum on any future Treaty revision entailing a transfer of competences. However given the developments in the UK and possible need to adapt its relations with the EU following the outcome of public vote, this option is not to be completely excluded. The ESM Treaty entailed even direct impact on revision of primary law, as the EU used for the first time the so-called simplified revision procedure by amending Article 136 TFEU. This amendment did not result in new legal basis for EU legal act, but only for interpretative provision confirming legality of Eurozone safeguard mechanism.

Another impact on EU law from procedural perspective is elimination of the roles of the EU institutions. Indeed, the EU co-legislators will be ousted from the decision-making process of the rules closely intertwined with EU law and the only role will be reserved to the EU Member States. It is to be noted that especially the European Parliament was not very happy with being just observer in the process of creation of the Fiscal Compact. This effect is closely linked with the creation of new international institutions. The ESM Treaty led to the creation of the Board of Governors or the Board of Directors, who are outside decision-making process of the EU and consequently outside the judicial scrutiny. Interestingly enough, this is not true for another entity created outside the framework of the EU by international agreement - the Unified Patent Court. This court is pursuant to Article 21 of the UPC Agreement under obligation to cooperate with the Court of Justice and is entitled to request a preliminary ruling as any national court. A failure to do so or any other action incompatible with the EU law is according to Article 23 of the UPC Agreement attributable to the Member States including for the purposes of Article 258 – 260 TFEU (infringements proceedings). The UPC Agreement thereby emphasizes the already existing power of the European Commission to commence infringement proceedings against the Member States for enforcement of their international obligations which are contrary to EU Law.

The international agreements concluded inter se have also wider effects on EU law by reinforcing the concept of two-speed Europe. This concept appears regularly several years, each

time the EU reform process is being hindered by one or several countries.[5] However, when analyzing the four agreements above, it is hard to conclude that they tend to indicate a closer integration of certain unique group of Member States. The simple reason for this conclusion is a strong differentiation between the Member States as contracting parties of the said agreements. Indeed, for each agreement the composition of contracting parties is different, hence indicating diverging national preferences resulting in absence of any single core group.

Another interaction with EU law may be observed with respect to the application of the principle of sincere cooperation. The question namely arises to what extent is ratification, or non-ratification of certain inter se agreement compatible with this fundamental principle of EU law. The principle of loyal cooperation is one of the most important principles for mutual relations between EU and its Member States. Pursuant to this principle the Member States and the EU work together to achieve the common goals. The principle of sincere cooperation also implies an obligation for the Member States to take all necessary measures to fulfill the obligations arising from EU primary and secondary law. Likewise, within the meaning of that principle the Member States must avoid any act which could jeopardize the attainment of the objectives of the EU. The application of this principle was discussed with respect to the ratification of the so-called mixed agreements (i.e. agreements where the contracting parties are both the EU and the MS). According to the case-law the principle of loyal cooperation means a close cooperation between the Member States and the EU in the process of negotiation and ratification of international agreements.[6] The Court also held that it will, when examining compliance with the principle of sincere cooperation examine the specific circumstances of the case, for example the consequences of the act of the Member State for the EU.[7] The relevant literature tends to indicate that in assessing the possible infringement of the principle of sincere cooperation it is necessary to take into account the reasons for the delay and the EU's interest for the early entry into force of the agreement.[8] The question of the ratification of one of the four international agreements stated above has been slightly addressed by the case-law of the Court of Justice. The Court namely stated that the principle of sincere cooperation does not prevent the Member States from the ratification of the ESM Treaty.[9] However, the Court did not rule on the question whether there is an obligation stemming from the principle of loyal cooperation to ratify that agreement, despite the proposition of the Irish Government to this effect. In any case the conclusion that the ratification of ESM Treaty and Fiscal Compact is an obligation stemming from the principle of loyal cooperation was set by the Irish High Court.[10] This conclusion seems logical as there was a clear EU interest in stabilizing the situation in the monetary union and this aim was to be facilitated by the early ratification of the ESM Treaty. It would be therefore possible, as evaluated by the Irish court, to classify the ratification of the ESM Treaty as a fulfillment of the principle of sincere cooperation. On the other hand, it is questionable whether delaying the ratification of the ESM because of budgetary problems of a State should be considered a violation of the principle of sincere cooperation.

Similar considerations are valid for ratification of the UPC Agreement and its link to principle of sincere cooperation. The relationship between the UPC Agreement and EU Law, namely the Regulations 1257/2012 and 1260/2012 was already addressed at point 2.3 above. A close link between the UPC Agreement and the regulations is obvious. The need to ratify the UPC Agreement by the Member States is also apparent both from recital 25 of Regulation 1257/2012 as well as judgments of the Court of Justice C-146/13 and C-147/13.

An additional question arises whether the need for ratification of the UPC Agreement as indicated by the provisions above in the light of the principle of loyal cooperation implies unconditional early ratification, or longer ratification process focused on resolving the contentious issues. I am inclined to conclude that the non-ratification (complete rejection of ratification), or

[5] DE WITTE, The Emergence of a European System of Public International Law: The EU and its Member States as Strange Subjects, p. 47.
[6] Opinion 2/91, para 36.
[7] C-246/07, Commission v. Sweden, paras 92 and 101.
[8] EECKHOUT, P.: External Relations of the European Union Legal and Constitutional Foundations, p. 259.
KLAMERT, M.: The Principle of Loyalty in EU Law, p. 202.
[9] C-370/10, Pringle, paras 151 – 152.
[10] Pringle v The Government of Ireland & Ors, High Court, para 82.

delayed ratification in order to obtain certain benefits would constitute a breach of the principle of sincere cooperation. Non-ratification would mean that the unitary patent protection covered by Regulations 1257/2012 and 1260/2012 would apply to the Member State which is not and will not be bound by the UPC Agreement. Postponing ratification in order to obtain a certain benefit would undermine the aims of the regulation and would run counter the spirit of principle of sincere cooperation. On the other hand, the EU law recognizes that Member States may resolve the constitutional issues before they are bound by international legal obligations linked with EU law. Reference to national constitutional procedures and requirements are in Article 84 of the UPC Agreement, as well as recital 25 of Regulation 1257/2012. In my view these provisions cover delay of ratification for some time in order to resolve contentious constitutional questions. This conclusion seems to be reinforced by Article 4 of the Treaty on European Union, which obliges the EU to respect national specificities resulting from the constitutional system.

At the same time the UPC Agreement foresees certain fragmentation with respect to its application by the Member States. According to Article 89 of the Agreement, the entry into force requires 13 ratifications and the entry into force triggers also the application of Regulations 1257/2012 and 1260/2012. Whilst the Regulation shall be applicable to all States participating in enhanced cooperation, the UPC Agreement will be binding for some time only for 13 or more Member States, which have completed the ratification process. This confirms the conclusion that Member States receive a relatively large leeway in assessing all aspects of the ratification of the UPC Agreement. There is however one additional condition for the delay in ratification to comply with the principle of sincere cooperation. The case-law of the Court of Justice confirms the presumption that the relevant EU institutions must be duly informed and consulted in case of instituting international dispute-settlement proceedings that may affect EU law.[11] In my view this conclusion may be fully transposed to ratification of inter se agreement closely intertwined with EU law. To conclude, whilst the final non-ratification of the UPC Agreement or postponement of the ratification with the view of obtaining certain benefit would violate the principle of sincere cooperation, the postponement of ratification aimed at resolution of national constitutional difficulties duly consulted with relevant EU institutions would not constitute a breach of the principle of sincere cooperation.

4 JUDICIAL APPROVAL

The entanglement of EU and international law certainly creates much floor for legal discussion, but what is more important, for decisions of the EU Courts. Given the international law dimension, the main question to be resolved is whether the EU Member States violated the EU law by concluded the said international agreement among them. From the four international agreements mentioned above, the Fiscal Compact and the IGA Agreement were not subject of the judicial scrutiny of the EU Courts, so the analysis will focus on the ESM Treaty and UPC Agreement. However given the fact, that the judicial decision relating to ESM Treaty was sufficiently analyzed in my previous contributions[12], this agreement will be analyzed only briefly and more emphasis will be laid upon the UPC Agreement. In the analysis focused on judicial endorsement I will not discuss the whole judgments, just the elements related to entanglement of EU law and inter se agreements.

One of the most important rulings of the Court of Justice in recent years was beyond any doubts the decision in Pringle.[13] The reason for this is the fact, that the negative verdict might seriously undermine the stability of Eurozone. In this case the Court of Justice had to deal first with the plea of lack of competence raised by Spain with respect to the ESM Treaty. The Spain argued that the ESM is a Treaty concluded between the Member States whose currency is euro and is subject to the rules of public international law. Spain referred to abundant case-law, pursuant to which where the EU is not a contracting party to the international agreement, the Court in principle has no jurisdiction. Spain suggested that the ESM Treaty is covered by these conclusions. The Court however ruled quite to the contrary claiming, that the preliminary questions were focused on interpretation of EU law, namely on compatibility of EU law with the ESM Treaty.[14] This conclusion is

[11] C 459/03, Commission v. Ireland, para 179.
[12] BUCHTA, The Sovereign debt crisis in Eurozone and Limits of EU Law.
[13] C-370/10, Pringle.
[14] Ibid, para 79.

relevant also for future inter se agreements, which must be constructed in a way to withstand the scrutiny of the Court of Justice.

The Court of Justice touched upon several aspects of compatibility of the ESM Treaty with EU law. I will not go into the details as most of the case has been covered by my previous contribution. Suffice it to say that in Pringle the Court went into analysis of various provisions of EU primary law using literal, historical and teleological method of interpretation and did not identify any discrepancy with the ESM Treaty. It confirmed the competence of the Member States to establish safeguard mechanism for Eurozone. Then it distinguished this competence from EU competence in monetary and economic policy.

Probably the most prominent element of the judgment was the compatibility of the ESM Treaty with the no bail-out clause, Article 125 of the TFEU. Here the Court used historical and teleological method of interpretation and concluded that Article 125 prohibits any financial assistance resulting in fostering excessive fiscal spending.[15] In order to check whether the ESM Treaty is compatible with the EU Treaties the Court applied these conclusions on ESM. It reasoned that assistance from ESM does not mean that other member States assume or guarantee debt of the recipient state.[16] The Court referred also to the strict conditionality as enshrined in the ESM Treaty, which ensures that the recipient state complies with EU fiscal rules.[17]

Even more interesting judiciary endorsement of mixed EU-intergovernmental action is provided by the Court of Justice in cases C-146/13 and C-147/13. In the case C-146/13 Spain presented objections against compatibility of the UPC Agreement with EU Law, namely absence of guarantees for preservation of EU law and exercise of competences belonging to the EU by the Member States. Spain was also disturbed by conditional effectiveness of EU Law upon the entry into force of the UPC Agreement as enshrined in Regulation 1215/2012. The Court had another occasion to stipulate whether the intergovernmental action violated EU Law. The Court avoided commenting on any negative effect of the UPC Agreement on EU Law by referring to lack of jurisdiction to rule on the lawfulness of international agreement concluded by the Member States in an action brought under Article 263 TFEU.[18] However the Court took a stance on conditional effectiveness of Regulation 1215/2012. It referred to case-law related to Article 288 TFEU, pursuant to which the regulation may leave to the Member States power to adopt necessary measures to ensure the application of provisions of the regulation.[19] In other words, the Court qualified the UPC Agreement as a national implementation measure, although adopted in international context.

The Court therefore avoided perception suggested by Spain, pursuant to which the relationship between the UPC Agreement on one side and Regulations 1215/2012 and 1257/2012 on the other side should be constructed as EU Law being conditional upon the will of the Member States to ratify their international obligations. Instead, according to the perception of the Court, EU Law is a primary obligation, which is being implemented by means of international law. This of course does not exclude the possibility that part of the legal framework does not fall within the competence of the EU and is regulated by inter se international agreement.

It seems from the two judgments above, that the Court endorsed the process of achieving the EU goals by means of mixed EU-intergovernmental action. To this effect it upheld the conformity of the UPC Agreement and ESM Treaty with EU law (although in case of UPC Agreement not explicitly). I am convinced, that similar outcome would be achieved should the Court assess the other two agreements mentioned above.

5 CONCLUSION

Given the developments in recent years it seems that the EU-intergovernmental mix will have a rising tendency. This solution is a very elegant way to cope with cases where the EU is not equipped with competences for achieving EU goals, or in recent years rather to deal with internal or external crisis. In this context it is not surprising that the last major crisis – migration was being solved also by combination of EU and intergovernmental measure. In this case the

[15] Ibid, para 135.
[16] Ibid, para 139.
[17] Ibid, para 143.
[18] C-146/13, para 101.
[19] Ibid, para 105.

intergovernmental measure was *Resolution of the representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40,000 persons in clear need of international protection.* The reason for this intergovernmental measure was not lack of EU competence, but voluntary commitment of the Member States beyond the existing obligations stemming from EU Law. In this respect it seems likely that some EU transitional measures adopted with the view to tackle the migration crisis will come under the scrutiny of the Court of Justice, so the question arises whether the Court will also have a look at the relation with intergovernmental measure.

In any case the question arises as to whether there will be a political will to transpose the content of the four international agreements mentioned above into primary law. In case of Fiscal Compact it is an obligation, as for the other there agreements possibility. The fact remains, that the combination of EU and intergovernmental measures will be used also in the future, the only question arises as to the frequency of this action.

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EFFECTIVENESS OF THE SELECTED PROCEDURES IN TRADEMARK LAW

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Abstract: There is a belief that the procedures in the trademark law should be regulated by the national law, however not by the EU law. Meanwhile, substantive law without proper procedural rules causes ineffectiveness of the trademark system. There is no justified reason why the procedures in the trademark law should be regulated mainly by the national law. Therefore, the EU law should regulate not only the substantive law, but also procedural rules in the trademark law. Owing to more intensive regulation by the EU law in respect to procedures, the provisions of substantive law will be applied properly. In the paper, the selected procedures from Polish trademark law will be discussed. Basing upon the examples, it will be shown that "under-regulation" regarding procedures causes ineffectiveness of the trademark law.

Key words: effectiveness, trademark procedures, Directive 2008/95, harmonization

1 INTRODUCTION

Trademarks are supranational means of communications referring to the goods. According to the opinion of the advocate general, Ruiz-Jarabo Colomer, a distinctive sign can indicate at the same time trade origin, the reputation of its proprietor and the quality of the goods it represents, but there is nothing to prevent the consumer, unaware of who manufactures the goods or provides the services which bear the trademark, from acquiring them because he perceives the mark as an emblem of prestige or a guarantee of quality.[1] Trademarks are playing an increasingly greater role in modern economy.[2] Due to the functions of the trademarks, a proper legal regulation is essential in the granting procedure and enforcing their protection. **Directive 2008/95/EC is a key act on trademarks**.[3] The said Directive affects, most of all, the provisions of substantive laws. It is believed that the procedures regarding trademarks laws shall be regulated by the national legislation systems. Meanwhile, such an approach is hardly understandable. The proceedings on trademarks being heard in the patent offices, in particular, are not of such characteristics that may justify lack of regulations in the form of the directive. What is considered relevant in cases related to infringement of exclusive rights, is no longer so essential, first of all, in cases on trademark protection. While taking an objective look at the procedures pending in the patent offices, they are alike, as a matter of principle. Moreover, the trademark laws stipulate that legal and material basis, with no appropriate procedures, fails to meet its functions, and, in some cases, it weakens the protection strength.

The initial act on trademarks at the EU level was the **First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks.4**

[1] Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-206/01 *Arsenal Football Club,* EU:C:2002:373, point 47.

[2] CHAVANNE, A, BURST J.-J., Droit de la propriété industrielle, Dalloz 1998, p. 490.

[3] Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version), OJ L 299, 8.11.2008, p. 25–33. Hereinafter as „Directive 2008/95".

[4] OJ L 040, 11.02.1989, p. 1–7, hereinafter referred to as "Directive 89/104". OJ L 40, 11.2.1989, p. 1–7. Directive 89/104 was repealed by the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version), OJ L 299, 8.11.2008, p. 25–33. Directive 2008/95 was introduced since the previous Directive 89/104 had been amended several times. **Reference to** repealed Directive 89/104 is deemed to be the reference to Directive 2008/95, in compliance with the correlation table enclosed in Annex II to Directive 2008/95.

Alongside and linked to the national trade mark systems, Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark[5], codified as Regulation (EC) No 207/2009[6], established a stand-alone system for the registration of unitary rights having equal effect throughout the EU. One of the fundamental reason for adopting the aforementioned Directive was the fact that **t**he trademark laws applicable in the Member States before the entry into force of Directive 89/104/EEC contained disparities, which may have impeded the free movement of goods and freedom to provide services and may have distorted competition within the common market. Therefore, it was necessary to approximate the laws of the Member States in order to ensure the proper functioning of the internal market. The **preamble of Directive 89/104 clearly states that i**t does not appear to be necessary at present to undertake full-scale approximation of the trademark laws of the Member States and it will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market. In addition, the provisions of the quoted Directive provided the Member States with the freedom to fix the provisions of procedure concerning the registration, the revocation and the invalidity of trademarks acquired by registration. To give an example, the Member States could have determined the form of trade mark registration and invalidity procedures, decide whether earlier rights should be invoked either in the registration procedure or in the invalidity procedure or in both and, if they allow earlier rights to be invoked in the registration procedure, have an opposition procedure or an ex officio examination procedure or both; whereas the Member States remain free to determine the effects of revocation or invalidity of trade marks. Directive 2008/95/EC did not change the essence of the objectives set out in Directive 89/104/EC. The statement saying that it does not appear to be necessary to undertake full-scale approximation of the trade mark laws of the Member States and that it will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market has been repeated once again. Thus, it has been recognized that full harmonization of the trademark laws is not possible. Simultaneously, it is worth underlining that rules of practice have not been regulated by the said Directive. The EU legislator focused on provisions of the substantive laws so that the conditions for obtaining and continuing to hold a registered trademark be, in general, identical in all Member States.

When analyzing *a priori* the trademarks law, it is to be emphasized that the procedures occurring in various legal systems are comparable. At the same time, these procedures seem not to be complicated. An example could be proceedings examining the trademarks. As a matter principle, two models of application procedures related to the trademark could be distinguished: an ex officio and an opposition approach. The ex officio one is based on the e carried out *ex officio* by the Patent Office, that covers not only, so called, absolute grounds with respect to the registration of the trademark, yet also takes into account relative grounds. Registration relative grounds appear when the third party has already been provided with powers to the trademark, that is filed to registration procedures.[7] Of course, mixed models exist, too. Validity of one of the aforesaid models in the application procedure does not result from the characteristics of a particular proceeding, but depends on the decision taken by a given state. The trademark application procedure constitutes barely an example, proving that the procedure itself is not an extremely complicated issue here. Certainly, it does not mean that procedures do not matter. On the contrary, effectiveness of the legal and material regulations is impaired if rules of practice are defective.

Effectiveness is a fundamental principle for the EU legal system. It is supposed to serve for implementation of the European integrity.[8] It works similarly in the case of trademarks. After all, Directive 89/104/EC was introduced since the trademark laws applicable in the Member States contained disparities, which may have impeded the free movement of goods and freedom to provide services and may have distorted competition within the common market. It was therefore necessary to approximate the laws of the Member States in order to ensure the proper functioning of the

[5] OJ L 11, 14.1.1994, p. 1–36, hereinafter referred to as Regulation 40/94.

[6] OJ L 78, 24.3.2009, p. 1–42, hereinafter referred to as Regulation 207/2009. References to the repealed Regulation No. 40/94 shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II fo Regulation 207/2009.

[7] MORDWIŁŁKO-OSAJDA, J., Znak towarowy. Bezwzględne przeszkody rejestracji, Warszawa 2009, p. 71.

[8] PÓŁTORAK, N., in: Europeizacja prawa administracyjnego, HAUSER R., NIEWIADOMSKI Z., WRÓBEL A. (eds.), Warszawa: C.H.BECK, 2014, p. 183.

internal market. Effectiveness is most of all a prescriptive rule that sets out how the EU laws need to be implemented by all the applicable entities, i.e. EU institutions, Member States and natural persons. In practice, due to the principle of shared administration - stipulating that the majority of tasks related to execution of EU regulations shall be carried out by the Member States – effectiveness mostly refers to the states. Therefore, the rule of effective implementation of EU laws affects, as a matter of principle, the structure and the administrative law.[9] Moreover, the Court of Justice of the European Union that derives effectiveness from the rule of loyal cooperation, also associates it with the rule of uniformity in execution of EU laws. According to the Court of Justice, a fundamental requirement of the Community legal order is that the Community law should be uniformly applied.[10] Uniformity is required in order to avoid a different approach towards the entities bound by the jurisdiction of particular states that may result in violation of the principle of fair market competition. Since there is no harmonization in terms of rules on execution of EU laws, a pursuit of uniformity regarding the execution could be achieved through indication of a certain execution standard – the principle of effectiveness.[11] Effectiveness ought to be the rule applied at any stage of the execution of EU laws, ranging from its interpretation, through legislative implementation, to administrative and jurisdiction execution. The role of the national legislator should be meant as enactment of an efficient law, allowing for the execution of the EU legislation. It refers both to the provisions of substantive and procedural laws. It seems to be reasonable to recognize the statement saying that the rules of practice aim at proper establishing of the substantive relationship. Upon the establishment of the substantive relationship, the procedural relationship is no longer in force. In this case, the procedural law is considered an instrument of the substantive law. Nonetheless, such a relationship between the procedural law and the substantive law occurs only in terms of the function. However, the provisions determining the procedures do not solely play an auxiliary role towards the provisions of the substantive law. Actually, norms of procedural and procedural laws feature a tight correlation, meant that powers and liabilities towards the entity, resulting from general regulations, shall not be established, if the procedure has not been properly developed.[12] That is why trademarks are protected not only with the provisions of the substantive law, but by procedural law as well. If there is no relevant procedure, the sense of legal and material regulation shall be ineffective.

To give an example, we may point out selected procedures enclosed in the provisions of the Polish Industrial Property Law of June 30, 2000[13] , regarding trademarks. Such an example could also be a binding model of a trademark application procedure as well as a current model of contradictory proceedings contained in the provisions of the Industrial Property Law of June 30, 2000. Furthermore, it is worth indicating the necessity to confirm the legal interest while filling a request for revocation of trademark registration due to non-use of the trademark as well as an influence of this requirement upon the effectiveness of the substantive law.

2 TRADEMARK APPLICATION PROCEDURE AS OF THE INDUSTRIAL PROPERTY LAW OF JUNE 30, 2000

As it has been previously stated, the Member States have freedom in setting up procedural laws referring to registration, revocation and invalidity of trademarks acquired through registration. Therefore, the Member States are allowed to decide whether right to the former trademarks should be referred to in the registration procedure or in the procedure concerning cancellation, or in the case of both procedures. If particular States accept to refer to the earlier rights in the registration procedure, they may apply the procedure of filling an opposition or the investigation procedure applied *ex officio*, or both types of procedures. In other words, there are two fundamental systems related to trademark examination: an ex officio and an opposition approach.

[9] PÓŁTORAK, N., in: Europeizacja prawa administracyjnego, HAUSER R., NIEWIADOMSKI Z., WRÓBEL A. (eds.), p. 183.

[10] Judgement of the Court of 5 March 1996, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others; joined cases C-46/93 and C-48/93; EU:C:1996:79, paragraph 33.

[11] PÓŁTORAK, N., in: Europeizacja prawa administracyjnego, HAUSER R., NIEWIADOMSKI Z., WRÓBEL A. (eds.), p. 184.

[12] KĘDZIORA R.: Ogólne postępowanie administracyjne, 2nd edition, Warszawa 2012, p. 2.

[13] Journal of Laws of 2013, item 1410.

The ex officio model is stipulated in the binding Industrial Property Law of June 30, 2000. In consequence, the Patent Office of the Republic of Poland (hereinafter referred to as: the Patent Office) examines *ex officio* the absolute as well as relative grounds for refusal occurring towards the trademark, that has been filed. Pursuant to Art. 144 of the Industrial Property Law of June 30, 2000, the decision on granting the protective right to the trademark is taken upon the date the Patent Office checked whether statutory requirements for acquisition of the right have been fulfilled. In practice, when it comes to relative grounds – in most cases the Patent Office refers to the provisions specified in Art. 132, item 2 points 1 and 2 of the Industrial Property Law of June 30, 2000. According to the aforesaid regulations, the protective right shall neither be granted with respect to the trademark that is identical to the trademark registered or filed for registration purposes (provided that such a trademark has been registered), with earlier priority to the benefit of another person for identical goods, nor to the trademark identical or similar to the trademark, the protective right was granted to or the application for the protective right was filed (unless such a trademark is provided with the protective right), with earlier priority to the benefit of another person for identical or similar goods, if there is any chance that recipients may be misled, including the risk that the trademark shall be associated with the earlier trademark. Moreover, the Patent Office takes into consideration rights granted on the ground of Regulation 207/2009.[14] Therefore, the law arising out of the community trademark is the same base for refusal for registration as the title resulting from the right granted by the Patent Office. Such situation leads to exaggerated conflicts. Counterposing the rights resulting from earlier national as well as community trademarks by the office is carried out with no consent and awareness of the entities authorized to the counterposed trademarks. In particular, it may turn out that the entity authorized to the earlier trademark has nothing against granting protection to the trademark filed with the Polish office. The entity authorized to the earlier trademark may simply be not interested in its trademark. Despite that, in the event if the Polish Patent Office counterposes the earlier trademark to the applicant, in most cases the only solution is to file an application for revocation of the protective right towards the trademark due to non-use thereof. It means commencing a separate proceeding, the result of which is not actually so sure. Additionally, specific circumstances may occur, if the protective right for the earlier trademark has expired, however this right is still counterposed against the filed trademark. Pursuant to Art. 132, item 1, point 3 of the Industrial Property Law of June 30, 2000, the protective right is not granted to the trademark for identical or similar goods, if this trademark is identical or similar to the trademark that has been registered previously within the territory of the Republic of Poland, that is no longer protected due to expiration, if the period between the expiration date and the day the similar trademark has been filed by another person does not exceed 2 years. This regulation is liberated in Art. 133 of the Industrial Property Law, stipulating that Art. 132, item 1, point 3 shall not apply, if the protection has expired in accordance with Art. 166, item 1, point 1 thereof, or the entity authorized to the earlier trademark gives consent for granting the protective right to the succeeding trademark. Nonetheless, from the viewpoint of the applicant, all those factors translate into additional costs to be incurred due to defending the trademark, possibly because of separate procedures, necessary to be launched. Simultaneously, counterposing of earlier trademarks carried out by the Patent Office *ex officio* prolongs the proceeding. In the end of the day, even if the Polish office issues a decision on granting of the protective right for a particular trademark and the applicant pays the fee upon due deadlines for the first, 10-year protection period, it does not meant that its right cannot be challenged. Pursuant to Art. 246 of the Industrial Property Law of June 30, 2000, anyone can raise a reasonable opposition against a final decision of the Patent Office on granting of the protective right to the trademark within 6 months following the date the information on granting of the right has been released in „Patent Office News“. If the authorized entity in the response to the opposition claims that it is unfounded, then the case shall be adjudicated in contradictory proceedings. Thus, in spite of office has successfully completed the examination of the trademark application, and, what is more, even despite paying fees for protection, the authorized body has to take into consideration that the oppositions might be raised by the third parties. On one hand, it undoubtedly results in extension of the office proceeding. On the other hand, such a procedural approach causes that the trust of the state authority is undermined. Despite receiving the Protection Certificate from Polish Patent Office, that proves granting of protection for the trademark, the authorized entities get to

[14] It results from provisions of Art. 132 item 5, in conection with Art. 4 of the Industrial Property Law of June 30, 2000.

know that the third party has filed an opposition against the decision and, additionally, the same office that stated there were no obstacles for granting the protective right, will re-evaluate whether the statutory terms and conditions with respect to the protection have been actually satisfied. Therefore, it seems that in terms of the application procedure pattern to be applied towards national patent offices, this is EU that have to take decisions. The pattern of the ex officio procedure towards trademarks causes that, in practice, the Polish applicants, which are the majority among the entities applying for trademarks in the Polish Patent Office, are treated worse that the entities from other EU Member States. It happens because rules of practice prompt the Polish office to stand up for the entities entitled to community trademarks. From the perspective of foreign entities, their protection standard is upgraded, whereas from the point of view of those who file the trademark with the Polish Patent Office, the pattern of the ex officio procedure is an essential ground in gaining protection within the territory of Poland. Such a differentiation is unacceptable. Polish applicant ought to be treated as other units from EU Member States whilst entities from EU Member States should be treated as they are in their home countries. Therefore differentiation in terms of approach patterns towards filed trademarks is not reasonable and, to the contrary, brings negative effects for the protection level in particular EU Member States. An ex officio pattern binding in a particular country results in ineffectiveness of substantive laws as compared to the country where the opposition approach is applies.

3 OPPOSITION PROCEDURE IN CASES OF TRADEMARKS SET OUT IN PROVISIONS OF THE INDUSTRIAL PROPERTY LAW OF JUNE 30, 2000

Another example of an inappropriate structure used in rules of practice provided for solutions enclosed in the Polish Industrial Property Law is the opposition procedure that could result from filling a request for revocation of the protective right referring to the trademark. Once the request has been filed, the Polish office delivers the copies of such request to the parties of the opposition procedure, simultaneously determining deadlines for the reply to be submitted in writing. Then, the party requested to provide responses to the petition provides the answer with relevant copies, corresponding to the number of pages of the opposition procedure. Upon the lapse of the deadline for the party to deliver the response to the request, the Patent Office appoints the trial date. In practice, in most cases a few trials are scheduled within a particular case. At the initial hearing one of the parties often submits a bulk paper, the counterparty has to take a stance to. In order to let the counterparty response, another deadline for the trial is scheduled. Furthermore, in the course of the hearing before the Patent Office, the party outlines its position with respect to the particular case. This opinion, made in writing, is read out during the trial and is simultaneously enclosed to the files. It is to be emphasized that this kind of procedure does not accelerate the proceeding. Moreover, the necessity to be present at subsequent hearings generates additional costs for both parties. All of this happens despite provisions of Art. 255^3 item 5, stipulating that in the case of excessive delays in the proceeding through the fault of the parties, the Patent Office may appoint, throughout the ongoing proceeding, also at a closed hearing, the deadline for presenting all statements and supplementary evidence to prove them, on the pain of losing the right ot claim them afterwards, unless the party substantiates that it was not likely to invoke them upon due deadlines or the need to invoke appeared later. That is why it seems that in the event of trademarks, the written form ought to be obligatory, i.e. the parties should exchange papers with each other. On the other hand, the oral part of the hearing ought to be managed solely in the case if necessary, e.g. hearing of witnesses. In the event of trademarks, the opposition procedure is not so specific that the trials shall be ordered. It particularly refers to the trials meant as reading of the positions of the parties, entered in the files submitted in writing.

Just like in case of the application procedure, the opposition procedure is inefficient. The opposition procedures are long-lasting and cost-generating for both parties. However, it does not result in smooth settlement of the issue.

4 REQUIREMENT TO HOLD THE LEGAL INTEREST

It is also worth mentioning that provisions of the Polish Industrial Property Law of June 30, 2000 stipulate the obligation to confirm the legal interest in the case one files a request for cancellation of the protective right to the trademark as well as a request for revocation of the said

right.[15] It is about the legal interest within the meaning of Art. 28 of Code of Administrative Proceeding.[16] The legal interest is an interest based upon a particular provision of the substantive law. The Supreme Administrative Court provides the following characteristics of the legal interest: "The legal interest ought to be meant as an and objective, i.e. really existing need for the legal protection. This is an interest of a personal character due to the fact that it is someone's, individualized and well-defined. Furthermore, it has to be currently present in the case, the administration authority is in charge to decide upon".[17] Therefore, it could be stated that the legal interest needs to have origins in a certain regulation within the substantive law. Provisions of Directive 2008/95 do not provide for such an obligation. The requirement to prove the legal interest when filling aforesaid requests is a limitation of access to the request. It happens despite the legal interest is an evidence in court proceedings. However, *de facto* this is a substantive premise. In this case, an additional regulation issued by the Polish legislator results in failure in resolving of the issues from the EU law perspective. Moreover, the goal of protective right cancellation is depriving of protection concerning the trademarks, the protection shall not be assigned, in accordance with provisions of the Industrial Property Law. In addition, the legislator provided for an option allowing for filing requests on revocation of registration due to non-use, so to "clear up" trademark registers from these trademarks that are no longer in use. In such a case, the requirement to hold the legal interest distorts the idea of the cancellation and revocation institutions.

5 CONCLUSION

Selected procedures in the Polish trademark law prove how inappropriate regulations in the field of the procedure may lead to ineffectiveness of substantive laws. Procedures do not barely play an auxiliary role towards substantive regulations. It is necessary to indicate that the Polish Parliament adopted the Law on amendments to the Industrial Property Law of June 30, 2000 on September 11, 2005. This amendment changes the pattern of the application procedure from an *ex officio* to an opposition approach. Furthermore, it makes essential changes in the case of opposition proceedings with respect to trademarks. Additionally, it abolishes the requirement to hold the legal interest when filing a request for cancellation or statement on revocation of the protective right to the trademark. However, the amendment does not mean that intervention of the EU legislator in relation to procedures before national offices is not necessary. On October 6, 2015, the aforesaid amendment has been signed by the President of the Republic of Poland.[18] However, the provisions of the amendment will enter into force after 6 months following the announcement. Eventually, with respect to proceedings for granting of the protective rights to trademarks and proceedings resulting from the opposition against the decision on granting the protective right to the trademark, instituted and not closed prior to the date this Act becomes effective, binding provisions of the Polish Industrial Property Law shall apply. Therefore, the problems that have been described above will be present in the Polish legal practice for a long, long time. Last but not least, freedom in regulation of rules of practice within the EU causes that, despite a highly advanced harmonization of the substantive law, procedural differences occur.

How substantial the resistance of the Member States against the amendments in the rules of practice is can be seen while analyzing the works on the **Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade**

[15] Provided that pursuant to Art. 167 of the Industrial Property Law of June 30, 2000, the General Prosecutor of the Republic of Poland or the Commissioner of the Patent Office may, in the public interest, file a request for cancellation of the protective right to the trademark or join the pending proceeding in this case. Therefore, neither the General Prosecutor nor the Commissioner of the Patent Office have to prove the legal interest, but only "the public interest".

[16] Act of June 14, 1960 – Code of Administrative Proceeding (conslidated text.: Journal of 2013, item 267 as amended).

[17] The judgement of the Supreme Administrative Court of October 26, 1999, IV SA 1693/97, non-public. See in: R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz,* Warszawa 2005, p. 104.

[18] As of October 6, 2015, the exact term of entering into force the subject amendment is still unkonwn.

marks.[19] The draft released by the European Commission included the statement, saying that "offices, examining *ex officio* whether a particular trademark matches the registration standards, reduce this procedure to determining lack of absolute grounds for refusal, set out in Art. 4". If this regulation become effective, the investigation procedure for trademarks in all EU Member States would be uniformed. The trademark examination would be then limited to grounds for refusal of registration with respect to the trademark itself. In consequence, all Member States would introduce a contradictory pattern. However, due to opposition from some EU Member States, the aforesaid provision was removed from the draft of the Directive's amendment in the course of works. Therefore, it proves that the attachment to the state's own procedural regulations among some of the EU Member States is stronger than arguments for withdrawal from the *ex officio* approach. Furthermore, it is interesting that the European Commission, when justifying the new provision of the Directive, pointed out that the *ex officio* examination would result in the law uncertainty. Patent offices are not capable of guaranteeing that the application, that has successfully gone through the office's examination, would not be questioned afterwards, because of the trademark, that has acquired reputation on the market, or due to the previous, well-recognized trademark, that had not been registered.

To sum up, differences in the procedure between the EU Member States result in varied treatment of the national and foreign entities. Thus, it seems that the EU legislator should not decline regulation of the trademark law procedures. Otherwise, the obstacles arising from improperly determined procedures, will continue.

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[19] COM(2013)162 final of 27.03.2013**.**

TAX HARMONIZATION IN THE EUROPEAN UNION, IS IT EVEN REAL (POSSIBLE)?

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Abstract: Tax harmonization in the European Union is often repeated topic. This contribution is focused on the necessity and the extent of tax harmonization in the European Union, especially on the harmonization of the corporate income tax. It contents description of the problems that occurs in the process of harmonization, necessary extent of harmonization (if so) and related tasks and problems.

Key words: tax, harmonization, coordination, European Union, extent

1 INTRODUCTION

Due to the increasing development of cooperation, within the European Union, there are still more and more areas that need to be coordinated, or in which the harmonization of law should be provided on certain level. Day by day, there are new issues, problems and changes to be faced by the European Union and its member states. On one hand, we can see the need for harmonization or coordination of law of member states of European Union, and on the other hand, we can see each member states' sovereignty to decide about its internal affairs.

In some areas the Member States gave up a part of their sovereignty, to ensure the better functioning of the internal market. But there are also some areas that are often discussed, because theirs harmonization will affect the sovereignty of member state in the extent, that is not acceptable for a lot of them. One of these areas is the area of taxes, especially of direct taxes.

The problems that occurred during the efforts to ratify the Lisbon Treaty show that many European citizens do not like the idea of transforming the EU into a superstate and granting greater powers to the European institutions. Because tax diversity is considered to be a form of independence and sovereignty of the state, the reluctance of some politicians with respect to the proposal to introduce common tax rules within the EU is normal.[1]

Given the above, it is necessary to put the question whether or not the harmonization of direct taxes in the European Union is possible, and if so, in what extent.

2 DEVELOPMENT OF TAX HARMONIZATION

According to the EU Treaty, member states have full autonomy in the field of direct taxation. This autonomy can by limited only of national taxes are not compatible with EU law. In principle, national tax legislation should not create obstacle to cross – border transactions. [2]

EU action on company taxation is focused only on measures linked with the single market principles. Wider reflection has been undertaken on several occasions, resulting in the development of important single market measures (Mergers and Parent – Subsidiary Directives, and more rently the proposed common consolidated corporate tax base).[3]

Consistent with the willingness to create a well-functioning single market, Europeans have agreed on harmonized rules in the area of indirect taxation. Indeed, the Value – Added Tax (VAT) is a part of acquis communitaire, an two directives (1977 and 2006) closely codify the VAT regime in EU Member states, with a minimum standard rate of 15% and restricted a list of reduced rates. (…) Second area of tax harmonization concerns capital income. In 1990, the Parent – subsidiary directive tackled the issue of double taxation of repatriated profits by a mother company from its subsidiaries. Also other directives were adopted to prevent of double taxation. In recent years,

[1] Pirvu, D: Corporate Income Tax Harmonization in the European Union, p. 165
[2] Pirvu, D: Corporate Income Tax Harmonization in the European Union, p. 4
[3] Tax policy in the EU, Issues and Challenges, European Parliament analysis, February 2015, p. 6

however, the debate has moved from "double taxation" to "double non-taxation". In September 2013, the OECD launched an ambitious initiative labelled Base Erosion and Profit Shifting (BEPS), aimed at addressing new challenges of corporate taxation in a globalized economy where the value – added of a firm is not only split up across the globe, but also difficult to measure, a growing part of it resulting from intellectual property.[4]

3 PROS AND CONS OF DIRECT TAX HARMONIZATION

The current EU taxation framework leaves Member states free to decide on their tax system provided they comply with the European Union rules. Those rules are adopted unanimously by the Council. The development of EU tax provisions is linked with the completion and proper functioning of the single market.[5] The problems that origin with respect to the direct tax harmonization could be divided in various groups. There are a lot of points of view whereof we can divide the problems, according of the reason of the problem. In this contribution, we would focus on following problems or views.

3.1 The Treaty on the functioning of the European Union

Tax provisions of *the Treaty on the functioning of the European Union* (hereinafter "**TFEU**") are included in following articles:

Article 110 (ex Article 90 TEC)

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Article 111 (ex Article 91 TEC)

Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

Article 112 (ex Article 92 TEC)

In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the measures contemplated have been previously approved for a limited period by the Council on a proposal from the Commission.

Article 113 (ex Article 93 TEC)

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

Corporate income tax coordination has not only supporters, but also opponents among experts, politicians and business representatives. The supporters say that according to the Lisbon treaty the member states shall by obliged to take all the measures for better functioning of single market. The opponents on the other hand say that if the direct taxes should by harmonized, there should exist provisions similar to the provisions about indirect taxation. Tax provision chapter of the Treaty on the functioning of the European union (110 – 113) specially provides for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and functioning of the internal market.

Article 116 (ex Article 96 TEC)

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

[4] Nénassy- Quéré, A., Trannoy, A., Wolff, G.: Tax Harmonization in Europe: Moving forvard, French Council of Economic Analysis, 14.07.2014

[5] Tax policy in the EU, Issues and Challenges, European Parliament analysis, February 2015

If such consultation does not result in an agreement eliminating the distortion in question, the European, Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

It is noticeable that EU institutions have certain powers in the development of tax legislation and tax harmonization, but only in the field of indirect taxes, because this may affect the free movement of goods and services and may distort the competition within the Single Market. Direct taxation is not expressly stipulated in the EU treaties, since the potential influence on the Single Market is lower, and the majority of member states wished to retain sovereignty in the area of direct tax, commonly used as an instrument of economic policy. Iterpreting Article 116 of TFEU, it becomes apparent that within the European Union, national tax regimes (including provisions for direct taxes) can implement corrective measures as long as they do not interfere with the principle of free movement of goods, persons, services and capital.

It can thus be stated that a coordinated fiscal policy in the EU is necessary and that this must take into account the different nature of taxes as follows:

- Indirect taxes require a higher degree of harmonization because they are related to the free movement of goods and services;
- Direct taxes require certain harmonization rules, especially in the field of corporate income, but also for individuals who receive incomes in many countries, because cases of double taxation may arise.[6]

As regards the tax on direct taxes, there a system of adopting directives in this area remains in force, and therefore it must be taken unanimously by the Council. In the area of indirect taxes were not adopted major changes, there is still necessary an unanimous Council decision after consulting the European Parliament and the Economic and Social Committee.

Nor the Lisbon Treaty has changed the approach to direct taxes that all directives must always be adopted unanimously by all members, therefore the approval of tax regulations by qualified majority has remained impossible.

3.2 Tax harmonization and tax competition

Tax competition has always existed. From an economic point of view, tax competition is often viewed as a substitute form market competition to induce efficient spending in the public sector. This lies on assumption that taxpayers will change location if public spending does not match their expectations. From this point of view the firms are more capable to take the advantage of tax competition. Tax competition between countries consists of attempting to attract either economy activity or corresponding tax revenues. Such competition is particularly vigorous in taxes which have mobile tax bases, such as corporate tax. Evolution of nominal tax rates is an indicator of this competition. Another form of tax competition is specific tax treatment of foreign source income or intellectual property elements[7].

From a business perspective, it is rational to base business where conditions are more favourable, which can result in “treaty – shopping” (tax planning). When a taxation regime confers economic advantages on a specific operator (which by definitions affects and distorts competitions), this can raise concerns linked to the prohibition of state aid enshrined in Articles 1078 to 109 TFEU. The Commission is granted the power to decide on the legality of state aid on basis of treaty provisions, secondary legislation and EU case law. It can monitor, verify, and restrict, and have aid recovered by the member states. As regard the form, all forms and levels are covered by the prohibition and measures amounting to state aid must be approved before they can be implemented, unless they are exempted under block – exemption measures. Tax competition´s impact on growth is generally recognised. Standard economic theory sees tax competition as detrimental to growth,

Tax competition may also affect growth through its impact on inequalities. Economists haver concluded that “On the whole there is no evidence that higher taxes in general are detrimental to growth…Taxation may hurt growth only when it becomes confiscatory, in which case it stops

[6] Pirvu, D: Corporate Income Tax Harmonization in the European Union, p. 13

[7] Tax policy in the EU, Issues and Challenges, European Parliament analysis, February 2015, p. 13

innovation by the most productive entrepreneurs or induces them to move to a lower – tax country." [8]

Regardless, if we recognize the tax competition harmful or not for internal market, for member states it means a measure for its internal organization, measure to attract capital to the country. On the other hand, tackling harmful tax competition and aggressive tax planning is a major aim of cooperation at EU level, in particular in business taxation, where the objective is to reduce the number of loopholes stemming from the complex array of rules, assessment bases and rates which may apply to a single firm. Cooperation is also developing in the international arena, in particular through OECD work on taxation in conjunction with the G20.[9]

3.3 Common corporate consolidated tax base (CCCTB)

Controversies surrounding corporate income tax coordination are generated by uncertainty about its effects. The publication of the proposal for a CCCTB on march 2011 intensified the debate on the need of introducing common rules of taxation. There were a different opinions on this proposal submitted. Some member states have submitted reasoned opinions to EU official expressing concerns over the subsidiary aspect of the proposal. In addition, some of the representatives of these counties had considerations regarding the principle of proportionality.[10]

The CCCTB, as presented in the proposal, is a "system of common rules for computing the tax base of companies which are tax resident in the EU and of EU-located branches of third – country companies. Specifically, the common fiscal framework provides for rules to compute each company´s(or branch) individual tax results , the consolidation of those rules, when there are other group members, and the apportionment of the consolidated tax base to each eligible Member State. A comprehensive solution could eliminate a number of tax planning opportunities and at the same time eliminate most of the obstacles which affect the economic efficiency of the single market. The proposal has been on the negotiating table for three years without making progress.[11]

A study of attitude of Members of the European Parliament (MEPs) about the introduction of a minimum corporate income tax rate across the member states, after questioning 156 MEPs from march to July 2007, revealed that the representatives of socialist orientation take a more favorable stance regarding corporate tax harmonization compared with parliamentary representatives of a liberal orientation. In terms of respondents´ origins, the survey results in the European Parliament showed that representatives from Poland, the Czech Republic and Great Britain mainly opposed the corporate tax harmonization idea, and representatives from Portugal, Austria and Belgium were the most vehement supporters of the idea. The grouping of the respondents according to time of accession to the EU of the represented countries generated the following result: almost all the parliamentarians from the new member states opposed the idea of minimum corporate income tax rate introduction.[12]

Daniela Pirvu concluded in the publication *Corporate Income Tax harmonization in the European Union* the opinions of the business environment also the political views on CCCTB. Many professional organizations and organizations representing business were represented at the meetings of the CCCTB. According to EUROCHAMBERS, different tax systems – and thus tax divergences – represent real obstacles for companies which operate across Europe, hampering the functioning of the Single Market and undermining the competitiveness of European business. The need to comply with a multiplicity of different rules results in unacceptable costs and represents an obstacle to cross – borders economic activity. It also impacts heavily on investors´ choices and business locations. In this respect, EUROCHAMBERS supports the European Commission´s suggestions for the creation of a CCCTB, which could by instrumental in achieving a better functioning Single Market, addressing the tax obstacles that exist for corporate taxpayers operating in more than one member state. The Union des Industries de la Communauté Européenne welcomes the efforts of the European Commission to address cross – border obstacles in the

[8] Tax policy in the EU, Issues and Challenges, European Parliament analysis, February 2015, p. 10 - 14

[9] Tax policy in the EU, Issues and Challenges, European Parliament analysis, February 2015, p. 1

[10] Pirvu, D: Corporate Income Tax Harmonization in the European Union, p. 165

[11] Tax policy in the EU, Issues and Challenges, European Parliament analysis, February 2015, p. 25

[12] Osterloh and Heinemann, 2009, pp. 31-32 IN: Pirvu, D: Corporate Income Tax Harmonization in the European Union

corporate tax field with its proposal for a CCCTB. To attract the interest and support of the business community, the CCCTB to meet at least the following key conditions: (a) to be optional for companies, i. e. not replace national corporate tax systems, (b) to allow for the consolidation of profits and losses from the start; (c) to reduce compliance costs with a "one stop shop"+ (d) to leave any decision on tax rates to national governments. According to UEAPME, a common tax base on company profits would provide SMEs with the right incentives to go international and make the most of the Single Market.

On the other hand, the opinions of member states were quite different. Some member states have submitted reasoned opinions to European Union officials expressing concerns over the subsidiarity aspect of the proposal. In addition, some of the representatives from these countries had considerations regarding the principle of proportionality. The following guidelines should be used to examine whether the above mentioned condition is fulfilled:

- The issue under consideration has transnational aspects which cannot be satisfactorily regulated by actions of member states;
- Actions by member states alone or lack of European Community action would conflict with the requirements of the Lisbon Treaty or would otherwise significantly damage member states ´ interests;
- Action at European Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the member states.

Reasoned opinion by the House of Representatives of the Kingdom of the Netherlands on the proposal for a European Council directive on CCCTB: In making the assessment, the House of Representatives observe that the positive gain in prosperity for the EU as a whole is very limited. The House of Representatives notes that the introduction of the proposed CCCTB directive would even have a negative effect on the GDP of the EU as a whole. For a number of member states, including Netherlands, the introduction of the proposed CCCTB directive would reduce the general level of prosperity. The House of Representatives considers that EU action goes beyond what is necessary in order to achieve the objectives of the Treaty and therefore takes the view that the proposal is not proportionate. The House of Representatives considers this proposal undesirable in that it would bring about a shift in the field of direct taxation from national to European level.

Reasoned opinion by the House of Commons of the United Kingdom of Great Britain and Northern Ireland on the proposal for a European Council directive on CCCTB: The future European Commission directive would have to by transposed into national law. According to the UK Government, this would not require an adjustment to existing legislation un the UK, but would increase costs: new costs associated with the need for coordination with other administrations; and one – off costs such as the need for employee training and upgrading of IT systems. (…)It is not convinced that a CCCTB is necessary to improve the simplicity and efficiency of corporate tax system in the EU. It considers that the fiscal impediments to cross – border activity that the proposal claims to tackle – compliance costs, double taxation and over – taxation – can be addressed through other routes, such as a informal coordination or bilateral solutions. The House of Commons considers that the draft directive on a CCCTB does not comply with the principle of subsidiarity.

Reasoned opinion by Dáil Éireann of the Republic of Ireland on the proposal for a European Council directive on CCCTB: It is clear from the impact assessment that the proposal may have significant and possibly unequal cost implications between individual member states. There is a lack of concrete quantified evaluations to justify such a policy outcome, particularly against the clear risk of decreasing budget revenues from corporate taxes, along with the estimated reductions in GDP, employment and foreign direct investment that a number of member states will experience. (…) In its current form, the CCCTB proposal does not comply with the principle of subsidiarity.

Reasoned opinion by the House of Representatives of the Republic of Malta on the proposal for a European Council directive on CCCTB: The House of Representatives of the Republic of Malta mentioned various reasons why believes that this proposal violates the principle of subsidiarity, e. g.: While the goal of the CCCTB is to create a coordinated action, given the fact that the CCCTB is to create a coordinated action, given the fact that the CCCTB is optional and also applies to companies that do not belong to a group, this means that it will not have this effect, Therefore, the aims of this directive will not be achieved more efficiently at EU level. Accordingly, the Maltese Parliament believes that the formula does not satisfy the premise of the objective that it can

be better achieved at EU level. Rather, the proposed action at European level could have negative effects.

Reasoned opinion by the Riksdag of the Kingdom of Sweden on the proposal for a European Council directive on CCCTB: The explanatory memorandum of the Swedish Government reiterates that the proposal for a European Council directive on a CCCTB falls within the national competence of each member state to safeguard welfare by raising and using tax revenues in an appropriate way. Corporate taxation is closely integrated with both other parts of the tax system and with the member states´ economical and political affairs. Viewed from this perspective, the member states are better placed than the EU to assess how corporate taxation should be designed in order to achieve political and economic objectives both nationally and within the EU. It could therefore be argued that there is a risk that the CCCTB could reduce competition and thus have a negative impact on productivity within a European Union. In addition, the legal basis for the proposal is the Article 115 – Treaty on functioning of the EU, whereby the European Council shall issue directives for the approximation of laws that directly affect the establishment or functioning of the internal market. In the Government ´s opinion, parts of this proposal go further. Although objections can be raised against parts of the proposal from the point of view of subsidiarity, the Government considers that, overall, there is no reason to question the European Commission's assessment that the proposal complies with the principle of subsidiarity.

Reasoned opinion by the Sejm of the Republic of Poland on the proposal for a European Council directive on CCCTB: The EU shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the EU in the Treaties remain with the member states. The Sejm takes the view that EU lacks the competence to adopt provisions which concern the rules for establishing a corporate tax base. The Sejm holds the view that the European Commission, in adopting a draft directive on a CCCTB, has therefore exceeded the competences conferred upon the EU and undertaken actions in an area that belongs to the exclusive competence of the member states.

Reasoned opinion by the National Council of the Slovak Republic on the proposal for a European Council directive on CCCTB: Fiscal sovereignty in the field of direct taxation is considered, along with independent budgetary policy, to be a key component of a national sovereignty. We should also like to draw attention to the costs associated with the introduction of a new system with a CCCTB and a possible increase in the administrative burden. We affirm that a system based on a voluntary principle is highly disadvantageous. We shoul also like to state that the adoption of this directive would have a negative impact on GDP growth and employment and we also expect a negative effect on the revenue side of member states´ budgets. (…) We can therefore assume that this measure will not lead to any desirable reduction in administrative costs for companies, nor will it lead to more efficient collection of corporate income taxes, since it will require additional costs for the administration of a dual system and the collection of corporate income tax.

Reasoned opinion by the Chamber of Deputies of Romania on the proposal for a European Council directive on CCCTB: Permanent Bureau of the Chamber of Deputies has decided to issue a reasoned opinion to the effect that the proposal for a directive does not comply with the principle of subsidiarity.

Reasoned opinion by the National Assembly of the Republic of Bulgaria on the proposal for a European Council directive on CCCTB: The EC has not presented sufficient quantitative and qualitative indicators to prove that the objectives of the proposed actions could not be adequately achieved independently by each member state in compliance with the requirements of Article 5(3) of the Treaty on the EU on the application of the principles of subsidiarity and proportionality of the Lisbon Treaty. With regard to the principle of proportionality, as enshrined in Article 5 (4) of the Treaty on the EU, the BFC considers that proposal for a directive goes beyond what is necessary to achieve the objectives of the Treaties, as it imposes an additional administrative and financial burden on the member states.[13]

3.4 Proportionality and subsidiarity of European law

According to article 3b, sec. 1, 3, 4 o the TFEU:

[13] Pirvu, D: Corporate Income Tax Harmonization in the European Union, p. 169 - 181

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.'

According to the arguments mentioned in the point 3.3 of this contribution, member states see a breach of principle of subsidiarity and also some of them of the principle of proportionality in the proposal of directive of CCCTB. On the one hand they argue that objectives of proposed direction can be achieved sufficiently by member states and theirs legislation and on the other hand, some of them argued also that this directive would exceed what is necessary for the objectives of the Treaties.

4 IS THE TAX HARMONIZATION CAPABLE TO HAMPER OTHER AIMS OF THE EUROPEAN UNION?

One of the aims of the European Union is to reduce or to offset differences between the Member states. One of the areas where the differences should be reduced is the area of economic situation of the Member states. In present day we can say that there are o lot of economic differences between Member states, especially between the original Member states and the new eastern or southern Member states. This economic differences causes also differences in granting a public services for the citizens of each member state.

When we take into account the reasoning of member states related with the proposal of directive of CCCTB, their arguments were focused on breach of the principles of subsidiarity and proporcionality and also on economical arguments, that adoption of this directive would have negative impact on GDP growth and it would be jointed with other costs associated with introduction of new system and can possible increase administrative burden of member state.

Various income tax policies also make possible for business investments to chose between member state a tax regime that would be for them the best. This "tax competition" of member states enable to states with not so developed economics to attract foreign investments and foreign capital. From this point of view the tax competition helps to reduce economic differences between the member states.

With the same tax regime in all member states, it is possible, that the foreign investments and capital would not choose the less developed economics within the European Union and it could have negative effect on reducing economical differences between the member states.

5 CONCLUSION

The corporate income tax harmonization is very difficult topic. On the one hand we have the aim of good functioning internal market where the conditions for investments would be similar to the conditions of one state and so the four freedoms would be granted within the European Union. On the other hand, there is the aim of reducing the differences between member states.

There are a lot of pros and cons of the corporate tax harmonization. In the TFEU the direct taxation is not adjusted and so the opponents of harmonization say that if it not adjusted it should not be harmonized, the supporters argue with the general provisions of TFEU.

The member states put a lot questions and arguments in relation with proposal of the directive of the CCCTB. One of the most frequent arguments was that this proposal is breaching the principle of subsidiarity and also that it could negatively affect GDP growth and rise administrative

burden of member states. On the other hand it also can reduce the tax competition of tax regimes that attracts foreign investments to member states.

According to all mentioned arguments, it is obvious that member states are not willing to harmonize the area of direct taxation. In my opinion, harmonization of direct taxation can helps to better functioning of internal market, but now is not the right time to this harmonization. Now there is a lot of differences between member states that hampers harmonization challenges. At first, the differences between member states should be reduced and than the direct tax harmonization could be possible.

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THE SOCIAL MARKET ECONOMY GOAL OF ARTICLE 3(3) TEU – A TASK FOR EU LAW?

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Abstract: From the entry into force of the Lisbon Treaty the EU has among its constitutional objectives the goal of achieving a highly competitive social market economy. At the same time, however, the EU has not been given any specific powers to actively develop its social policy. After six years of legal force of the Lisbon Treaty there is still no clarity on how should the EU interpret the legacy of German post-war *Sozialmarktwirtschaft,* whether it should strive for its own economic and social "Constitution", whether it can try to fulfil the objective of social market economy through the instruments of EU law. The paper argues that some, rather partial, measures enacted by the EU legislator would be desirable and feasible without creating a danger of over-regulation that would threaten the freedoms of the internal market or distort the existing division of powers between the EU and the Member States in the social field. The social market economy concept, being itself a compromise between the free markets and social welfare requirements, can act there as a guarantee that neither unbounded market freedoms nor socializing policies would dominate the EU.

Key words: European Union, Lisbon Treaty, Court of Justice, social market economy, social rights, social welfare, market freedoms

1 UNTORDUCTION - WHY ASK SUCH A QUESTION?

The question in the title of the paper has at least two reasons. From a legal perspective, it is clear that the Lisbon EU Treaty (TEU), where in Art. 3 (3) the aim of "highly competitive social market economy aiming at full employment and social progress" appeared for the first time in the history of integration, opened the possibility for a more social EU. Even if the principle of *ius ad finem dat ius ad media* does not apply to such Treaty goals, there is no doubt that they represent direct guidelines of constitutional importance. Their impact was supposed to be further strengthened by the newly inserted "Horizontal Social clause" of Article 9 of the Treaty on Functioning of the EU (TFEU) and also by the Charter of Fundamental Rights of the European Union (comprising Title IV "Solidarity") that became legally binding together with the Lisbon Treaty. Moreover, the term "social" was repeated 167-times in the text of TEU and TFEU. Therefore certain potential for changes could have been expected, for changes that would entail a certain re-balancing between the economic and monetary integration on the one hand and the social rights and welfare on the other.

From a practical standpoint, however, there´s the fact that, neither this enhancement of social integration objectives in the Lisbon Treaty, nor the financial, economic and debt crisis after 2008, have brought about any significant social re-orientation of the integration project. Rather the opposite happened as crisis solutions adopted at the EU level were inspired by the neoliberal doctrine of fiscal discipline, budgetary austerity and labour market flexibility. The European left who has not failed to criticize them repeatedly, however has not been able to offer another sufficiently effective and acceptable paradigm that would change the parameters of the measures taken to rescue and stabilize the Euro zone (EMU).[1] The European Commission President, J.-C. Juncker, a politician of Christian-social orientation, in his first speech to the European Parliament recognized, that "there was a lack of social fairness" in the measures taken during the crisis.[2]

From the centre to the left side of the political spectrum in the EU it is thus believed that the strengthening of the social dimension of integration is necessary to compensate for the effects of economic integration which especially after the capital movements´ and services´ liberalization and

[1] See for instance: BRUUN, N., LORCHER, K., SCHOMANN, I. Eds. The Economic and Financial Crisis and Collective Labour Law in Europe.
[2] BARNARD, C. How to Make EU Social Policy Live Up to its Name.

also with the imposition of the single currency budgetary discipline negatively affected the nation-based social welfare systems. Some would even argue that the new EU´s social dimension "is supposed to regulate freedom of movement and curb the dominance of the Single Market integration" while almost everyone who believes that the EU integration project as such should continue would agree that the enhanced social dimension is necessary for the political backing of the project by the general population.[3]

The contradiction between the social accents of the Lisbon Treaty and the socially problematic impact of the internal market freedoms and of the fiscal coordination applied within the EMU has of course its explanation, which is beyond the scope of this paper. In brief, it can only be recalled that on the separation of the market integration, carried out at the EU level, from the social compensation measures, retained by Member States within their competence, the founding compromise of European integration had been built in the 50s of the past century. This distribution of roles in the style of "Smith abroad, Keynes at home" lasted until the 90s, when the completion of the internal market for the first time threatened the political capacity of the Member States to impose their social policy norms.[4] At that time, the EU responded - within the powers conferred to it – with an effort to harmonize certain standards (health and safety at work, maximum working hours, protection of employees in cases of collective redundancy or the transfer of a company seat or employer's inability to pay etc.), which had to prevent the regulatory race to the bottom between EU countries.

With the outbreak of the current crisis however, it became clear that the diversity of social welfare systems, stemming from the national regulatory autonomy, could destabilize the EMU. Social considerations have been then subjected to the need to solve the critical situation in the most indebted countries. Tools such as the Excessive Deficit Procedure, Macroeconomic Imbalance Procedure and the Memoranda of Understanding (for "bail-out" countries) have been used to impose cuts in social benefits and to enhance labour market flexibility.[5] It looks as if the EU has started pushing towards stronger social coordination and harmonization, albeit guided mostly by monetary orthodoxy and thus, despite all social accents of the Lisbon Treaty, not very socially friendly at all. Can a certain revival of the social market economy goal lead the EU out of this unsustainable situation? And how can the EU law contribute to it? The rest of this paper tries to provide plausible answers.

2 SOCIAL MARKET ECONOMY AS THE RIGHT SOLUTION TO THE PROBLEM?

Such question cannot be answered without uncertainty because of two groups of reasons.

First, the primary law of the EU in the current version offers no specific hints. The Lisbon Treaty does not mention the social market economy anywhere else than in Art. 3(3) TEU. This paragraph 3 seems more a "whish list"[6] as it features a total of 18 internal EU market “goals”. A wide range of socio-cultural and environmental objectives dominate among them, however, there are also references to liberal-market values (price stability, high competitiveness). It is therefore difficult to distillate out of it any coherent economic and social model. Precisely measurable objectives (growth, stability, competitiveness) and those that can be regulated by law (equality, non-discrimination, the rights of the child) find themselves in line with the appeals to the general well-being (social progress and solidarity, solidarity between generations and the Member States, the full employment). To such a list of incongruent goals the notion of social market economy, being itself a rather complex concept of social and economic processes´ regulation, is associated without any differentiation.

The Lisbon Treaty neither changes nor expands the concept and scope of EU competences in the social sphere (Title X "Social Policy"). Moreover in its other parts it contains provisions based on the neo-liberal foundations (especially in Title VIII Economic and Monetary Policy, which includes repeated references to “open economy with free competition”). It is therefore not clear at all how strongly, through which ways and with what tools, should the EU carry out its turn towards some socially acceptable model, especially if in the social sector it can only "support and complement" the

[3] SCHELLINGER, A. Giving Teeth to the EU´s Social Dimension, p. 3.
[4] DE WITTE, F. The Architecture of a “Social Market Economy”, p. 7. MICOSSI, S., TOSATO, G.L.,Eds. The European Union in the 21st Century, p. 46.
[5] BRUUN, N., LORCHER, K., SCHOMANN, I. Eds. The Economic and Financial Crisis and Collective Labour Law in Europe, p. 39.
[6] HOUSE OF LORDS. The Treaty of Lisbon: An Impact Assessment, p. 21.

measures adopted by the Member States and any EU harmonization remains forbidden regarding the key issues of social status and collective rights of workers.

Secondly, the European Commission as the initiator of the new measures at EU level, refers to the concept of social market economy (namely in the speeches and documents of DG Employment, Social Affairs and Inclusion) quite often, but without defining it more precisely as the model of a mixed economy that avoids both extremes of the *laisssez-faire* and the socialization of economy. The Commission therefore understands the social market economy as something that has traditionally existed in Western Europe and particularly in Scandinavia and Germany it has been so far successfully adapted to today's challenges.[7] It is thus not clear whether the EU should contribute to the achievement of the social market economy goal by anything more than by encouraging the sharing of best practices and by other actions that may lead to a spontaneous convergence of social standards and their enforcement tools at a national level.

The EU Court of Justice (CJEU), which is called to provide the authoritative interpretation of the legal terms of the Treaty, has not yet provided any guidance to the meaning of the highly competitive social market economy goal. It even seems that the CJEU has been consciously avoiding any reference to this goal in its reasoning, apparently because the Member States as "masters of the Treaty" did not agree to give any normative content to it.[8] In general, one cannot expect much from the EU institutions in this respect, for the basic reason that even in the 21st century the EU remains a "Stateless market" or a "Stateless monetary union". There is still a Treaty and not a Constitution, the EMU has economic governance instead of a government, and the EU on its own can develop several specific policies but not a common comprehensive social and economic development policy. The social market economy goal can hardly change it and it would be naïve to expect that it could automatically drive the EU towards a full-fledged economic and social Constitution.

These two groups of reasons create an uncertainty whether the social market economy could have been understood by the drafters of the Treaty as a distinct model that should be achieved by the EU and through the instruments conferred to it. This makes the interpretation of the social market economy goal difficult but at the same time necessary if any proposal on how to achieve it is to be formulated.

It is clear that the EU's goal of social market economy cannot directly refer to the concept of economic and social policy of post-war West Germany at the time of Ludwig Erhard and Alfred Müller-Armack.[9] First, it had been a compromise made of Ordo-liberal, Social-Christian and Social Democratic elements hence a specific product of social consensus in one particular EU country during the 50s and 60s of the 20th century.[10] Moreover, it is clear that the former perception of the social needs of citizens, and their effective social rights, cannot be compared with the present time, when the standard of consumption, housing, education, leisure etc. is completely different. Due to its blended origin, however, the social market economy concept is fortunately not embedded in any clear-cut ideology and thus remains open to modern interpretations that reflect on the state of markets and of the social needs of the 21st century.[11] On the other hand, none of the current interpreters of social market economy can deny that this concept has a distinct Ordo-liberal pedigree, because, only thanks to it, all discussions about what this concept means for the current EU could find a certain common ground.

First, it is obvious that such a goal will push neither for socialist or social-democratic dominance of politics over the market, nor for any prevalence of social rights over the EU freedoms of movement. An open market with free competition must remain the basis of not only economic, but generally of human freedom as such.[12] It however needs to be subjected to strict framework of rules designed to ensure that the market is not destroyed either by excessive concentration of economic

[7] ANDOR, L. Building a social market economy in the European Union; ŠMEJKAL, V. EU a naplňování cíle sociálně tržní ekonomiky, p. 13-15.
[8] ŠMEJKAL, V. CJEU and the Social Market Economy Goal of the EU, p. 943.
[9] JOERGES, C. The Legitimacy *Problématique* of Economic Governance in the EU, p. 82.
[10] See for details: HASSE, R. H., SCHNEIDER, H. WEIGELT, K. Social Market Economy. History, Principles and Implementation From A to Z.
[11] VAN SUNTUM, U., BOHM, T., OELGEMOLLER, J. ILGMANN, C. Walter Eucken´s Principles of Economic Policy Today, p. 2.
[12] JOERGES, C., RÖDL, F. Social Market Economy as Europe´s Social Model?

power or by the social inequalities that market economy has tendency to create as its externalities. A model of the social market economy will thus prefer market-sensitive and not corporatist or protectionist measures. Secondly, it is clear that the sought-after framework of rules will give priority to ruled-based and not outcome-based solutions wherever possible, as it is supposed to rely rather on directing independent energies of responsible individuals, than on the wisdom of a State as omnipotent manager. This means that the key principles that should form the constitutional rules of the social market economy will be neither numerous, nor very detailed. A significant role in their interpretation and application will be played by an independent judiciary. Third, it is clear that due to the first two principles and also with regard to the principle of subsidiarity, enshrined both in the EU construction and in the concept of the social market economy, the principles to be adopted and enforced uniformly by the EU authorities should represent only a small part of what the maintenance of a functional social market economy would require in everyday practice. In order to give to the EU´s concept of social market economy the necessary democratic legitimacy, political support and thus also the practical effectiveness, no "one-size-fits-all" model promoted by the multinational institution through a single set of technocratic rules can ever be contemplated.[13]

At the same time, it has to be stressed that the economic part of the constitutive and regulative principles of the Ordo-liberal order, had been historically built into the EU foundations. Price stability, open markets, private property, freedom of contract, individual liability and protection of competition are traditionally written in either Treaty provisions or general principles of the EU law. EU-embedding of social principles of the social market economy, i.e. income policy, social inclusion, effective labour markets, correction of (social) externalities, has been so far much less clear given the historical division of tasks and responsibilities between the EU and the Member States. Should the EU move closer to the model of social market economy, it will have to strive for a certain rebalancing, for being granted, in accordance with the outlined principles, greater powers and duties in the social field.

The purpose of further questioning, therefore, would be whether and where the EU law should undergo changes in the interpretation or in the positive content, so that the EU, while keeping with the principle of subsidiarity, and with the basic framework of the division of powers between the EU and the Member States, could change its image of liberalizing, deregulating, socially insensitive entity alienated to ordinary people. Within such a limited assignment the attention will be paid just to regulatory measures whose implementation at EU level would fit the concept of the social market economy and at the same time would help to remedy the perceived "lack of social fairness" of the European integration.

3 SOCIAL MARKET ECONOMY GOAL AS A BALANCING CLAUSE

The least controversial hypothesis would be to perceive the social market economy as a general commandment to consistently balance the social and the economic impact of each act or measure of the EU.[14] This assumption seems to best reflect the ideas of the Treaty drafters. Retrospective analysis of how this objective got into the Lisbon Treaty demonstrates that this goal was transposed into TEU from the draft Constitutional Treaty (CT) of 2004 without any noteworthy discussion.[15] At the time of drafting CT, it was obvious that without emphasizing the social aspect of the EU the new Treaty would be unacceptable to the voters scared by the impact of the EU enlargement and global competition. As the CT's Working Group XI - *Social Europe* had neither been able to agree on strengthening of the EU powers in the social field nor to emphasize the necessity of “Social Europe”, it had introduced "the Highly competitive social market economy" as a generally acceptable compromise, as nothing more than an appeal to mediate between market freedoms and social welfare.[16]

[13] For modern interpretation of social market economy principles see: HASSE, R. H., SCHNEIDER, H. WEIGELT, K. Social Market Economy. History, Principles and Implementation From A to Z; VAN SUNTUM, U., BOHM, T., OELGEMOLLER, J. ILGMANN, C. Walter Eucken´s Principles of Economic Policy Today; FRANKE, S.F., GREGOSZ, D. The Social Market Economy. What Does It Really Means; ŠAROCH, S. Social Market Economy Doctrine and European Social Model in a Globalized World.

[14] COSTAMAGNA, F. The Internal Market and the Welfare State after the Lisbon Treaty, p. 7.

[15] See for details: CONVENTION Final Report of Working Group XI on Social Europe.

[16] JOERGES, C., RÖDL, F. Social Market Economy as Europe´s Social Model?, p. 21.

The insertion of the „Horizontal Social clause“ into Article 9 of TFEU shows the same direction: in defining and implementing its policies and activities, the Union shall take into account several social goals such as high level of employment, adequate social protection, fight against social exclusion etc. Needless to stress that the policies the EU can develop and implement on its own are, according to Article 3 TFEU, first of all customs union and common trade policy, protection of economic competition on the internal market and currency policy of the EMU, hence policies of economic nature. Among the so-called shared-powers´ policies, the completion and further development of the internal market comes first (Art 4(2)a TFEU). Therefore the social clause is called to integrate the social considerations into traditional economic policies conducted by the EU, i.e. to re-balance their content so that their impact does not compromise the achievement of the enumerated social goals.

This rebalancing should obviously have repercussions on everything that the Commission proposes, whether as a recommendation to the EMU countries, or as a legislative initiative to adopt new secondary acts with a socio-economic impact. The same requirement can be applied to the outputs of other EU institutions, with the possible exception of the European Central Bank (ECB), which should - at least according the Ordo-liberal core of the social market economy – remain an independent guardian of price stability. But even today the ECB can, under the Article 282 (2) TFEU, contribute to achieving the other EU objectives, if they are not to the detriment of price stability. Legally speaking, however, the final word in such balancing should belong to none other than the CJEU. At least since its judgment of 1973 in Case 6/72 Continental Can the target provisions of the Treaties should not be read as if they "merely contain a general program devoid of legal effect", but that as being "indispensable for the achievement of the Community tasks" and due to this the EU authorities are kept to implement them in practice.[17] In the event of any dispute as to whether the acts of EU institutions sufficiently respect the balance between the economic and the social, the CJEU should be the key body to decide on the invalidation of any measure going against this or that key value or goal of the EU (see Article 263 TFEU).

It is however symptomatic for the CJEU today that while in cases of conflict of social measures with provisions on competition protection where it consistently recognizes the social limits of the application of competition rules (or allows for extensive exemptions from their prohibitions[18]), it does not take the same position in conflicts of social measures with the freedoms of movement of the internal market. Here the CJEU still upholds its well-known pre-Lisbon stance taken in cases C-483/05 *Viking*, C-341/05 *Laval*, C-346/06 *Rüffert* and C-319/06 *Commission v. Luxembourg*. In them it has recognized that the Community “has not just economic but also a social purpose" hence the rights of the free movement "must be balanced against the objectives pursued by social policy", however applied its traditional “breach-proportionality-justification" test.[19] It means that the CJEU treated the rights of workers as a possible exception from the general free movement rule. Such exception must not only be kept proportionate in size but also needs to be objectively justified. Thus in the eyes of the CJEU judges the right to enjoy freedom of movement does not necessitate any justification as the motivation of those who move is irrelevant, however the exercise of social rights is dependent on their justification by pursuance of an objective public interest.

In the post-Lisbon period, the CJEU has been repeatedly called upon by Advocates General to adjust its approach to the new social accents of the Lisbon Treaty. AG Trstenjak in the Opinion in case C-271/08 *Commission v. Germany* and very similarly AG Cruz Villalon in the Opinion in case C-515/08 *Santos Palhota* suggested to the CJEU that when deciding on the conflict of social rights and economic freedoms it should satisfy itself with the test of proportionality, i.e. the CJEU should seek their fair balance instead of keeping the *de facto* hierarchy between the general rule and a justified *ad hoc* exception to it.[20] However, the CJEU has not moved that way so far, on the contrary,

[17] CJEU judgment of 21/02/1973. *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*. Case 6-72. ECLI:EU:C:1973:22. Para 23.
[18] See for details: ŠMEJKAL, V. (2015).
[19] CJEU judgment of 18/12/2007. *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet.* Case C-341/05. ECLI:EU:C:2007:809. Paras 104-105.
[20] Opinion of Advocate General Trstenjak delivered on 14 April 2010. Case C-271/08. *European Commission v Federal Republic of Germany*. ECLI:EU:C:2010:183. Paras 186-187 and Opinion of

it has stressed in particular that the collective rights of workers must be exercised in accordance with the EU law, therefore not in conflict with the requirements of the freedoms protected by the Treaty. The CJEU has also expressly rejected parallels between its approach to conflict between competition rules and social rights and the one it adopts in the cases of clashes between fundamental market freedoms and social rights.[21] This does not mean, of course, that the CJEU adjudicates programmatically to the detriment of the rights of workers and their trade unions (see e.g., its friendly decision on defence of rights of posted workers in case C-396/13 *Sähköalojen ammattiliitto ry*), but it seems that the changes made by the Lisbon Treaty have not been a sufficient impetus for the CJEU to reverse its precedential stance.

In the wave of criticism of the CJEU decisions in *Viking, Laval* and similar cases the European Trade Union Confederation (ETUC) proposed in 2008 that a so-called Social Progress Protocol was attached to the Treaties. There the trade unions suggested that "Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress…. In case of conflict fundamental social rights shall take precedence."[22] Such a reversal of the current hierarchy would maybe correspond to the ideal of "Social Europe", but not to the concept of social market economy, because the performance of market freedoms would be radically subordinated to the interests of social protection, instead of their fair balance that does not allow for permanent dominance of one or the other principle.

In terms of the social market economy it would therefore be better if the CJEU drew from the changes contained in the Lisbon Treaty the same conclusion as the above quoted Advocates General proposed and if it began to weigh the fundamental market freedoms against the protection of social rights and welfare on a strictly equal footing. If the CJEU feels it impossible under the current wording of the Treaties, it would be desirable to enhance the provision of key importance for the purpose. The natural way would be to change the Horizontal Social clause, so that social values in the latter gained unquestioned status of the values of the Union. This change can be inspired by Article 14 TFEU, which classifies the services of general economic interest as "the shared values of the Union." Thanks to this they enjoy a sufficiently accommodating treatment from the EU law under the protection of competition, state aid control and the internal market. The new wording of Article 9 TFEU should therefore be:

„In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health, *as they hold the status of fundamental values of the Union."*

The signal from the legislature could not be understood by the CJEU otherwise than as a command to a fully equivalent treatment of market freedoms and social rights, i.e. to abandonment of the requirement of justification and for maintenance of only the proportionality test when assessing their conflict. Of course, such proposal means an amendment to the EU primary law, which requires unanimity and ratification by all Member States. Unlike the solution proposed by the Social Progress Protocol of ETUC, it is impartial towards social rights and market freedoms and could therefore receive a more consensual acceptance, being finally also in accordance with the principles of the social market economy. The Lisbon Treaty would undergo a change anyway in the foreseeable future, whether the EU wants to keep the UK among its members or vice versa when it responds to its departure.[23] States such as the UK could also be allowed to reduce symbolically the possible impact of the newly worded Horizontal Social clause on its social system, in the same vein as it got the exception from the application of the EU Charter of Fundamental Rights.

4 SOCIAL MARKET ECONOMY GOAL AS AN APPEAL TO CERTAIN REDISTRIBUTION

A better wording of the Horizontal Social clause of TFEU can "ease the pressure" exerted by the market freedoms on social rights. In itself however, it would not give to the EU any effective tool

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Advocate General Cruz Villalón delivered on 5 May 2010. Case C-515/08. *Santos Palhota and Others*. ECLI:EU:C:2010:245. Paras 51-53.

[21] CJEU judgment of 15/07/2010. *European Commission v Federal Republic of Germany*. Case C-271/08. ECLI:EU:C:2010:426. Paras 43-46.

[22] ETUC Proposal for a Social Progress Protocol.

[23] WATERFIELD, B. Angela Merkel backs EU Treaty change.

for independent implementation of any of the social measures that traditionally form the part of the concept of social market economy. Although these measures are not "carved in stone", as it was pointed out above, all authors commenting on the social market economy of today include in this concept the correction of income distribution, measures of social compensation, regulation of (social) externalities or intervention in cases of "legitimate poverty".[24] Surely, the EU is already providing some funds from its budget on social cohesion, in particular through the European Social Fund, and thus tries to promote active employment policy measures. Its main problem here, however, lies in the lack of competences and resources for a greater autonomous activity.

The EU may not intervene in income distribution or in balancing of the relations on labour markets in any way that would harmonize the minimum wage or the scope of trade union rights to collective action. Even there, where certain measures may be promoted by the EU, they cannot restrict the Member States in defining their own principles of social security systems or significantly affect the financial equilibrium of these systems (Article 153 (4)(5) TFEU). Should the EU itself want to invest socially, or to provide directly certain types of social benefits (as it is being nowadays recommended from many sides[25]), the existing financial provisions of the TFEU, which regulates the establishment and use of the EU budget, would represent a strait jacket for any expansion.

To demonstrate clearly the existing limits, it is enough to compare the current EU budget in terms of size and structure of expenditure with the national budgets of EU member states. The EU budget is fixed at 1% of EU GNI and the tendency of the major states “donors” is to downsize it even further.[26] Cohesion funds drain from it slightly more than one third, and about 25% of this go to the European Social Fund (ESF). This fund disposes for a seven-year period from 2014 to 2020 of a sum in the order of EUR 80 billion. In contrast, the national budgets represent on average 49% of the GDP of member countries, of which about 21% go to social purposes (in the case of countries such as France, Finland, Belgium and Denmark even over 30%). A sum of the annual budgets of the 28 Member States is roughly 45 times larger than the EU´s annual budget and annual budgets of medium-sized EU countries such as Austria or Belgium exceed in their absolute size that of the EU budget.[27] In the current situation the EU has no possibility to strengthen the bond between itself and the EU citizens by providing them with some complementary benefits. And any new own resources for the EU can be created according to the Article 311 of TFEU only by unanimous approval in the Council and a subsequent ratification by each Member State.

However unlikely any quick and easy approval of such increase in the EU budget for social purposes is, it certainly would be useful and it would correspond to the objective of the social market economy. Increased fiscal capacity of the EU looks like a necessity for both the stabilization of the EU and for the strengthening of its ties with the citizens. Several new tools that would fill this purpose have been proposed in the literature treating the topic (e.g. Complementary European unemployment insurance) as well as the sources from which they could be financed without increasing the Member States' contributions (redirecting of the existing agricultural and structural subsidies[28], using the interest generated by the ECB[29], through the introduction of a financial transaction tax (FTT) or carbon tax[30]). Some of them have already appeared as drafts or legislative projects, as for instance the FTT proposed by the European Commission to the enhanced cooperation[31] of 11 EMU countries or new sources proposed pursuant to Article 11 TEU by the

[24] See for details: HASSE, R. H., SCHNEIDER, H. WEIGELT, K. Social Market Economy. History, Principles and Implementation From A to Z; VAN SUNTUM, U., BOHM, T., OELGEMOLLER, J. ILGMANN, C. Walter Eucken´s Principles of Economic Policy Today; FRANKE, S.F., GREGOSZ, D. The Social Market Economy. What Does It Really Means; ŠAROCH, S. Social Market Economy Doctrine and European Social Model in a Globalized World.

[25] VANDENBROUCKE, F. The Case for a European Social Union, p. 11; GIUBONNI, S. Europe´s Crisis-Law and the welfare state, p. 18.

[26] CIPRIANI, G. Financing the EU Budget, p. 88.

[27] EUROPEAN COMMISSION, Budget. Myths and Facts; OECD, Social Expenditure Update.

[28] MAU, S. European integration – with or without social policy?.

[29] NATALI, D. Social development in the European Union 2013, p. 22.

[30] PONZANO, P. Réorienter l´Europe vers la croissance et l´emploi, p. 295-296.

[31] EUROPEAN COMMISSION: Proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax. COM(2013) 71 final. Brussels, 14/02/2013.

European citizens' initiative called *New Deal 4 Europe*.[32] The logic of these proposals is compelling. If the Member States observe the fiscal discipline they are prescribed to within EMU and should the EMU be able to deal effectively with social consequences of future asymmetric shocks in some of its parts, it cannot suppose that long-term and immediate social costs will be satisfactorily ensured by the concerned Member States. This is largely a matter of self-preservation of the EU to secure enough resources for social purposes. In this respect an agreement of the Member States to increase the EU budget by just 1 percentage point, i.e. to make it equivalent to 2% of EU GNI, would bring to the EU budget each year EUR 140-150 billion more, which would easily allow to multiply the current size of the European Social Fund by ten.

The proposed new EU instruments such as the EU or Euro zone unemployment scheme[33], or for instance a scheme for the payment of certain benefits to the unemployed who decide to look for a job in another Member State, would undoubtedly help to better balance the economic and social elements of the EU's activities, while not changing the distribution of roles and powers of the EU and Member States in the social field. The EU would not receive any of the social powers that the Lisbon Treaty under Article 153 TFEU does not want to confer to it. Conversely, however, it can get equipped with an additional tool for the correction of the burning social problems in a situation when a concerned Member State would not be capable to do so. The EU citizens would gain direct EU contribution to maintain their social welfare without having to pay any direct EU-tax. At this point one can only speculate whether the inability of the EU-28 to reach an agreement, would push forward an EMU-alone solution or that of several key states acting through an enhanced co-operation or through a by-pass of the Treaty by another international "Pact".

5 SOCIAL MARKET ECONOMY GOAL AS AN IMPETUS FOR FURTHER HARMONIZATION MEASURES

Socially critical authors propose to the EU a wide variety of other measures, including e.g. introduction of the EU-harmonized minimum wage as a percentage of the median wage in each member state or even of the EU-guaranteed minimum income.[34] While it is possible that such measures could contribute to the social well-being of EU citizens, to the popularity of the EU, as well as to higher labour mobility, in terms of the social market economy they would represent a significantly restrictive harmonization towards market freedoms and thus going beyond the minimum necessary for balancing the market and social elements in the policies of the EU.

On the contrary, the proposals for further harmonization of minimum social and labour standards[35] are welcome, especially if they revive the trend of the 90s, when the EU adopted most of the directives on health and safety at the workplace, protection of employees rights in cases of collective redundancies, transfer of undertakings, insolvency of their employer and even converted into binding directives agreements reached within the European social dialogue (on parental leave, part time work, fixed-term contracts[36]). The secondary EU law should maximally utilize there the limits of the powers already conferred to the EU in order to prevent the sinister race to the bottom between Member States at the expense of social welfare. For the needs of this paper it is sufficient to point out that such measures of secondary EU law could definitely bring the EU closer to the concept of social market economy.

6 CONCLUSION

The EU´s social market economy objective must be seen not as a call for building a Social Europe in the meaning of the primacy of social policy over the free market, but rather as a "mere" correction of the free market by damping its anti-social impacts. Only in this way the EU can get the

[32] NEW DEAL 4 EUROPE - For A European Special Plan For Sustainable Development And Employment. Available at: http://www.newdeal4europe.eu/en/

[33] KADIDLO, L., LACINA. L. Why Would Eurozone Need an Own Budget?

[34] NATALI, D. Ed. Social development in the European Union 2013, p. 21-22 and p. 99-108, see also: European Citizens' Initiative for an Unconditional Basic Income. Available at: http://basicincome2013.eu/

[35] VANDENBROUCKE, F. The Case for a European Social Union, p. 11-12. GIUBONNI, S. Europe´s Crisis-Law and the welfare state, p. 18.

[36] VOSS, E. European Social Dialogue, p. 18.

social market economy that would strengthen its competitiveness and secure high employment and social progress at the same time.

The EU can get closer to this goal through a whole range of policy measures, initiatives, projects that were not the object of this paper. Here, the aim was to show whether and to what extent the target of social market economy requires legislative changes, whether and to what extent it is a challenge for the EU law. The limits of the above considered legislative changes were set both by the existing division of powers between the EU and the Member States (which is, mainly in the social sector, historically significantly skewed to the detriment of the EU) and by the very concept of the social market economy, which prefers subsidiary conceived and democratically adopted rule-oriented solutions. It was shown and argued that certain changes in primary and secondary law would be desirable, and perhaps even possible.

This paper was focused primarily on two key amendments to the Lisbon Treaty, one completing the Horizontal Social clause, another proposing new size and role of the EU budget and therefore it pleaded for changes affecting the EU primary law and requiring unanimous support of Member States. Nevertheless, the proposed amendments are not radical changes that would alter the existing character of the EU or deprive the Member States of their decisive say in ensuring social rights and welfare of their citizens. Implementation of the proposed measures could eliminate the current problem of weaker position of social and employment rights compared with the strength of the internal market freedoms. In the same manner the EU could be enabled by them to bring solutions to situations of asymmetric social shocks. Rather minimal changes can give there a major signal to the general public that the goal of social market economy is not just another declaration that would never have any positive impact on the EU's and their citizens' future.

The social market economy goal of Article 3(3) TEU is therefore definitely a task for the EU law but it requires neither substantive changes in the current EU setting, nor any „legislative storm“ of dozens of acts of newly harmonized social legislation. On the contrary, the beneficial balancing of social and market aspects of the EU can be achieved without any "social revolution". It seems that the inclusion of this objective in the Treaty was a wise compromise that the EU should actively use in the current fight for its survival.

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EU SECONDARY LEGISLATION NOT BINDING TO ALL MEMBER STATES: SHOULDN'T WE PREFER AN INTERNATIONAL TREATY BETWEEN INTERESTED MEMBERS INSTEAD?

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Abstract: In some cases, it is not possible to reach unanimity for the adoption of an act of secondary law, where the unanimity is required. There are dual standard solutions to such situations: 1. enhanced cooperation method eliminating Member States not interested in the proposed act or 2. non-participation of the refusing State on the basis of a general exemption granted to that State formerly on the primary law level. It seems that the method of international treaties (agreements) could be, for such situations, more appropriate. Those agreements would be reserved only to Member States. The possibility of making reservations would attract more (or may be all) Member States and the whole law-making mechanism would be simpler (no separate decision on the authorization of enhanced cooperation, no special additional agreements). It should be considered whether obligations of parties emerging from such agreements should be regarded as obligations under international law or under EU law.

Key words: secondary legislation, international treaty, enhanced cooperation

1 DIFFERENTIATED INTEGRATION IN THE EU

The European Union represents an integrating tool for European countries. Its aim is to provide to the participating countries and their citizens a successfull economic, social and political development. The integration is supposed to bring the economic stability and development and to allow appropriate solutions to the follow-up complementary issues such as the creation and functioning of the area of freedom, security and justice.

This really means that the integration should correspond to the interests of all member States. All of them should teoretically pursue same goals.

However, this does not automatically mean, that when adopting European legal rules aiming to achieve those goals, the member States will always easily reach consensus. Their positions about the means and methods and details of the legal regulation may differ - and sometimes it is the case. We can observe sometimes very different positions of particular member States when adopting legal rules governing different aspects of integration. Both primary and secondary law are concerned.

Let us remind some famous historical examples, such as French refusal of the qualified majority voting in the area of agricultural policy in the mid-sixties, that has been resolved by the Luxembourg Compromise (1966), refusal of common European currency by the United Kingdom and Denmark, refusal of the Schengen system by some member States etc.

It seems that the enlargments are making the European Union more and more heterogeneous and the deepening of the integration (more and more EU competences) brings the same consequence. Now, with 28 members, it is sometimes quite difficult to come to a generally acceptable solution.[1]

Different positions of particular member States are surmountable by several methods:

1. On the level of primary law, where the unanimity is strictly required, differentiating positions can be taken into account by general exemptions contained in **protocols and unilateral**

[1] SCHIMMELFENNIG, F., LEUFFEN, D., RITTBERGER, B. Ever looser union? Towards a theory of differentiated integration in the EU, Version 1, February 2011, EUSA Conference 2011, Boston, p. 9 – 10. Available at http://www.euce.org/eusa/2011/papers/9g_schimmelfennig.pdf

For a different opinion see SCHMIDTCHEN, D., COOTER, R. Constitutional Law and Economics of the European Union, Edward Elgar Publishing, 1997, pp. 248 et seq. (Comment by M. G. Faure)

declarations by particular States annexed to the treaties and providing a different regime. The effect of those protocols and declarations is in fact that of reservations.[2]

2. On the level of secondary law, where the unanimity is being required as well, the instrument for taking into account differentiating positions of member States insisting on them, are **exemptions** granted to those States

- directly in the text of acts of secondary law3 or
- later by the Commission on their request.4

3. The principal instrument designated to overcome the lack of unanimity when adopting acts of secondary law is **the qualified majority voting system in the Council.** The States not willing to accept the proposal may

- vote against it or,
- abstain to the vote.

The consequences of both options are same, since only positive votes are counted.

Voting against or abstentions are quite frequent, especially in the field of agricultural and commercial policies and internal market, environmental protection or consumer protection. Let us remind, that the act adopted by the majority will be binding for the overvoted minority.

The advantage of the qualified majority voting is that the act of secondary law can be approved more easily and more quickly, there is no need to reach the consensus. On the other hand, its precarious disadvantage is the "violation" of overvoted States, imposed will by other States to them. This may cause serious political problems, even the diminution of sympathies for the EU in affected States.

4. A very special instrument for overpassing the diversity of positions in cases where the unanimity is required, is the **enhanced cooperation** system introduced by the Amsterdam treaty in 1997 and developed later. It means that only States willing to accept the proposed solution will participate. The other ones (not interested in the proposed solution) will not take part in the adoption of the corresponding act and consequently will not be bound by it. They are completely excluded

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[2] PROTOCOL No. 15
ON CERTAIN PROVISIONS RELATING TO THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:
... RECOGNISING that the United Kingdom shall not be obliged or committed to adopt the euro without a separate decision to do so by its government and parliament, ...
1. Unless the United Kingdom notifies the Council that it intends to adopt the euro, it shall be under no obligation to do so. ...
3. The United Kingdom shall retain its powers in the field of monetary policy according to national law.
A similar exemption has been accorded to Denmark by the Protocol No. 16.
3 For instance Article 105 of the VAT directive No. 2006/112 reads:
1. Portugal may apply one of the two reduced rates provided for in Article 98 to the tolls on bridges in the Lisbon area.
2. Portugal may, in the case of transactions carried out in the autonomous regions of the Azores and Madeira and of direct importation into those regions, apply rates lower than those applying on the mainland.
4 Article 114 TFEU:
4. If, after the adoption of a harmonisation measure ... , a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
5. Moreover, ..., if ... a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.
6. The Commission shall ... approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. ...

from the regulation. Unlike the majority voting system, the enhanced cooperation does not force disagreeing States to comply with the will of majority, but leaves them aside.[5]

So far two cases of the enhanced cooperation have been realized. Let us analyze them in detail since there could be serious doubts about the rationality of that procedure.

1. The first one concerned the Council regulation No 1259/2010 relating to the law applicable to divorce and legal separation - a matter of private international law. The determination of the applicable law in family matters is normally made according to the national Act on private international law. The regulation brings new rules, which may not be in conformity with the Act. Provided that the EU law has priority over the national law, the former national regulation will be put aside and in fact replaced by the EU regulation without the consent of the national Parliament which had adopted the original Act. One may argue that only States where the EU regulation will be in conformity with the existing national Act will take part in this operation.

2. However, the second case of the enhanced cooperation is certainly different and more complicated, because the EU regulation cetrainly cannot be in conformity with national rules applicable so far. It concerns the EU unitary patent, and especially its language versions. There are two regulations on this subject: Regulation No 1257/2012 concerning the creation of unitary patent protection and Regulation No 1260/2012 concerning the creation of unitary patent protection with regard to the applicable translation arrangements.

At least the second one contains provisions which are obviously not in conformity with current national legislation of several States. It excludes the use of national language (!) for granted patents as public and binding legal documents (if other than English, French and German).

It means that general legal obligations resulting from binding public documents will not be available in the national language. And this rule will be introduced into the legal order of member States as an EU regulation approved only by national governments, not Parliaments.

Those two cases show that only some member States are concerned by that concrete integration measure. Disagreeing States may profit the opportunity to ignore the measure, e.g. to refuse it tacitly.

The procedure for establishing and realisation of the enhanced cooperation comprises following stages:

1. **Request** from interested States to establish enhanced cooperation.
2. Proposal from the European **Commission** to authorize the enhanced cooperation etween interested States,
3. Consent of the **European Parliament** to authorize the enhanced cooperation,
4. **Council** decision authorizing enhanced cooperation in this particular case,
5. Proposal from the European **Commission** of the implementing regulation,
6. **Transmission** of the draft legislative act to the national parliaments,
7. Issuing the opinion (not legally binding) by the **European Parliament,**
8. Issuing the opinion (not legally binding) by the **European Economic and Social Committee,**
9. Adopting by the **Council** of the regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

National parliaments must be informed, but have no opportunity to agree or disagree.

2 COMMENTS ON THE ENHANCED COOPERATION METHOD

States refusing the proposed solution are completely excluded from the adoption of the regulation - their opinions are not taken into account (take or leave system). General remark: The regulation adopted by the Council of Ministers derogates the Act of national Parlament. The general problem of the democratic deficit emerges here. In addition to this we may make another general remark: Secondary legislation acts are sometimes approved very quickly and hastily with no sufficient consideration.

The solution proposed by this study is to replace the enhanced cooperation system with an international treaty concluded by EU members. There are at least three advantages of this solution:

[5] For details on this method see for instance HOLZINGER, K., SCHIMMELFENNIG, F. Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data, Journal of European Public Policy, 19 (2012), 2. - pp. 292 – 305, available at http://kops.uni-konstanz.de/bitstream/handle/123456789/18593/Holzinger_Differentiated%20integration.pdf?sequence=1

1. States not sharing the original proposal might negotiate and make ***reservations*** if necessary and consequently they could be able to accept the proposal in a modified form.
2. The treaty would be discussed and evaluated ***carefully and thoroughly*** by all governments and other involved institutions of member States
3. The finalized treaty would be submitted to ***national Parliaments*** for approval (ratification). There would be no problem to modify their former Acts.

The proof of the suitability and desirability of this solution are the EU unitary patent regulations and the Agreement on the Unified Patent Court
1. Unitary patent regulations were adopted in 2012 very quickly and easily (by ministers of the whole group of enhanced cooperation - 25 members).
2. Unified Patent Court is an integral part of the unitary patent system, its functioning is the condition for entry into force of both unitary patent regulations.
3. Unified Patent Court could be established only on the basis of an international treaty (lack of EU competence).
4. Unified Patent Court Agreement adopted (signed) in 2012, submitted to the necessary ratification by member States that should follow.
5. End of the ratification process and entry into force of the Agreement was originally foreseen for 2013.
6. October 2015: there are only 9 ratifications (not enough for the entry into force of the Agreement and of the whole system).
Thanks to the Patent Court Agreement, States got the possibility to consider and evaluate the whole system of EU unitary patent **very carefully** (what they did not do when they were adopting the two regulations).

Poland, which approved both regulations very quickly and enthusiastically, only now discovered that the system of EU unitary patent is for it very disadvantageous and refuses to ratify (and even sign) the Agreement (and consequently accept both formerly approved unitary patent regulations).

3 ADVANTAGES OF THE PROPOSED SOLUTION

It is almost sure that the described solution would be considered as inacceptable by EU institutions and many member States as well, since it represents the aberrance back to the intergovernmental method of integration, which is considered to be less effective than the supranational method. But: „The deeper vertical integration becomes, the more it reduces state autonomy and the more likely it is to provoke nationalist backlash.“[6]

We can easily foresee serious objections:
1. The lenght of the procedure (approval by national Parliaments).
2. No influence of the CJEU on the interpretation of such treaties (preliminary references).
3. No priority over national law would be guaranteed.
4. No enforceability within the EU system.

ad 1. The procedure of adopting such acts would certainly be longer, but the States accepting it would be sure that they made something in favour to them and would not regret it later. Less quantity means more quality.

ad 2. Preliminary rulings of the EU Court of Justice for those treaties could be guaranteed by a protocol, as it was the case of the Convention called Brussels I: The Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters provides, that the Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of the Convention.....

ad 3. The priority of application of international treaties over national laws is guaranteed by Constitutions of member States.

ad 4. The enforceability could be guaranteed by protocols, as in the case of interpretation (Art. 258, 259 and 260 TFEU could be extended to such treaties).

To conclude, we can argue that the rejection of supranationalism by reintroducing international treaties would contribute to a higher quality and non-confrontationality of the regulation adopted in cases, where certain member States strongly oppose the proposed solution.

[6] SCHIMMELFENNIG, F., LEUFFEN, D., RITTBERGER, B. Ever looser union? Towards a theory of differentiated integration in the EU, Version 1, February 2011, EUSA Conference 2011, Boston, p. 9. Available at http://www.euce.org/eusa/2011/papers/9g_schimmelfennig.pdf.

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