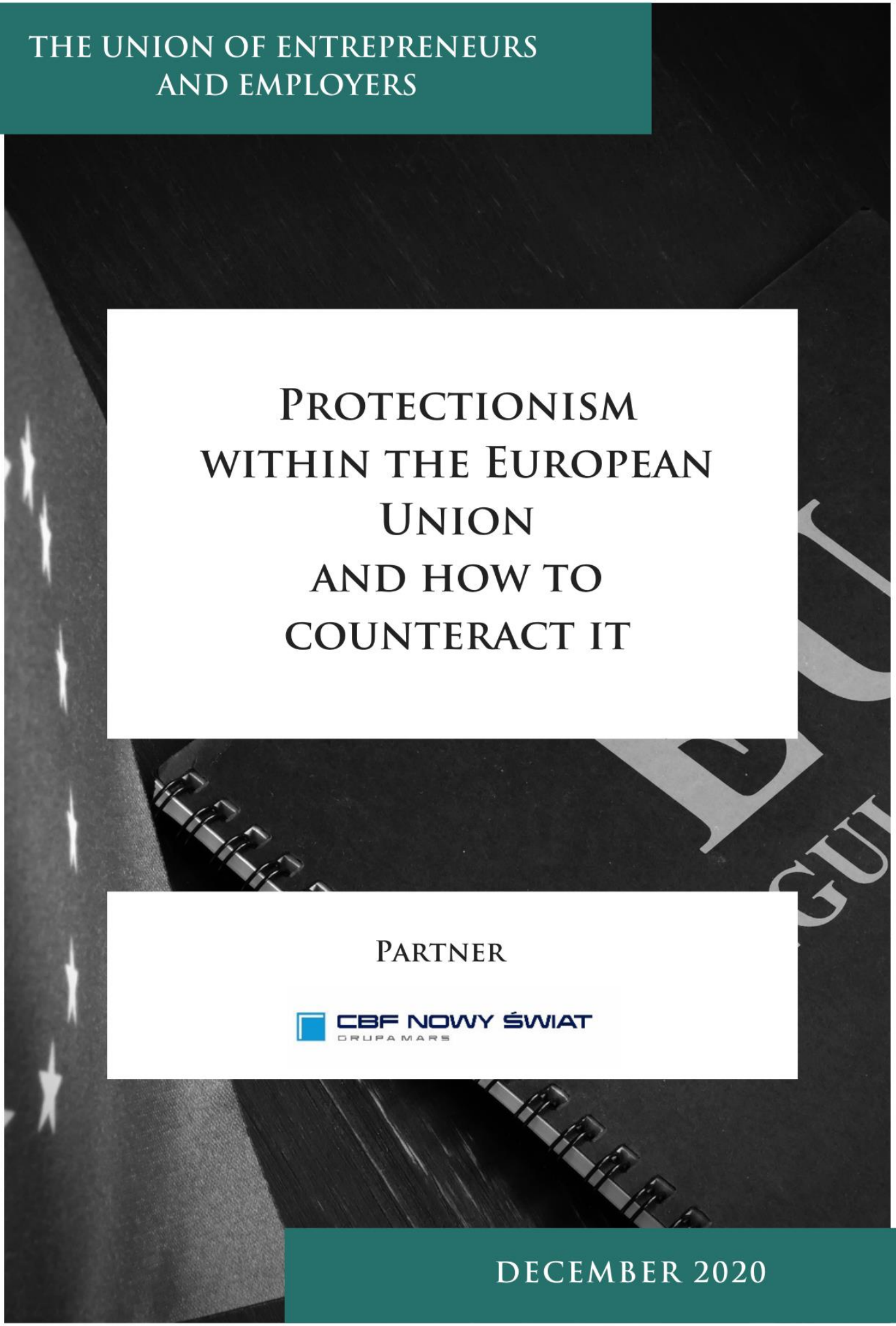
THE UNION OF ENTREPRENEURS AND EMPLOYERS



Protectionism within the European Union and how to counteract it

Partner

CBF NOWY ŚWIAT
GRUPA MARS

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THESIS

This study offers a comprehensive insight into the problem of protectionism within the European Union, analysing it from a historical, economic, practical, legal, and political perspective.

At the outset, it must be emphasised that the common market took shape in conditions of record-low support for the European project, as part of an initiative of entrepreneurs who established the *European Roundtable of Industrialists*. Their actions came as a response to the impasse in European relations that began with the Empty Chair Crisis in 1965 and the economic recession caused by the 1973 oil shock which led to a decline in the competitiveness of the European economy vis-à-vis the United States and Japan.

The present state of affairs in the EU is in many ways reminiscent of the beginning of the 1980s. History and economic data show that the way out of a crisis lies in the elimination of barriers between the economies of individual member states, rather than in protectionism. Five years after the publication of "White Paper, Completing the Internal Market" in 1985, the Community's GDP increased from USD 2.7 trillion to USD 6.5 trillion. Nevertheless, the claim that it is the creation of the common market that is fully responsible for the Community's dynamic economic development would disregard other changes that took place at the turn of the 1980s and 1990s, and would, therefore, be unjustified. Accordingly, a team of researchers led by Prof. Gabriel Felbermayr, Ph.D., President of Kiel Institute for the World Economy, using the sectoral gravity model, calculated that membership in the single market increased trade in goods by about 36%, and trade in services by as much as 82%. The establishment of the common market also led to a 34% decrease in trade costs. Research by Felbermayr et al. show that the collapse of the single market would lead to a decline in income *per capita* by approximately 4% across the EU, however, those would be the smaller, poorer, and more centrally located countries to suffer the most. By comparison, countries such as Luxembourg, Hungary or Ireland would lose 24%, 21% and 13% real GDP respectively, while countries like Germany, France or Italy would lose 5%, 4% and 4% respectively.

Economists Comerford and Rodriguez Mora carried out also the opposite experiment, namely calculating the impact of a deeper integration on the economies of the member states. They concluded their study by saying that "there is still a long way to go to reach (...) a United States of Europe". Indeed, a recent report by the European Parliament indicates that removing the remaining barriers to the free movement of goods and services could generate an additional EUR 713 billion by the end of 2029, and according to the calculations of AmCham EU, eliminating the existing barriers would permanently increase EU's GDP *per capita* by 0.6% which would correspond to an average additional income of EUR 120-370 per household. A single market that were to function better would attract an additional EUR 17 billion in investment *per annum* and generate a further 1.3 million jobs, which are crucial to rebuild the competitiveness of the European economy.

Moving on to the analysis of protectionism from a practical perspective, independent studies by both the European Commission and the Union of Entrepreneurs and Employers acknowledge that protectionism is a serious problem affecting the majority of entrepreneurs and impeding the development of the common market. The research by the Commission identified 13 barriers to the single market, most relevant from the point of view of entrepreneurs or consumers, and their five root causes. On the other hand, the research among entrepreneurs from Poland, the Czech Republic and Slovakia conducted by the Union of Entrepreneurs and Employers on protectionism within the European Union shows that almost 40% of surveyed companies had

encountered protectionist practices in the common market, either in person or through business partners. Administrative and clerical difficulties and the requirement to present additional documents (certificates, attestations etc.) are some of the most common practices encountered by every fifth respondent.

Most of these practices can be addressed through a wide range of restrictions contained in common market law, which do not allow the application of the following: import and export duties or charges having equivalent effect, taxation discriminating against products from other member states, quantitative restrictions or measures having an equivalent effect in terms of import and export. The extensive body of judicial decisions of the European Court of Justice provides interpretations of the provisions and allows for a precise definition of which measures are compatible with the internal market and which pose a risk to it.

However, the current legal framework does not seem to be sufficient to address all the problems of the common market for several reasons. First of all, the current regulations may be insufficient to address the problem of greater meticulousness in enforcement of laws in case of foreign companies. Secondly, prohibition does not translate into automatic compliance and, due to the provisions of the common market, several hundred infringement proceedings are carried out each year against member states, although these proceedings are based not only on measures restricting trade within the EU, but also on erroneous transposition of EU directives. Third, the complexity of judicial decisions may raise doubts and generate disputes. Moreover, some protectionist behaviours originating from EU institutions completely escape the presented legal framework – one may cite the amendment to the Directive on posted workers as an example.

Thus, despite the existence of sophisticated regulations and the abundance of judicial decisions of the CJEU, the single market still leaves much to be desired. Improving its quality has been the subject of the European Commission's *"Long term action plan for better implementation and enforcement of single market rules"*, which contains six main areas of action: (i) expanding knowledge and raising awareness of single market law, (ii) improving transposition, implementation, and application of EU law, (iii) making the best use of the preventive mechanism, (iv) detecting instances of non-compliance in the single market and at the external borders, (v) enforcing the rules more effectively within the Community, and (vi) improving the handling of infringement cases on the part of member states. The proposals put forward by the European Commission are comprehensive and far-reaching, but their serious weakness is the dependence on implementation and application by member states. Most of these actions, however well planned and implemented, can be in vain without the involvement of national administrations and national policy makers. Therefore, the Union of Entrepreneurs and Employers herein presents opportunities for improving the Commission's actions.

The Union of Entrepreneurs and Employers calls for the appointment of the *Internal Market Ombudsman* whose task will be to inform entrepreneurs operating in other member states about their rights under Community regulations and to issue legal opinions interpreting these provisions. Moreover, the Ombudsman is to have soft intervention competences, such as the right to ask questions to national administration bodies and entrepreneurs. The Ombudsman is to be an EU official, independent of national administration.

The person holding the position will be employed by the European Commission, but will not work at its headquarters in Brussels, but at the Representation offices located in 33 cities in the member states.

The Union of Entrepreneurs and Employers also calls for the introduction of a horizontal direct effect on the free movement of goods. This will open the path for these provisions to be invoked in disputes between private persons before national courts, thus revolutionising the functioning of the common market and enabling the restoration of competitiveness of the European economy. Furthermore, extending the direct effect to the free movement of goods will systematise the judicial decisions of the CJEU and better protect the rights of Europeans.

Despite the improvement in the quality of common market law, there will be one form of protectionism that will still escape the legal framework. The amendment to the Directive on posted workers is an example of a legal form of protectionism and Poland's inability to take care of its own interests. In the search for a way to quantify the problem of protectionism within the EU institutions, we turned to personnel policy. In terms of positions held by a given nationality in the European Commission, the most numerous groups are Belgians (14.8%), followed by Italians (12.5%), the French (9.8%), the Spanish (7.7%), Germans (6.5%) and Poles in sixth place (4.5%). However, if we look at the number of Directors General of a given nationality, we will see that the French are the most numerous and hold 6 positions, Germans and Italians hold 4 positions each, the Dutch and the Finnish 3 positions, the Danish, the Spanish, Bulgarians and Greeks – 2 positions each, and the Irish, Austrians, Cypriots, Belgians, Estonians, Swedes, Luxembourgers and Lithuanians – 1 position each. However, there is currently not a single Pole among the Directors General. This shows that despite the relatively large number of Poles in the European Commission, their influence on shaping European policy is considerably scarce.

One of the reasons why Poland is in such a bad position is the systematic neglect of personnel policy in Polish diplomacy and public administration in terms of EU institutions. The ineffective system of appointing positions, the lack of support programmes for Polish candidates for EU institutions, and the preference of internal political disputes over the interests of Poland understood as the highest possible number of Poles in high EU positions, make it impossible to conduct an effective personnel policy. Reasonable and stable personnel policy is a prerequisite for building Poland's strong position within the Community. This, however, requires that a non-partisan national interest be defined. In view of the fact that other countries are able to undertake such a task, Poland has no choice but to follow in their footsteps.

1. INTRODUCTION

The European single market is one of the EU's greatest achievements. The single market means no internal borders for the free movement of people, goods, services and capital for 500 million people. More than two-thirds of member states' trade exchange takes place within the EU, making it one of the most integrated trade blocs in the world[1]. At the same time, the EU creates 16% world GDP, outpaced only by China and the United States, which generate respectively 16.4% and 16.3% of the global GDP[2]. A strong single market was recognised as a prerequisite for rebuilding the competitiveness of EU industry in the New Industrial Strategy for Europe[3].

The four freedoms on which the single market is based guarantee the free movement of people, goods, services and capital. These fundamental freedoms are enshrined in a number of legal acts that are upheld by the European Commission and the Court of Justice of the EU. Despite the real achievements of the Union, enterprises still face many obstacles. During the meeting of the European Parliament in October 2018, as many as 70% of entrepreneurs said that the common market was not sufficiently integrated[4]. Indeed, several hundred court proceedings for infringement of the internal market rules take place every year[5]. These cases are most often brought against member states in connection with incorrect transposition of a directive, but the current problems of the internal market also extend beyond the correct implementation of EU law. According to the European Commission, member states often seem to tolerate or create obstacles to the single market in national law to create additional protection for domestic entrepreneurs[6].

Moreover, the case of the revision of Directive 96/71/EC on the posting of workers is an example of the triumph of protectionist policy over integration policy, where the dominance of transport companies from Central and Eastern Europe motivated the coalition of member states to change EU law so that they could protect their transport sector. Thus, the European Union became a tool in the hands of nationalist politicians and served to undermine integration and the common market.

The aim of this study is to analyse the problem of protectionism within the European Union. The analysis will focus on protectionism from a historical, economic, practical, legal and political perspective.

The first chapter, devoted to historical analysis, shows that the common market was born on the initiative of entrepreneurs as a response to the impasse in European relations, initiated by the Empty Chair Crisis and the economic recession caused by the 1973 oil shock. Thus, this section shows that the way out of a crisis lies in deeper economic integration rather than protectionism.

1 *Jan in 't Veld, The economic benefits of the EU Single Market in goods and services, Journal of Policy Modelling 41 (2019) 803-818.*

2 *Data expressed in purchasing power parity; Eurostat, China, US and EU are the largest economies in the world, https://ec.europa.eu/eurostat/documents/2995521/10868691/2-19052020-BP-EN.pdf/bb14f7f9-fc26-8aa1-60d4-7c2b509dda8e (last access 07.11.2019).*

3 *European Commission, European Industrial Strategy, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy_en (last access 07.11.2019).*

4 *European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Identifying and addressing barriers to the Single Market, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri= CELEX:52020DC0093&from=EN (last access 07.11.2019).*

5 *European Commission, Single Market Scoreboard, https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm (last access 07.11.2019).*

6 *European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Long term action plan for better implementation and enforcement of single market rules, https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-94-F1-EN-MAIN-PART-1.PDF (last access 07.11.2019).*

The studies using gravity models and counterfactual analysis in chapter two show that economic integration within the European Union accounts for a significant part of the GDP of both the Member States and the Community. More importantly, however, the presented research shows that there is still room for deepening economic integration in the EU, and further integration will bring significant economic benefits.

The third chapter looks at protectionism from a practical perspective: it analyses the typology of harmful practices and presents the results of the European Commission research on barriers to the common market and research by the Union of Entrepreneurs and Employers on the opinions of entrepreneurs from Poland, the Czech Republic and Slovakia[7]. The results of the presented studies are consistent in showing that protectionism is a serious problem affecting most entrepreneurs and hampering the development of the common market.

Possibilities of addressing protectionist practices are addressed in chapter four, which contains the legal framework for the free movement of goods. The analysis shows that the existing rules are, however, insufficient and suggests ways to improve them.

Despite the improvement in the quality of common market law, there will be one form of protectionism that will still escape the legal framework. The amendment to the Posted Workers Directive is a legal form of protectionism that needs to be counteracted at the political level. In light of this fact, the fifth chapter shows that the shortcomings in the appropriate personnel policy affect the possibility of representing one's own interests on the EU forum.

The final sixth chapter summarises the conclusions of this study.

7 *The research commissioned by the Union of Entrepreneurs and Employers was prepared by the Maison & Partners.*

2. HISTORICAL PERSPECTIVE

The last decade has brought a rise in protectionist sentiment around the world. Examples include the trade war between the United States and China, or the amendments to the Posted Workers Directive. There is a general perception that protectionism benefits old member states at the expense of the newer ones. It may be difficult, for obvious reasons, to get the member states that allegedly benefit from protectionist practices to change their strategy. The crisis caused by the coronavirus pandemic is all the more unfavourable to liberal economic ideas. So how do we get out of this impasse? The first chapter of this study offers a historical look at European economic integration and compares the conditions under which the single market was created to the current situation in the European Union. Thus, it shows that the shift towards economic integration can be a response to the problems currently affecting the member states and the Community itself.

Recent years have not been free from strife for the European Union. The 2008 financial crisis affected almost all EU member states and highlighted the north-south divide. Trust amongst countries, already weakened at that time, was put to the next test during the 2015 migration crisis. The interests of member states, often contradictory, prevented the Union from reacting quickly and adequately, which led to its internal weakening. Negative sentiments were used by Eurosceptic and populist politicians who emphasised the importance of sovereignty. This situation was further worsened by a dispute over the rule of law between EU institutions and member states.

Another blow came in 2016 with the referendum in which the British decided to leave the Community after forty-seven years of membership. The loss of the United Kingdom from the EU may be considered the Eurosceptics' greatest victory. Nevertheless, in reaction to Brexit, some EU parties decided that the EU without the UK would be stronger and would develop faster. Simultaneously, the EU's economic situation was improving, and in the State of the Union Address in September 2017, the then President of the European Commission, Jean-Claude Juncker announced that "ten years since crisis struck, Europe's economy is finally bouncing back" [8].

The composition of the Commission formed by Ursula von der Leyen was approved by Members of the European Parliament on 27th November 2019. Meanwhile, already on 30th January 2020, the World Health Organization announced a state of emergency in connection with the coronavirus epidemic[9], and on 11th March 2020, a pandemic was announced[10].

[8] *European Commission, 2017 State of the Union Address by President Jean-Claude Juncker, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165 (last access 07.11.2019).*

[9] *Puls Medycyny, WHO ogłasza stan zagrożenia w związku z koronawirusem (WHO announces state of emergency in connection with the coronavirus), https://pulsmedycyny.pl/who-oglasza-stan-wyjatkowy-w-zwiazku-z-koronawirusem-981178 (last access 07.11.2019).*

[10] *Puls Medycyny, WHO ogłosiło pandemię COVID-19. Co to oznacza? (WHO announced the COVID-19 pandemic. What does it mean?), https://pulsmedycyny. pl/who-oglosilo-pandemie-covid-19-co-to-oznacza-984790 (last access 07.11.2019).*

The newly formed Commission, not unlike national governments, had to reconsider its priorities and redirect all forces to fighting the pandemic and its consequences. The ensuing crisis focused Europeans' attention on nation states. Crisis situations naturally mean that politicians responsible for the fate of the country must, or at least should, ensure its basic needs, and European integration and cooperation falls in the background, as does any need for a higher level.

Looking at the events of the last dozen or so years, many people agree that the European Union is weakening, is in crisis, and may not even stand the test of time. However, few know that Jean Monnet himself stated that "Europe will be forged in crises, and will be the sum of the solutions"[11]. As he predicted, the EU has already gone through many of them, including Eurosclerosis.

The beginnings of Eurosclerosis can be traced back to 1965 when President Charles de Gaulle pushed the vision of the European Community as a Europe of states, not nations. De Gaulle's intergovernmental approach led to the so-called Empty Chair Crisis when de Gaulle boycotted European institutions, effectively blocking their operations. The Luxembourg Compromise concluded a year later ended the crisis, but significantly weakened the Community. In place of a qualified majority, it introduced unanimity in votes on matters concerning the so-called important national interests, thereby giving member states a broad veto power and paralysing action at European level[12].

Another factor that contributed to the stagnation of European integration was the aftermath of the 1973 Arab-Israeli war[13,14]. Under attack, Israel received the support of the United States, which in a very short time provided it with military equipment worth over USD 2.2 billion. In response, states of the Persian Gulf issued an ultimatum to the United States: withdrawal of military aid or an embargo on oil supplies[15]. President Nixon did not step down, as a result of which the embargo extended not only to the United States but also to Israel's European allies. At the same time, the Organisation of Petroleum Exporting Countries (OPEC) limited production, which resulted in an almost threefold increase in the price of this commodity from the level of USD 2 to USD 6 per barrel of oil. In 1975, that price hit USD 10[16]. The increase in prices gave rise to a deep recession and a severe crisis in the West[17,18]. The economic recession resulted in increased protectionism – member states were afraid that integration measures would weaken their ability to protect their domestic markets against foreign competition and thus deprive them of the possibility to control unemployment.

As a result of political and economic problems, support for the European project was in decline. The European public opinion poll "Eurobarometer" showed that in the late 1970s only 50% of respondents considered membership in the community a good thing, while more than a dozen as bad[19]. The situation was so severe that in 1982, *The Economist* announced the death of the European Economic Community on its cover (see Image 1).

11 *Jean Monnet, Memoirs, William Collins Sons & Co. Ltd (1978).*

12 *Anil Awesti, The Myth of Eurosclerosis: European Integration in the 1970s, in L'Europe en Formation 3 (2009) 39-52.*

13 *Ibid.*

14 *When in 1973 r. Jom Kippur was celebrated in Israel, Egyptian and Syrian armed forces began an offensive whose aim was to reclaim the Sinai Peninsula that was occupied since the Six-Days War in 1967; Jerzy Zdanowski, Historia Bliskiego Wschodu w XX wieku (History of the Middle East in the 20th century), Zakład Narodowy im. Ossolińskich, (2010).*

15 *The US imported 40% of crude oil, half of which from the Persian Gulf; ibid.*

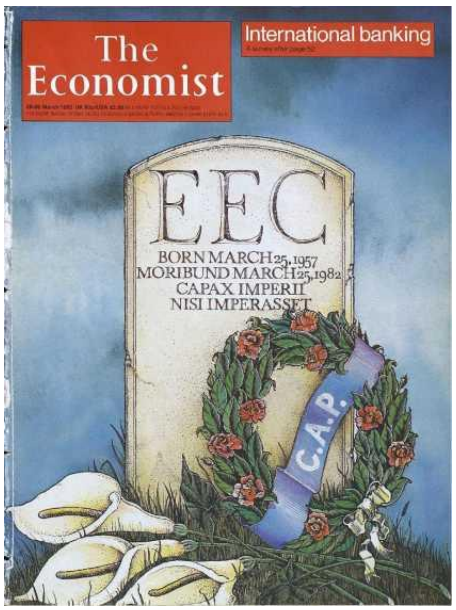
16 *Jakub Wiech, Dzień, w którym stanęła Ziemia. 46 lat temu świat tonął w kryzysie naftowym (The day the Earth stood still. 46 years ago, the world was engulfed in the oil crisis), https://www.energetyka24.com/ropa/dzien-w-ktorym-stanela-ziemia-46-lat-temu-swiat-tonal-w-kryzysie-naftowym-komentarz (last access 07.11.2019).*

17 *BBC Polska, Światowe zapasy ropy naftowej (World crude oil stocks), http://www.bbc.co.uk/polish/specials/1643_oil_world/page5.shtml (last access 07.11.2019).*

18 *According to Andrzej Krajewski "[In the Netherlands,] petrol was allocated to drivers, and private cars were forbidden on Sundays (...). The governments of France and Germany suddenly showed great sympathy for the Arab world. Their main demand was for Israel to recognise the rights of Palestinians to their own state. The approaching winter intensified the enthusiasm for this idea (...). The Italian government ordered all gas stations closed every Saturday and Sunday until further notice (...) In other countries, temperature limitations began to be introduced in public buildings and apartments. Shop windows were not to be illuminated after 10 pm. For the first time since the war, cities had to reduce or even abandon traditional illumination before Christmas. Large-scale propaganda campaigns were also initiated, urging people to save energy"; Andrzej Krajewski, Krew cywilizacji. Biografia ropy naftowej (Civilisation's blood. Biography of crude oil), Mando (2018).*

19 *European Commission, Is this the worst crisis in European public opinion?, https://ec.europa.eu/commfrontoffice/publicopinion/topics/eb40years_en.pdf (last access 07.11.2019).*

Image 1: *The Economist* cover, 20th March 1982



weakening of the Community translated into the loss of its position in relation to countries from other parts of the world. In a 1985 article, the German economist and president of the Kiel Institute for the World Economy[20], Herbert Giersch asked, "What happened to the economy of Western Europe?" – and mentioned that in terms of GDP, the economy in Europe was growing slower than in the 1950s and 1960s[21], than the economy of the United States, or than the economies of countries in the Pacific region. For example, in the years 1981-1985, the European Community recorded an average annual GDP growth of 1.1%, only half the rate achieved by the US economy and only a quarter compared to Japan[22]. Despite losing competitiveness, the United States mobilised its own fairly single internal market, and Japan benefited from its extensive strategic planning. Meanwhile, the Community, consumed by Eurosclerosis, was lagging behind[23].

It was in the context of the declining competitiveness of the European economy that the impetus for renewed integration was born. In the very same year as *The Economist* announced the death of EC on its pages, Volvo President Peter Gyllenhammar began calling on European companies to take action to formulate and implement a new industrial strategy[24]. Gyllenhammar's actions were inspired by the then Commissioner for Internal Market and Industrial Affairs, Etienne Davignon, and their discussions led to the creation of a cross-sector group made up of CEOs of 17 of Europe's largest companies[25]. The first *European Round Table of Industrialists* (hereinafter ERTI) meeting was held in Paris in 1983[26]. The second ERTI meeting resulted in a memorandum on "Foundations for the Future of European Industry" drawn up for Commissioner Davignon[27].

The activity of ERTI was paying off. In 1984, the French employers' organisation Conseil National du Patronat Français and the French Chamber of Commerce and Industry in Paris organised a conference to break off with the Eurosclerosis of national politicians and create new "Eurodynamics"[28]. In 1985 in Brussels, the CEO of Philips Wisse Dekker presented "Europe 1990 An agenda for action" which included a list of measures necessary to complete the single market with precise deadlines. Lord Arthur Cockfield, the author of "White Paper, Completing the Internal Market" published in June 1985, was among the audience[29].

20 *The Kiel Institute for the World Economy is an independent, non-profit economic research institute and think tank based in Kiel, Germany. In 2017, it was recognised as one of the 50 most influential think tanks in the world, and in the top fifteen in the world in terms of economic policy.*

21 *Average annual GDP growth in the European Community (EC), which was 4.8% from 1960 to 1973, fell to 2.1% from 1973 to 1983, and is expected to be only slightly higher (2.4%) until 1988 (in line with EC forecasts); Herbert Giersch, Eurosclerosis, in Kieler Diskussionsbeiträge 112 (1985) 1-20.*

22 *Ibid.*

23 *Volker Bornschier, Western Europe's move toward political union, in State-building in Europe. The Revitalization of Western European Integration, Cambridge Press (2000).*

24 *Michael Nollert and Nicola Fielder, Lobbying for a Europe of big business: the European Roundtable of Industrialists, in State-building in Europe: The Revitalization of Western European Integration, Cambridge Press (2000).*

25 *Umberto Agnelli, Fiat, Italy; Sir Peter Baxendell, Shell, the United Kingdom; Carlo de Benedetti, Olivetti, Italy; Wisse Dekker, Philips, the Netherlands; Kenneth Durham, Unilever, the United Kingdom; Roger Faroux, Saint-Gobain, France; Pehr Gyllenhammar, Volvo, Sweden; Bernard Hanon, Renault, France; John Harvey-Jones, Imperial Chemical Industries, the United Kingdom; Olivier Lecerf, Lafarge Coppée, France; Helmut Maucher, Nestlé, Switzerland; Hans Merkle, Bosch, Germany; Curt Nicolin, Asea, Sweden; Louis von Planta, Ciba-Geigy, Switzerland; Antoine Riboud, BSN, France; Wolfgang Seelig, Siemens, Germany; Dieter Spethmann, Thyssen AG, Germany; ibid.*

26 *Ibid.*

27 *European Roundtable of Industrialists, Memorandum to EC Commissioner E. Davignon before the EEC summit meeting at Stuttgart on June 17-19, http://euactive.ru/lk/theory09_1.pdf (last access 07.11.2020).*

28 *Michael Nollert and Nicola Fielder, Lobbying for a Europe of big business: the European Roundtable of Industrialists, in State-building in Europe: The Revitalization of Western European Integration, Cambridge Press (2000).*

29 *Ibid.*

A mere year later, in 1986, the Single European Act was signed – an international treaty which streamlined decision-making within the EC, but above all, formally established the creation of the common market and set the deadline for its completion on 31st December 1992.

The single market officially started to function on 1st January 1993. The support for the European project reached unprecedented levels – 71% of Europeans considered EU membership a good thing, whereas only 7% – a negative one. The momentum generated at that time led to the signing of another international agreement – the Maastricht Treaty, under which the Monetary Union was created, and the European Union replaced the European Communities. The pre-accession process for the countries of the region of Central and Eastern Europe also began in the early 1990s, preparing them for EU membership.

The history and economic results, as will be demonstrated in the next chapter of the study, show that the effective way out of the crisis is not protectionism but economic liberalism. We are now at the same point as 40 years ago: relations between member states have been strained for more than a decade, an unexpected crisis has worsened the overall situation and the loss of competitiveness. To overcome this impasse, counter-intuitive steps must be taken, and the internal market must be relaunched. The impulse for this initiative must once again come from entrepreneurs.

3. ECONOMIC PERSPECTIVE

At the time this study is being written, Europe is facing the second wave of the coronavirus pandemic. Restrictions and the closure of the economy lead to enormous costs and weaken Europe's economic position. The way out of this economic crisis lies, however, not in the return to national economies, but in closer economic integration of Europe. This chapter shows what benefits economic integration brought about in the past and what further integration can add to them.

The starting point for this analysis is the year 1985, when "White Paper, Completing the Internal Market" was written. At that time, the GDP of the US amounting to USD 4.339 trillion was almost twice the GDP of the Community – USD 2.678 trillion. The next five years saw a significant economic recovery in Europe, which allowed it to overtake the United States in 1990 with a result of USD 6.5 trillion to their USD 5.963 trillion.

The creation of a common market generates economic growth for several basic reasons. First of all, removing the barriers to trade means reducing costs. Secondly, the communitarisation of the market allows for the achievement of economies of scale. Third, the common market leads to greater competition between enterprises, and thus increases their efficiency. Nevertheless, the statement that the creation of the common market is fully responsible for the dynamic economic development would ignore other changes that took place at the turn of the 1980s and 1990s, and thus would be unjustified. Therefore, to assess the exact impact of European integration on economic growth, economists used a gravity model and calculated the cost of the inexistence of European integration.

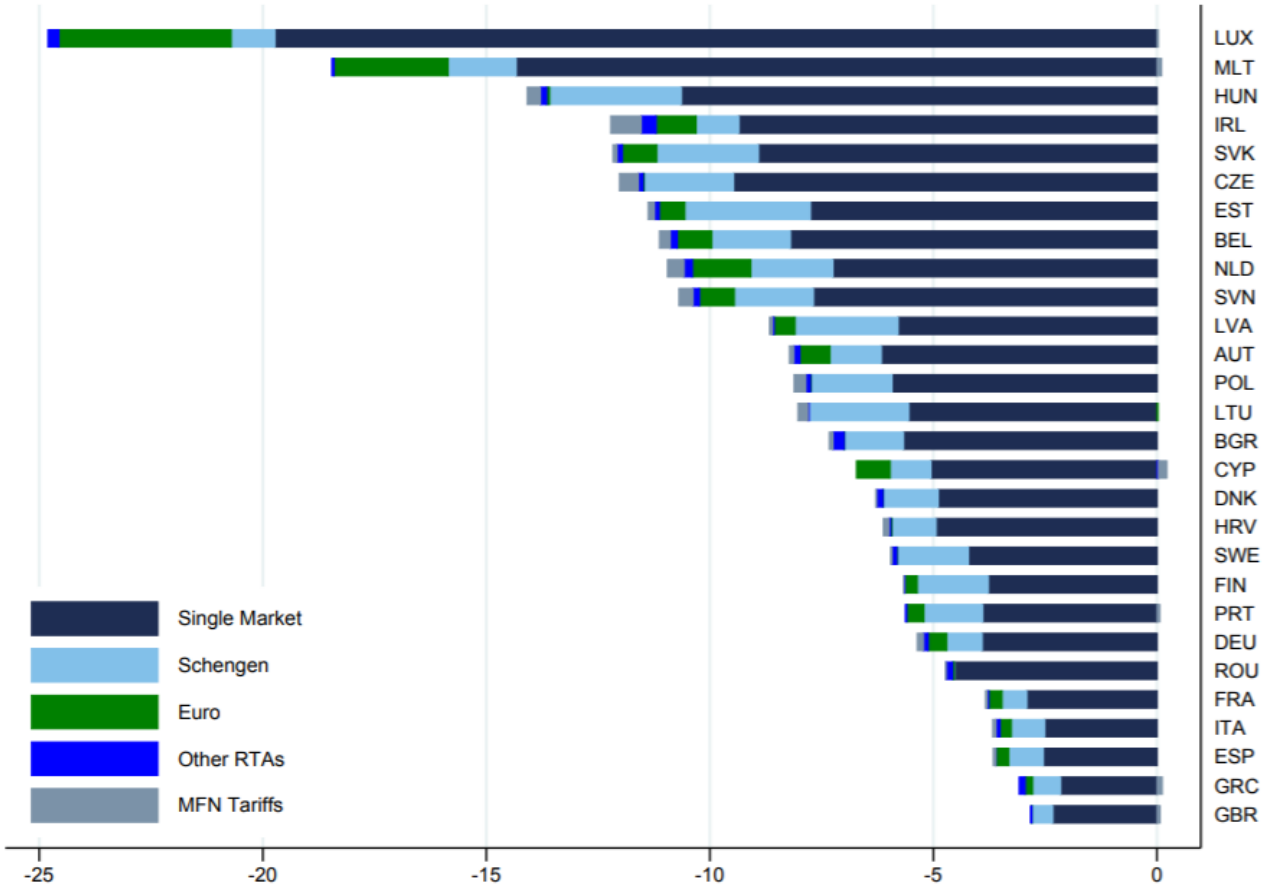
A team of researchers led by Prof. Gabriel Felbermayr, Ph.D. analysed the impact of the various stages of integration on the trade exchange of products and services over the period 2000-2014. Using the sectoral gravity model, the researchers calculated that membership in the single market increased trade in goods by about 36%, and trade in services by as much as 82%. The establishment of the common market has also led to a 34% decrease in trade costs. Moreover, membership in the euro area brought additional savings in trade costs of 1.7% for goods and 9.8% for trade in services. The results of the counterfactual analysis also show that the total regression of European integration would reduce intra-EU trade by 40%[30].

Moreover, research by Felbermayr et al. shows that the collapse of the single market would lead to a decline in *per capita* income by approximately 4% across the EU. Researchers also found large differences between countries, which are shown in Figure 1 below. Countries that are smaller, poorer, and more centrally located would suffer the most from the break-up of Europe. Likewise, countries that are larger, richer, and on the periphery of Europe would suffer less. By comparison, countries such as Luxembourg, Hungary or Ireland would lose 24%, 21% and 13% of their real GDP respectively, while countries such as Germany, France or Italy would respectively lose 5%, 4% and 4% of their real GDP[31]

[30] *Gabriel Felbermayr, Jasmin Katrin Gröschl, Inga Heiland, Undoing Europe in a New Quantitative Trade Model, in ifo Working Paper 250 (2018) 1-60.*

[31] *Gabriel Felbermayr, Jasmin Katrin Gröschl, Inga Heiland, Undoing Europe in a New Quantitative Trade Model, in ifo Working Paper 250 (2018) 1-60.*

Fig. 1: Percentage change in real GDP at different stages of integration, base year 2014.



In terms of *per capita* income, the smallest countries would lose the most: Luxembourg (-19.73%) and Malta (-14.33%). They would be followed by the new member states: Hungary (-10.6%), the Czech Republic (-9.5%), Slovakia (-8.9%), Slovenia (-7.7%), Estonia (-7.8%) and Poland (-5.9%). Similar negative effects would be experienced by small member states: Austria (-6.2%), Belgium (-8.2%), Ireland (-9.4%). Still negative, albeit much smaller effects, would be felt by large economies such as Germany (-3.9%), France (-2.9%), Italy (-2.5%) and the United Kingdom (-2.3%). Interestingly, the analysis by Felbermayr et al. showed that the US would only suffer a slight negative impact from the lack of the European Union (-0.02%), while a number of third countries would benefit from the lack of the EU: Switzerland (+0.5%), Taiwan (+0.3%), Korea (+0.2%), Turkey (+0.2%) and China (+0.1%)[32].

These results are consistent with the analysis of economists David Comerford of *Chancellor's Fellow of the Fraser of Allander Institute* and Prof. Sevi Rodriguez Mora from the University of Edinburgh. Together, they showed that in the absence of the EU, the GDP of member states would fall by an average of 1.7%, while the decline in GDP for small countries would be much greater, oscillating around 5%. Comerford and Rodriguez Mora also carried out the opposite experiment, namely calculating the impact of greater integration on the economies of member states. If barriers to the intra-EU trade were reduced to the level typical for a single-country market, the GDP of the EU would increase by 10.9%. In this case, similarly, smaller member states would see the biggest changes, while for larger member states, there would be less profits[33]. Comerford and Rodriguez Mora conclude

32 *Ibid.*

33 *David Comerford and Sevi Rodriguez Mora, The gains from economic integration: The EU has still a long way to go, https://voxeu.org/article/gains-economic-integration-eu (last access 07.11.2020).*

their study by saying that contrary to what populists say, "there is still a long way to go to reach full economic integration, a United States of Europe" [34].

The possibility of deeper economic integration in Europe has been the subject of various other studies. A recent report by the European Parliament shows that removing remaining barriers to the free movement of goods and services could generate an additional EUR 713 billion by the end of 2029[35]. Furthermore, in its research, AmCham EU analysed three potential scenarios corresponding to the next steps of economic integration. Their calculations show that the most ambitious scenario may generate a third of the benefits that have arisen as a result of economic integration since the early 1990s. In terms of numbers, the average GDP *per capita* would permanently increase by 0.6%. This increase would correspond to an average additional income of EUR 120-370 per household. A better functioning single market would attract an additional EUR 17 billion (0.6%) of investment *per annum* and generate 1.3 million more jobs[36].

Overall, economic integration accounts for a significant part of economic growth in Europe and a better functioning single market will bring further benefits in terms of generating investment and jobs. However, withdrawal from integration poses a threat to the maintenance of the net economic benefits brought about by integration. In the next chapter of this study, we will look at protectionist practices that threaten the common market.

34 *Ibid.*

35 *European Parliament, Europe's two trillion euro dividend: Mapping the Cost of Non-Europe, 2019-2024, https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631745/EPRS_STU(2019)631745_EN.pdf (last access 07.11.2020).*

36 *AmCham EU, The EU Single Market: Impact on Member States, http://www.amchameu.eu/sites/default/files/amcham_eu_single_market_web.pdf (last access 07.11.2020).*

4. PRACTICAL PERSPECTIVE

The previous chapters of this study dealt with protectionism and the macro-scale common market. This chapter discussed the micro-scale and describes what protectionism looks like in practice. In this chapter, we focus on the typology of measures, European Commission research on barriers in the common market, and research by the Union of Entrepreneurs and Employers on the opinions of entrepreneurs.

4.1. Typology of protectionist measures

Classical protectionist measures include customs duties, quantitative quotas, subsidies, local content requirements, and administrative practices[37].

Customs duties are taxes on imports from foreign markets. In 1968, the Customs Union was created, under which customs duties between member states were abolished, and the European Commission was given exclusive competence to determine customs duties for products imported into the Community[38].

Quotas directly limit the amount of goods that can be imported into a given country. Mostly, quantitative quotas are enforced through the issue of import licenses to certain companies. However, voluntary export restraint is another protectionist measure in this sense, one that can be imposed by the exporting country or can be enforced by applying political pressure on a country to stop the export of goods.

Subsidies are another classic protectionist measure. Direct payments from governments to entrepreneurs make it possible to support selected branches of the national economy, putting foreign competition in an inferior position. Thus, subsidies distort the equilibrium of competition in the common market. Therefore, competition law, which regulates, inter alia, the granting of subsidies is also the exclusive domain of the European Commission. Member states are required to notify any and all state aid to the Competition Directorate General, which then examines its compliance with Art. 107 of the Treaty on the Functioning of the European Union, which allows subsidies only under specific circumstances[39].

37 *Arthur Guarino, The Economic Effects of Trade Protectionism, https://www.focus-economics.com/blog/effects-of-trade-protectionism-on-economy (last access 07.11.2020).*

38 *In addition to the EU member states, the EU Customs Union also includes Andorra, San Marino and Turkey. This means that these countries gave up the possibility of shaping their own trade policy in favour of a better negotiating position that the European Commission has in talks with third-party countries.*

39 *Art. 107 §3 TFEU states that the following instances can be declared compliant with the internal market:*
a) aid to promote the economic development of regions with an abnormally low standard of living or regions with severe underemployment, and regions referred to in Art. 349, taking into account their structural, economic, and social situation;
b) aid to promote the execution of important projects of common European interest or to remedy a serious disturbance in the economy of a member state;
c) aid to facilitate the development of certain economic activities or certain economic regions, as long as they do not alter trading conditions to an extent contrary to the common interest;
d) aid to promote culture and heritage conservation, as long as it does not alter the conditions for trading and competition in the Union to an extent contrary to the common interest;
e) other categories of aid that the Council may define with a decision, acting on a proposal from the Commission

Local content requirements set the threshold at which part of a product must be domestically produced, thus restricting the imports of goods[40].

Protectionism can also manifest itself in more subtle forms – through administrative practices. Such actions may take various forms, from the requirement of additional certificates, greater meticulousness in enforcing regulations with regard to foreign companies, or more frequent inspections. Although the administrative procedure does not have to show irregularities, it requires time and resources, which effectively makes it harder for foreign companies to conduct business on given markets

4.2. Research by the Union of Entrepreneurs and Employers on the opinions of Polish, Czech and Slovak entrepreneurs regarding protectionism within the European Union

In March 2020, the European Commission, chaired by Ursula von der Leyen, presented "*Communication on identifying and addressing barriers to the Single Market*"[41]. This document contains 13 crucial barriers from the perspective of an entrepreneur or a consumer. Moreover, the Commission identified five root causes of these barriers[42]. The following subsection briefly summarises the results of these studies.

<u>13 main barriers to the single market</u>

1. Businesses report difficulties in obtaining information – not only on market opportunities and potential trading partners, but also on relevant regulatory requirements.
2. Businesses report onerous and complex administrative procedures related to sales of goods or services in another member state.
3. Businesses complain about unequal access to public procurement.
4. Businesses report inefficiencies related to additional technical requirements, standards and other regulations in some sectors at national level (contrary to EU requirements).
5. Businesses in the service sector have consistently reported problems with requirements regarding market entry and running business operations in relation to specific types of activities or professions.
6. The experiences of consumers and entrepreneurs show that their orders for cross-border purchases are rejected or redirected.
7. Consumers report a lower level of confidence in cross-border online purchases.
8. Consumers are the target of cross-border fraud.
9. Businesses report cumbersome procedures resulting from differences in tax systems and administration.
10. Businesses report problems with commercial/civil dispute resolution and collection of payments.
11. Businesses report problems with registering business operations in another member state.
12. Businesses report problems with skills shortages and mismatches.
13. Many of the businesses surveyed states that language constituted a barrier.

<u>The causes of barriers to the common market</u>

The Commission by means of research identified five root causes of the primary barriers to the single market: regulatory choices at EU and national level; transposition, implementation, and enforcement of provisions of the law; administrative capacities and practices in the member states; the general business and consumer environment; and non-public policy root causes such as language or culture.

40 *World Trade Organization, Technical Information on Rules of Origin, https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm (last access 07.11.2020).*

41 *European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Identifying and addressing barriers to the Single Market, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0093&from=EN (last access 07.11.2019)*

42 *For full research results, see: supra.*

First of all, regulatory choices at the EU and national level constitute a major barrier to the single market. The so-called *gold plating*, an excessively stringent implementation of EU law, plays a key role here. *Gold plating* takes place in the case of minimum harmonisation of the law, that is, when EU standards do not regulate a given matter in an exhaustive manner, but set minimum standards and leave room for member states to adopt higher standards. Importantly, the minimum harmonisation applies in many areas important for the single market, such as consumer protection. A symptom of *gold plating* is an excessively rigorous implementation of EU law that leads to discrepancies between the member states and hinders the functioning of the common market. The Commission also notes that a commonplace reason why member states resort to this practice is to create additional protection, in the form of over-regulation, for their markets and businesses, and reminds that additional regulation is only warranted provided it is necessary and proportionate to the execution of legitimate public interests.

Secondly, barriers to the common market can largely arise from the erroneous transposition of directives. Problems with the correct, full, and timely implementation of EU directives lead to legal fragmentation and weaken the functioning of the single market. Moreover, inconsistent application of EU regulations by member states not only limits the possibility of exercising the freedoms of the common market for consumers and entrepreneurs, but also hinders the development of the common market. For example, the squandered potential related to the correct implementation of the provisions of the Services Directive or the Directive on the recognition of professional qualifications.

Third, insufficient administrative capacity and practices are also factors of a restrictive nature for the single market. The negligence in the development of a digital administration limits access to information and impedes formalities related to the sales of goods or services in another member state. Furthermore, the Commission also considers insufficient coordination between national administrations and EU institutions as well as the unsatisfactory expertise of national officials to be important causes of barriers to the single market.

Another source of problems on the common market, according to the Commission, is the member states' general business and consumer environment. Many of the identified barriers do not have a clear cross-border nature, but rather are difficulties of an administrative nature related solely to the specificity of a given member state. For example, building permits or the tax system create difficulties in running a business in another member state.

The fifth and final root cause of the single market barriers identified by the Commission is unrelated to EU or national policy. The factors identified here include: a wider cultural context, consumer preferences, language barriers, logistical problems, macro- and microeconomic conditions, as well as infrastructural constraints. Interestingly, the Commission's findings are consistent with the results of the research conducted by the Union of Entrepreneurs and Employers, presented below.

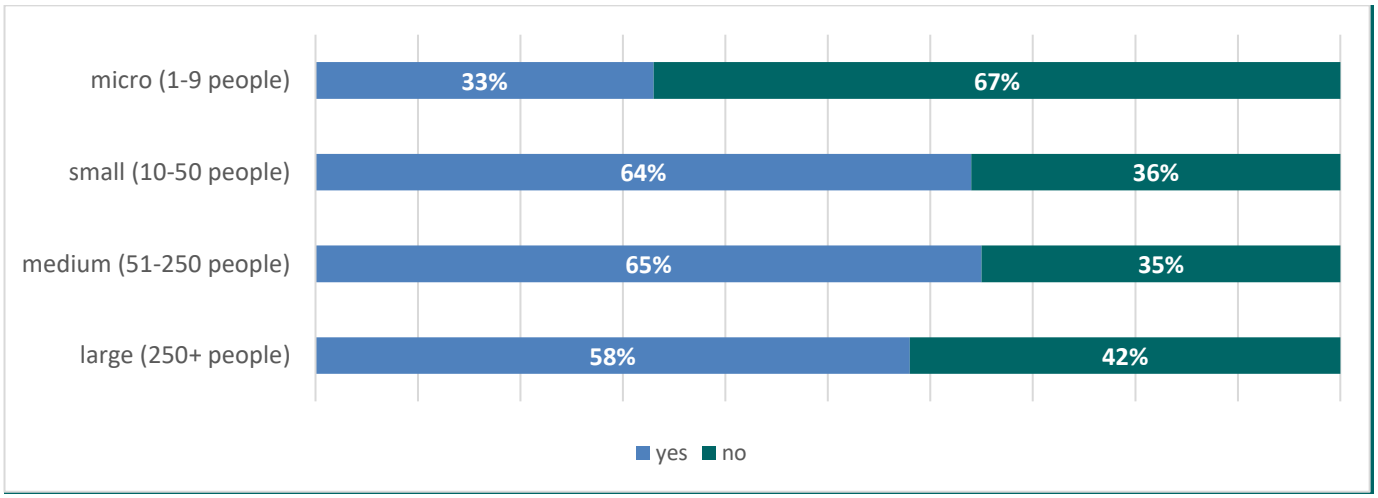
4.3. Research by the Union of Entrepreneurs and Employers on the opinions of Polish, Czech and Slovak entrepreneurs regarding protectionism within the European Union

Research commissioned by the Union of Entrepreneurs and Employers in October 2020 showed that protectionism is a significant problem for entrepreneurs from the Central and Eastern European region. The main aim of the survey was to identify the opinions of representatives of companies from Poland, the Czech Republic and Slovakia on protectionist practices within the EU. Over 1,151 entrepreneurs from Poland, the Czech Republic and Slovakia[43] participated in the research, and the sample structure was selected to be representative of the companies in terms of company size[44].

A necessary condition to recognise the existence of protectionism is to operate on a market other than domestic. Almost half of the respondents have experience in operating on intra-EU markets. 48% of entrepreneurs admit that their company is currently operating (34%) or operated in the past (14%) on other EU markets. This index is similar among respondents from all 3 surveyed countries, although among representatives of Czech and Slovak companies, there are slightly more companies that currently operate in the EU, and among Polish companies – that conducted such activity in the past. Regardless of the country, it can be seen that companies that operate more often on other EU markets are larger companies (employing at least 10 people), from the manufacturing sector (from the service sector the least often), as well as those that have been present on the market for at least 3 years.

The research showed that **46% of all respondents had heard of protectionist practices in EU markets,** and the awareness of protectionist practices was strongly correlated with the experience of operating on EU markets. Companies that operate or operated on other EU markets have heard about the problem of protectionism within the EU significantly more often than companies that have never operated on other EU markets. Henceforth, the awareness of this aspect is higher among companies employing at least 10 people, from the manufacturing industry, operating on the market for 3 to 10 years (Slovakia is an exception here, as entrepreneurs from the "youngest" of companies are also relatively aware of the problem).

Fig. 2a. Protectionism awareness depending on company size



43 *773 entrepreneurs from Poland, 158 from the Czech Republic and 220 from Slovakia participated in the research.*

44 *In Poland, 59% of the respondents are micro-companies, 19% are small companies, 15% are medium-sized, and 7% are large companies. In the Czech Republic, 42% of the surveyed companies are micro-companies, 18% are small companies, 20% are medium-sized, and 19% are large companies. In Slovakia, 57% of the respondents are micro-companies, 15% are small companies, 14% are medium-sized, and 14% are large companies. Parity was maintained in each country.*

Fig. 2a. Protectionism awareness depending on company size

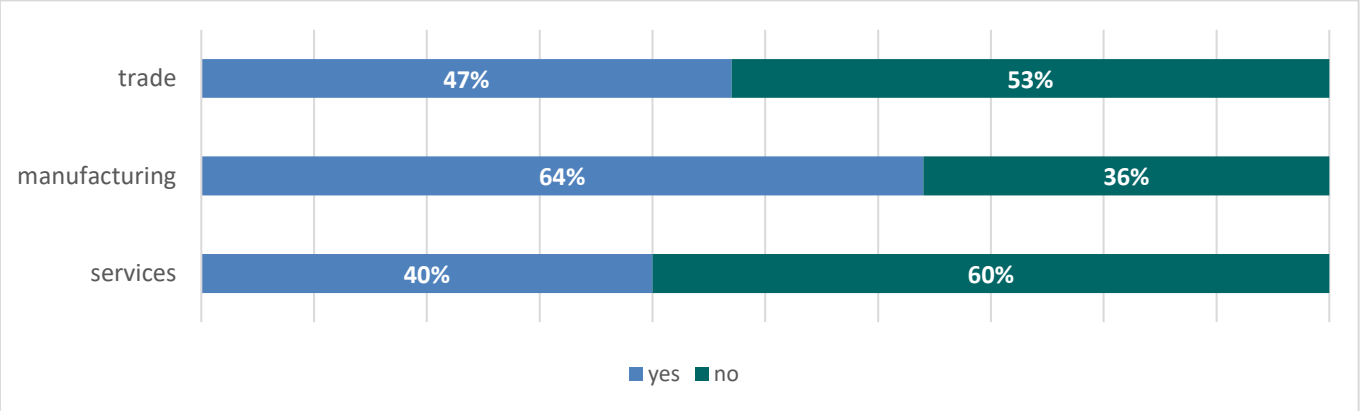
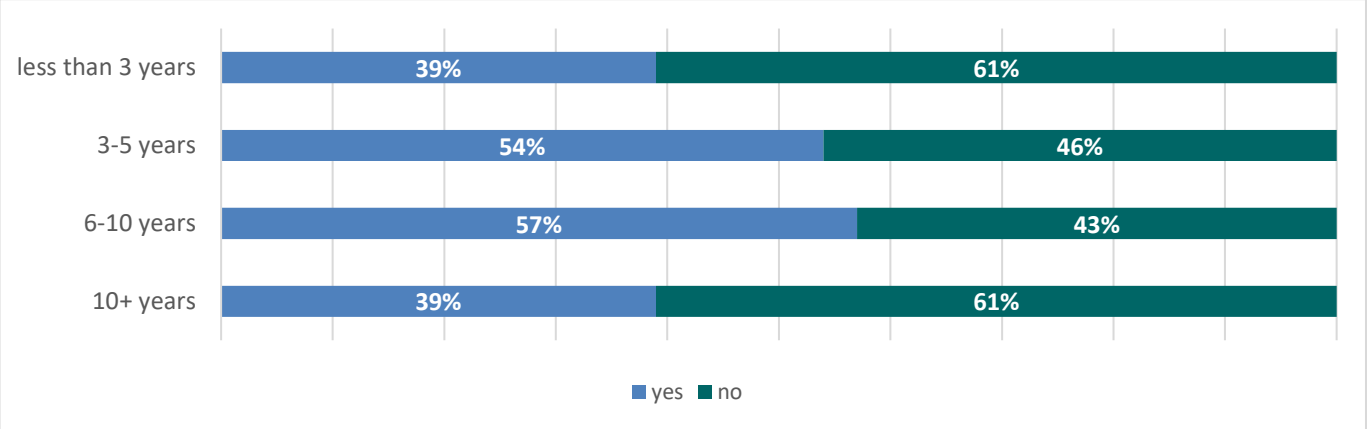


Fig. 2b. Protectionism awareness depending on industry



Moreover, almost 40% of the surveyed companies have come into contact personally or through business partners with the application of protectionist practices within the European Union. **Approximately every fourth respondent admits that they have had contact with protectionist practices on EU markets.** Representatives of companies from Poland and the Czech Republic have had such experiences considerably more often than those from Slovakia. As in the case of knowledge of the problem, there is a strong correlation between exposure to protectionism within the EU and experience in operating on EU markets, and thus – the size, industry, and the company's position on the market.

Fig. 3a. Experience of protectionism among companies that currently operate on other EU markets

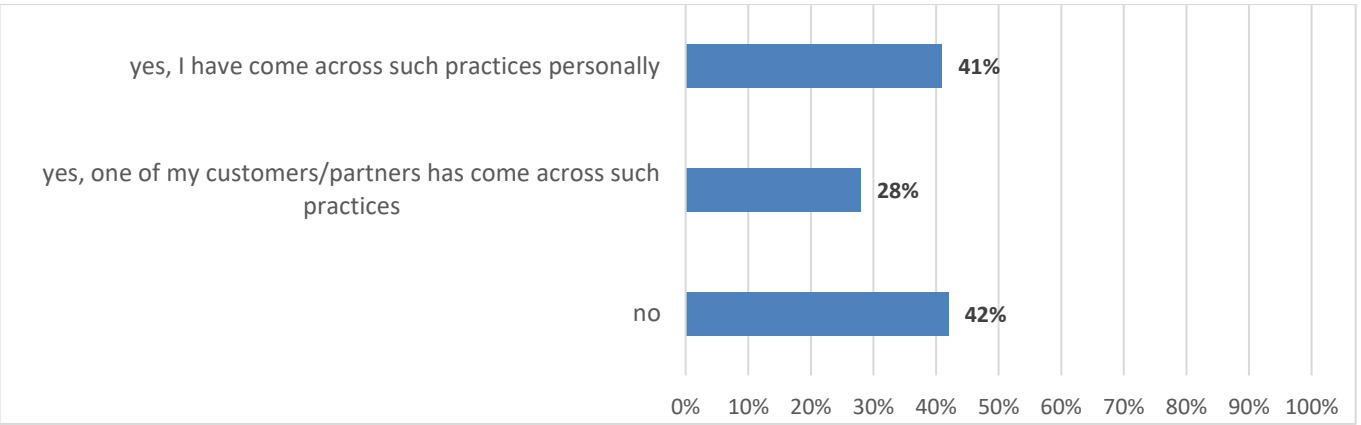


Fig. 3b. Experience of protectionism among companies that operated on other EU markets in the past

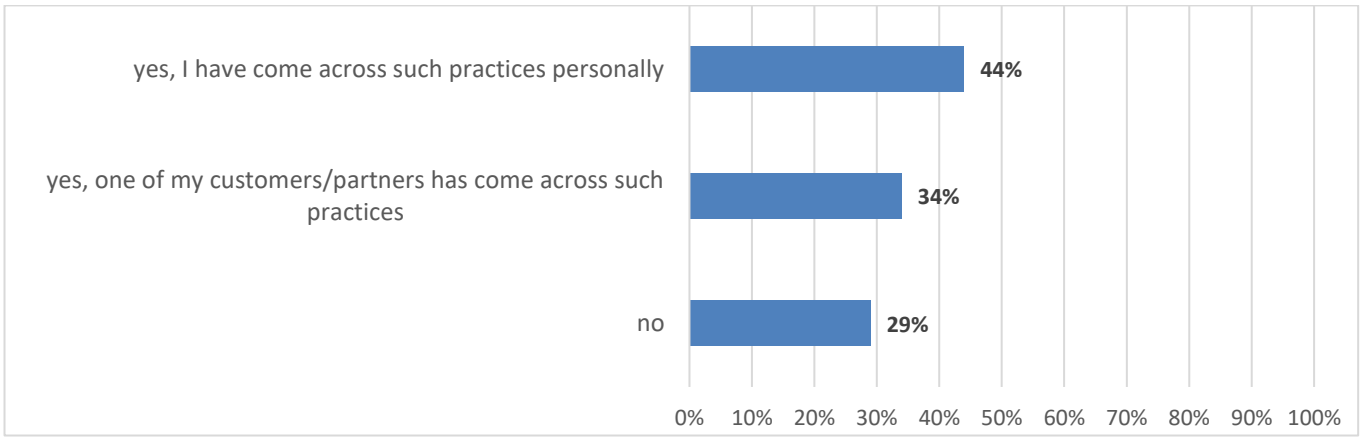
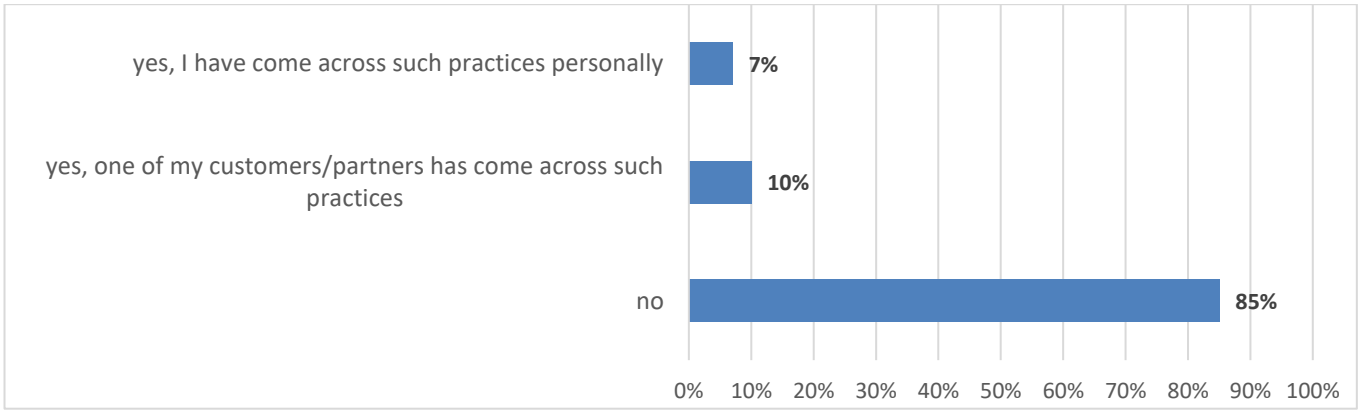


Fig. 3c. Experience of protectionism among companies that have not operated on other EU markets



Manufacturing companies most often encountered protectionist measures among the analysed industries – 42% of respondents from this industry replied that they had personally experienced protectionism, while 29% stated that they had been exposed to protectionism via a business partner. The second most affected industry is trade, where 27% of respondents had direct contact with protectionism, while another 20% said that their business partners experienced protectionist measures. The service industry remains relatively least affected, where 17% experienced protectionism directly and another 17% came across protectionism via a business partner.

Administrative and clerical difficulties as well as the requirement to present additional documents (certificates, attestations etc.) turned out to be the most frequently used practices. One in every five respondents admits that they encountered administrative and clerical difficulties in connection with their activities in other EU countries. Representatives of companies from the Czech Republic declare contact with such practices more often (30%), while those from Slovakia least frequently (13%). Medium-sized companies and enterprises that operated or operate in other EU countries are also characteristic of entities that experienced this problem more often.

Almost every third respondent from the sector of small (30%), medium (31%) and large (26%) companies encountered a requirement to register a company in a given country or sell their products or services under a different brand.

In terms of commonness, another practice that was encountered by almost the same number of respondents (19%) was the requirement to present additional certificates, attestations, documents,

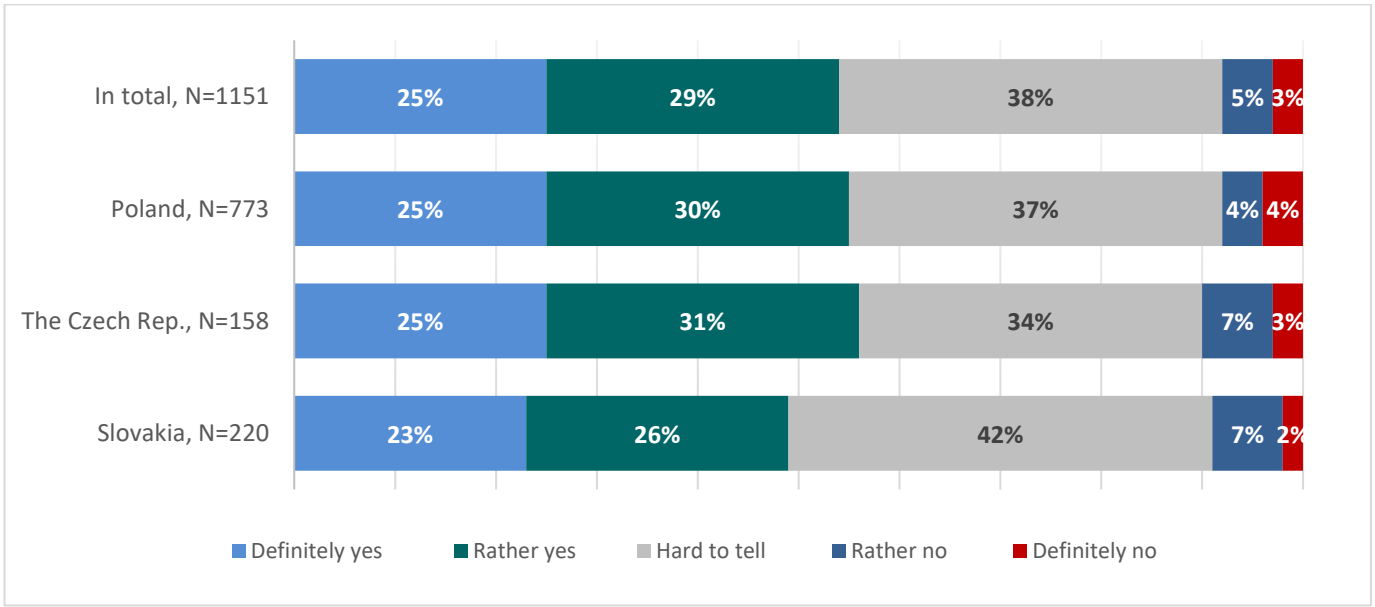
and to impose higher requirements on foreign companies than on domestic ones. This difficulty is more often indicated by small and medium-sized companies (in the case of Poland and the Czech Republic – also by large companies), companies from the manufacturing industry, with experience in operating on other EU markets (in the case of Poland and the Czech Republic – at present, and in the case of Slovakia – those that operated in the past). It is also noteworthy that a small percentage of respondents came across the requirement to pay employees the minimum wage of a given country.

Among the protectionist practices listed by respondents, one should also highlight the following quotations:

- *"With a request for additional documents not provided for by law, a deliberate extension of the decision-making process."* (respondent from Poland)
- *"Failure to respect industry rights, even though the EU regulations clearly state that they are valid throughout the whole EU"* (respondent from Poland)
- *"Selection procedure where the main criterion is that you are not a foreign company. Unfavourable criteria for companies from abroad."* (respondent from the Czech Republic)
- *"Providing more favourable business conditions for domestic companies."* (respondent from Slovakia)

Approximately the half of representatives of companies believe that protectionist practices damage competitiveness, and curbing them would increase the foreign activity of domestic companies. **Regardless of the country where the company operates, ca. half of the surveyed entrepreneurs from Poland, the Czech Republic and Slovakia believe that protectionist practices have a negative impact on the competitiveness of companies.** This opinion is more often expressed by respondents from companies employing at least 10 people (the Czech Republic is an exception where micro-entrepreneurs are of the same opinion), and from the production sector. In the case of Polish companies, it can also be seen that the respondents from companies currently operating on the EU market are most strongly convinced this is true. **A similar percentage of respondents (54%) feel that with a reduction in the use of protectionist practices, the foreign activity of companies could increase.** Representatives of large companies and those that currently operating on EU markets agree with this assumption most often.

Fig. 4. Perceived impact of protectionism on the competitiveness of a respondent's company on other EU markets



Opinions on the enforcement of fundamental freedoms by EU bodies are divided. 35% of respondents (a similar percentage in all three countries) believe the EU bodies sufficiently monitor the observance of fundamental freedoms on the EU market, while 23% are of the opposite opinion. Respondents from Czech and Slovak companies disagree more often than Polish ones (the third group often do not have an opinion on this subject).

At the same time, companies that have experience in operating on other EU markets evaluate more positively the actions of EU bodies, which may suggest that they perceive the source of the problem elsewhere, for instance, in the actions of the authorities of a given country.

The results of the research above describe the symptoms of a disease that the European economy is suffering from. The use of traditional protectionist measures such as customs duties inside the EU is impossible, still the study shows that protectionism within the EU still exists, but takes a more sophisticated form. Companies most often encounter difficulties in the form of administrative practices, as national authorities place additional requirements on companies from other member states. The next chapter presents the legal countermeasures for such behaviour on the common market.

5. LEGAL PERSPECTIVE

5.1. Right to free movement of goods

There are many forms of economic integration. Free trade areas, a customs union, the single market and an economic union with a single internal market and monetary union[45]. According to Article 38 TFEU, the European Union is a customs union. The single market, which includes an area without internal frontiers, is established by Article 26(2) TFEU. Nevertheless, certain restrictions to the free movement of people, goods, services and capital still exist, and the rich body of judicial decisions of the Court of Justice of the European Union (CJEU) allows for the definition of what is a protectionist measure or, in the terminology of EU law, a measure incompatible with the internal market. This chapter presents the framework for the free movement of goods. To this end, the following issues will be discussed: the legal theory underpinning the internal market, the scope of the provisions on the free movement of goods, the prohibition of customs duties, the prohibition of discriminatory internal taxation, the prohibition of quantitative restrictions on imports, the prohibition of quantitative restrictions on exports, and restrictions on the free movement of goods.

Legal theory underpinning the internal market

In the legal theory that underpins the internal market, we can distinguish between positive and negative integration. Negative integration is the elimination of barriers between countries and is enshrined in the prohibitions established by the Treaties[46]. Examples of this are Article 30 TFEU, which prohibits import and export duties or charges having equivalent effect, or Article 34, which prohibits quantitative restrictions and all measures having equivalent effect. Positive integration, on the other hand, takes place when Community rules are laid down to redress regional imbalances. The best example of this form of integration is Article 114 TFEU, which gives the European Parliament and the Council the power to adopt measures for the approximation of the provisions of the member states which have as their object the establishment and functioning of the internal market.

Scope of the provisions on the free movement of goods

The scope of the provisions on the free movement of goods is fundamental to Community Law. This scope is determined on three grounds: the definition of goods, the existence of cross-border elements, and the application of the rules to member states.

First of all, the concept of goods was defined by the European Court of Justice (ECJ) as early as 1968 in the case of *Commission v Italy (C-7/68)*, when the Commission asked Italy to abolish the export tax on products of artistic, historical, archaeological or ethnographic value. Italy did not abolish the tax, claiming that cultural items of artistic, historical or archaeological value cannot be considered as goods. Furthermore, Italy justified its refusal by the need to protect national treasures.

45 *Jan Barcz, Prawo Unii Europejskiej Zagadnienia systemowe (European Union law. Systemic issues), Wydawnictwo Prawo i Praktyka Gospodarcza (2003).*

46 *In particular, the following Articles: 30, 34, 35, 45(2), 49, 56 TFEU.*

The ECJ was faced with the task of defining the concept of goods and the scope of Community Law. The definition adopted at the time proved to be very broad: goods are all products whose value is expressed in money and which can be the subject of transactions. The subsequent cases have confirmed the broad interpretation adopted by the Court: waste[47], electricity[48] or coins that have fallen out of use[49] are considered as goods.

Secondly, for Community Law to be applicable, there must be a cross-border element. This means that the application of Community Law will be triggered by the fact that the goods cross the border between member states. Community Law is therefore not applicable in purely national situations. Nevertheless, it is worth noting that in the *Carbonati case (C-72/03)* the ECJ decided that Article 30 TFEU, which prohibits customs duties, also applies to charges levied when crossing internal borders of member states. Carbonati is one of many examples where the ECJ adopts a deliberate interpretation of the Treaties to enable the creation and functioning of the common market.

Third, the provisions on the free movement of goods are addressed to member states. For example, the removal of customs duties is addressed to member states, not to natural or legal persons. These rules have vertical direct effect, which means that citizens can invoke the European standard against the country. Important in this respect is the doctrine of the emancipation of the state, according to which the ECJ accepted that under the notion of a state the central government should be understood as well as regional governments[50], professional regulatory bodies[51], and private organisations supported by the state[52].

<u>Prohibition of customs duties</u>

The Article 30 TFEU, mentioned before, prohibits import and export duties or charges having equivalent effect. The distinction between the two categories was already made in 1969 in the *Commission v Italy (C-24/68)* case, where Italy collected a charge on exports, which was then used to finance the collection of trade statistics. Consequently, Italy considered that the charge levied did not qualify as a duty and the prohibition of Article 30 TFEU did not apply. Nevertheless, the ECJ considered this charge to be a charge having equivalent effect to a customs duty, and gave an interpretation of this provision by stating that "any monetary charge, whatever its amount and however it may be applied, imposed unilaterally on domestic or foreign goods by reason of their crossing a border and which is not a customs duty in the strict sense, shall constitute a charge having equivalent effect [...] even if it is not imposed on the state, is not discriminatory or protective in effect and if the product on which the charge is levied does not compete with any domestic product"[53]. Thanks to this definition, the Court deprived member states of the possibility to conceal duties in the form of other charges. However, the Court revised its approach in the *Commission v Germany case (C-18/87)*, where the German regional authorities charged a fee on the import of live animals into the country to cover the costs of veterinary checks required by Directive 81/396. At that time, the ECJ considered that the fee would not constitute a charge having equivalent effect to a customs duty within the meaning of Article 30 TFEU "if it relates to a general system of internal charges applied systematically and according to the same criteria to domestic products and imported products [...], if it constitutes payment for a service actually provided to the operator in proportion to the service [...], or again, subject to certain conditions, if it involves checks carried out in order to fulfil obligations imposed by Community Law [...]".

47 *Commission v Belgium (C-2/90).*
48 *Commune d'Almelo and others v NV Energiebedrijf Ijsselmij (C-393/92).*
49 *Regina v Ernest George Thompson, Brian Albert Johnson I Colin Alex Norman Woodiwiss (7/78).*
50 *Joint cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña.*
51 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) (C-171/11).*
52 *Commission v Ireland (C-249/81).*
53 *Commission v Italy (C-7/68).*

Prohibition of discriminatory internal taxation

While Article 30 TFEU regulates taxes levied when crossing borders, Article 110 complements the legal framework of the common market by regulating national taxation and prohibiting discriminatory internal taxation. Article 110 TFEU[54] facilitates the free movement of goods by ensuring "complete neutrality of internal taxation as regards competition between domestic products and products imported from other Member States"[55] . In accordance with the division of competences, member states retain autonomy in tax policy, but taxes levied under national competence must comply with Community Law, including Article 110 TFEU. In the *Chemial Farmaceutici* case, the ECJ considered that the application of different tax rates to different categories of products is allowed, provided that such differentiation is based on objective criteria, such as the type of raw materials used, or the production processes applied. The choice of criteria must not conflict with Community Law or the requirements of policies adopted within the Community[56]. Where different tax rates are not imposed on the basis of objective criteria, the Court will examine whether the first indent of Article 110 TFEU, which regulates the taxation of similar goods, or the second indent of Article 110 TFEU, which regulates the taxation of competing goods, applies to the infringement. Extensive judicial decisions of the ECJ allow to determine when goods are similar or when there is a competitive relationship between them, and fiscal measures infringe that relationship[57]. In the case of an infringement, the Member State is obliged to remove the discriminatory effect and to eliminate the fiscal measures.

Prohibition of quantitative restrictions on imports

Another pillar of common market law is the prohibition of quantitative restrictions. Under Article 34 TFEU, quantitative restrictions on imports and all measures having equivalent effect are prohibited between member states. The European Court of Justice gave a partial interpretation of Article 34 TFEU in the *Geddo case (C-2/73)*, where it decided that the prohibition of quantitative restrictions includes measures which constitute a total or partial restriction, depending on the circumstances, on imports, exports or goods in transit. In contrast, the first ruling defining measures having equivalent effect to a quantitative restriction was given by the Court in *Procureur du Roi vs. Benoit o Gustav Dassonville (C-8/74).* The case concerned the Dassonville brothers, who imported Scotch whisky from France into Belgium. Under Belgian Royal Decree No 57 of 2nd December 1934, importers were obliged to present a certificate of authenticity issued by the product manufacturer. Unable to present certificates from the manufacturer, the Dassonville brothers issued their own certificates, for which they were subsequently accused of breaking the decree and falsifying documents. In their defence against the ECJ, the Dassonville brothers argued that the requirement for a certificate restricts the free movement of goods. The Court agreed with the defence, ruling that "any provisions of a member state relating to trade which may hinder, directly or indirectly, actually or potentially, intra-Community trade must be regarded as a measure having an effect equivalent to quantitative restrictions"[58]. The ECJ has thus established a very broad definition of the measures having equivalent effect, which became known history as the Dassonville formula.

54 *Article 110 (1) TFUE: 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. Article 110 (2) TFEU Moreover, no Member State shall impose on the products of other Member States any internal taxation which indirectly protects other products.*

55 *Cooperativa Co-Frutta Srl v Amministrazione delle finanze dello Stato (C-193/85).*

56 *Chemial Farmaceutici SpA v DAF SpA (C-140/79).*

57 *There is a rich body of judicial decisions to determine what similar products and products in competition are. See: Case 106/84 Commission v Denmark, Case 170/78 Commission v United Kingdom.*

58 *The different rationale of the Dassonville formula has been defined in subsequent cases, see: Case 249/81 Commission v Ireland, Case 21/84 Commission v France, Case 265/95 Commission v France, Case 177/82 Criminal proceedings against van de Haar, Joined Cases C-321-324/94 Pistre, Case C-325/00 Commission v Germany, Case 249/81 Commission v Ireland.*

Further fundamental principles were forged in the case of the *Rewe-Zentral A.G. v the Bundesmonopolverwaltung für Branntwein* commonly known as *Cassis de Dijon*[59]. This case concerned the French blackcurrant liqueur, Cassis de Dijon, whose alcohol content was between 16 and 22%. The law in force in Germany at the time stipulated that the liqueur must contain a minimum of 25% alcohol. On that basis, the German company Rewe-Zentral A.G. was not permitted to import Cassis de Dijon liqueur into the Federal Republic of Germany. Rewe-Zentral A.G. appealed against the decision, and a question was referred to the ECJ for a preliminary ruling during the proceedings. In this judgment, the Court introduced the principle of necessary requirements and the principle of mutual recognition of standards. The first principle confirmed the right of a member state to introduce restrictions on the movement of goods on the grounds of an important and justified public interest. Restrictions were only possible if the conditions laid down in Cassis were met, that is, if there was no harmonisation at Community level, if restrictions were applied in a non-discriminatory and proportionate manner, if restrictions were necessary to protect the public interest, and if the Community interest in the free movement of goods was taken into account. The burden of proof lies with the member state. The second principle means that goods that have been manufactured and placed on the market legally in one member state must be placed on the market in another member state.

The application of the Dassonville formula was subsequently restricted by the *Keck* case[60]. The plaintiffs in this case were Bernard Keck and Daniel Mithouard, who were prosecuted for price dumping. In the preliminary ruling procedure, the managers accused the national legislation of being incompatible with European Union law. The CJEU decided at the time that "it must be stated that, contrary to previous judicial decisions, the application to products from other member states of national provisions which restrict or prohibit certain sales, in so far as they apply to all interested operators established in national territory and concern in the same way, from a legal and factual point of view, the marketing of national products and products from other member states, does not hinder, directly or indirectly, actually or potentially, trade between member states within the meaning of the judgment of 11th July 1974 in Case 8/74 Dassonville". Thus, the *Keck* Court divided the MHEE (measures having equivalent effect) into rules on the product (marking, weight etc.) and rules on how to sell it (marketing conditions). *Keck* is an exception to *Dassonville* in the sense that rules governing how goods are sold, which apply in the same way to all traders, treating domestic as well as imported products in the same way, will not have a similar effect to quantitative restrictions and will therefore comply with EU law. The distinction created in the *Keck* case provoked a serious debate.[61] The ruling was criticised by, among others, CJEU Advocate General Jacobs in the *Leclerc-Siplec case (C-412/93)*, who stated that the criteria created are unclear and too formalistic and that the discrimination test is inappropriate, since market access may be hindered by non-discriminatory measures[62]. In the immediate aftermath of the CJEU judgment, the criteria laid down in *Keck* were strictly adhered to, while in subsequent case law the Court departed from the formalistic approach[63].

The most recent trend in judicial decisions regarding MHEE (measures having equivalent effect) was set by the *Trailers* case. Recalling its previous judicial decisions, the Court stated that "measures adopted by a member state the purpose or effect of which is to give less favourable treatment to products originating in other member states must be considered as having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC [*now Article 34 TFEU*],

59 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (C-120/78).*

60 *Joint Cases C-267/91 and C-268/91, criminal proceedings against Bernard Keck and Daniel Mithouard.*

61 *Laurence Gormley, Reasoning Renounced? The Remarkable Judgment in Keck & Mithouard?, w European Business Law Review 5 (1994) 63-67.*

62 *Ibid.*

63 *Joint cases C-34/95, C-35/95 and C-36/95 Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95), C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP), C-322/01 Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval.*

as must the measures referred to in paragraph 35 of this judgment [product requirements]. That concept also covers any other measure which impedes access to the market of a Member State for products originating in other member states". Thus, the CJEU redefined the concept of the measures having equivalent effect as a means of hindering market access[64].

Prohibition of quantitative restrictions on exports

The judicial decision discussed above is based on Article 34 TFEU and regulates quantitative restrictions on imports. Quantitative restrictions on exports are instead prohibited under Article 35 TFEU[65]. Initially, Article 35 was only applied to measures applied in a non-uniform manner (as opposed to measures applied in the same way)[66]. However, over time, ECJ case law evolved towards measures applied in the same way and thus towards greater compliance with Article 34. In *Gybrechts (C-205/07)*, the ECJ held that a measure applied in the same way falls within the scope of Article 35 and can be justified by public interest requirements, which sounds like the Cassis de Dijon formula applied to exports. In case *C-161/09 Kakavetsos Fragkopoulos*, on the other hand, the CJEU applied the Dassonville formula[67].

Restrictions on the free movement of goods

Cassis de Dijon formula introduced the principle of the necessary requirements as a potential justification for a measure having equivalent effect to a quantitative restriction. However, this is not the only way in which member states can enforce their regulatory autonomy.

Under Article 36 TFEU, member states may apply measures having equivalent effect to quantitative restrictions where justified on general, non-economic grounds[68]. Article 36 also contains a closed catalogue of the grounds that allow for a derogation, and these are the grounds:

- public morality,
- public order,
- public safety,
- protection of human and animal health and life or plant protection,
- protection of national treasures of artistic, historical or archaeological value,
- protection of industrial and commercial property[69].

Interestingly, the derogation in Article 36 TFEU applies only to measures having an effect equivalent to quantitative restrictions, namely Articles 34 and 35 TFEU. However, the ban on fiscal restrictions in Article 30 TFEU is absolute in nature and such a restriction cannot be excluded on the grounds of Article 36 TFEU.

The second sentence of Article 36 TFEU clarifies that prohibitions and restrictions should not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states. On the one hand, Article 36 TFEU is an expression of the division of competences between the EU and the member states. On the other hand, this provision illustrates the tensions present in Community Law between the imperative of the common market and the competences of the member states.

64 *Case C-142/05 Åklagaren v Percy Mickelsson and Joakim Roos.*

65 *Article 35 TFEU: Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between Member States.*

66 *This distinction is illustrated in Case 15/79 P.B. Groenveld BV v Produktschap voor Vee en Vlees, which concerns the Dutch Ordinance on the processing and preparation of meat of 5th December 1973, prohibiting any producer of processed meat products from holding and processing meat from solipeds, namely horsemeat. The company Groenveld B.V. conducted activities in the scope of import and trade of horsemeat. Greonveld wanted to extend its activity on production of sausages from horsemeat, but did not obtain permission for it under the above Regulation. The company appealed against the decision and, in the course of the proceedings, the Dutch court asked the ECJ for a preliminary ruling as to whether the prohibition in the Regulation is contrary to Article 34 of the Treaty establishing the European Economic Community, now Article 35 TFEU. The interpretation given by the ECJ at the time was that "[Article 35] concerns national measures which have as their specific object or effect the restriction of the structure of exports and thus establish a difference in treatment between the domestic trade of a member state and that of foreign trade in such a way as to confer a particular advantage on the domestic production or market of that state at the expense of the production or trade of other member state. This is not the case with prohibition such as the one in question, which is objectively applied to the production of a particular type of goods without distinction according to whether the goods are intended for the domestic market or for export. Thus, the Court decided that Article 35 EEC only applies to measures applied in a non-uniform manner.*

67 *Kakavetsos Fragkopoulos Ae Epexergasias Kai Emporias Stafidas v Nomarchiaki Aftodioikisi Korinthias (C-161/09).*

68 *European Parliament, Free movement of goods, https://www.europarl.europa.eu/RegData/etudes/fiches_techniques/2013/030102/04A_FT(2013)030102_EN.pdf (last access 07.11.2020).*

69 *There is an abundance of judicial decisions to determine which criteria must be met in order for measures having an equivalent effect to qualify for any of the above, and hence the derogation in Article 36 TFEU. See Case 34/79 Henn and Darby, Case C-54/99 Église de Scientologie, Case 72/83 Campus Oil, Case C-322/01 Doc Morris, Case 7/68 Commission v Italy, Case 15/74 Centrafarm v Sterling Drug.*

Maintaining the right balance between meeting these two competing objectives was and remains crucial from a political perspective. The necessary condition for the creation of the common market was the support of member states. Naturally, if the establishment of the single market meant a complete loss of ability to regulate the quality or standards of the products placed on the markets, member states would not support such a project. The CJEU plays a key role in balancing these interests.

The issue of legal harmonisation at Union level is also important in the context of derogation. Taking into account the fact that an increasing proportion of legislation in the EU is subject to harmonisation, the regulatory autonomy of the member states in the area covered by harmonisation is naturally lower. This has consequences at the level of Article 36 TFEU. Maximum harmonisation may make it impossible to obtain a derogation from Article 36 TFEU[70]. In the case of minimum harmonisation, however, the possibility of obtaining a derogation will depend on whether the harmonisation measure has left room for national regulation in this area[71,72]. Thus, it will be much more difficult to justify restrictions on the free movement of goods in matters subject to EU harmonisation. It should also be added that, in the case of harmonisation, it is not possible to invoke judicial decisions to justify the measures having equivalent effect[73].

In contrast, in the absence of harmonisation, member states may justify measures having equivalent effect to quantitative restrictions through the exemptions already discussed in Article 36 TFEU, as well as the principle of essential requirements established in the *Cassis de Dijon* case. There is no exhaustive catalogue of mandatory requirements. They derive from the evolving case law of the CJEU, which includes, amongst others, the following overriding requirements:

- effectiveness of fiscal surveillance[74],
- fairness of commercial transactions[75],
- consumer protection[76] protecting however "rational consumers"[77],
- environmental protection[78],
- fundamental rights, but "member states may not, however, invoke the freedom of expression of their officials to justify an obstacle and thus avoid their own responsibility under [Union] law"[79],
- maintaining press diversity[80].

Economic considerations cannot in themselves constitute grounds for restricting the free movement of goods[81].

Furthermore, in order to justify measures that have a restrictive effect on trade, member states must also demonstrate that such measures are proportionate in relation to their legitimate objective. The proportionality test thus provides objective criteria to determine whether a balance has been

70 *See: Case C-573/12 Ålands Vindkraft.*

71 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (C-120/78).*

72 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd. (C-1/96).*

73 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (C-12/78).*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH (C-370/93).*

78 *The following: Case 302/86 Commission v Denmark – Deposit and return scheme; Case C-28/29 Commission v Austria – Transport restrictions, Case C-204-208/12 Essent Belgium.*

79 *Schmidberger v Austria – environmental protests (C-112/00).*

80 *Case 368/95 Familiapress.*

81 *Peter Olivier, When, If Ever, Can Restrictions on Free Movement Be Justified on Economic Grounds?, in European Law Review 41 (2016) 147-177.*

struck between the legitimate interests of member states on the one hand and the free movement of goods on the other. In order for the proportionality requirement to be met, the measures must meet three criteria:

- adequacy – measures must be appropriate to achieve a legitimate objective,
- necessity – the measures chosen are the least intrusive, albeit effective, means to achieve the objective,
- when applying the test, it should also be taken into account whether the measures in question do not unduly affect the free movement of goods (proportionality *sensu stricto*).

Summary

This section presents the legal framework governing the free movement of goods in the European Union. Common market law contains a wide range of prohibitions and does not allow the application of: import and export duties or charges having equivalent effect, discriminatory taxation of products from other member states, quantitative restrictions and measures having equivalent effect to quantitative restrictions on imports and exports. The extensive body of judicial decisions of the EU Court interprets the rules and makes it possible to determine precisely which measures are compatible with and threaten the internal market.

When we compare the types of protectionist measures presented in chapter three with those prohibited under Community legislation, we see that EU law creates a comprehensive legal framework that can capture most of these types of measures.[82] Customs duties and quantitative quotas are expressly prohibited by Articles 30, 34 and 35, while local content requirements and requirements for additional certificates or charges may be qualified as measures having equivalent effect. However, for several reasons, the current legal framework may not be sufficient to address all the problems of the common market. First of all, the current rules may not be sufficient to address the problem of greater meticulousness in enforcement against foreign companies. Secondly, the ban does not mean automatic compliance and there are several hundred infringement proceedings against member states every year, even though these proceedings are based not only on measures restricting intra-EU trade but also on erroneous transposition of directives[83]. Third, the brief review of judicial decisions presented above does not reflect the real level of complexity of the body of judicial decisions of the CJEU, and yet it shows doubts of interpretation, such as the *Keck* case. In other words, the level of complexity of judicial decisions may give rise to disputes. Furthermore, some protectionist behaviour originating from the EU institutions is completely absent from the legal framework presented – the revision of the Posted Workers Directive can be cited as an example here. New initiatives aimed at improving the quality of the provisions of the common market and improving the application of the law are presented in the next part of this chapter. However, an analysis of the problem of protectionism within the EU institutions, illustrated by the example of posted workers, is presented in chapter five of this study.

5.2. New initiatives

Despite the existence of sophisticated legislation and the extensive body of judicial decisions of the CJEU, the common market still leaves much to be desired. Improving the quality of the single market is a constant priority for the European Commission and was the subject of the document published in March 2020 in the form of a long-term action plan for better implementation and enforcement of single market legislation[84]. This part of the study examines the initiatives presented by the Commission and makes proposals how to improve them.

82 *Subsidies not yet mentioned in chapter three are regulated by the Directorate-General for Competition at EU level. State aid is an element of competition law, and therefore it will not be discussed in this study.*

83 *European Commission, Single Market Scoreboard, https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm (last access 07.11.2019).*

84 *European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Long term action plan for better implementation and enforcement of single market rules, https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-94-F1-EN-MAIN-PART-1.PDF (last access 07.11.2020).*

Long term action plan for better implementation and enforcement of single market rules

As part of the long-term plan, the European Commission has envisaged six main areas of action: (i) expanding knowledge and raising awareness of single market law, (ii) improving transposition, implementation, and application of EU law, (iii) making the best use of the preventive mechanism, (iv) detecting instances of non-compliance in the single market and at the external borders, (v) enforcing the rules more effectively within the Community, and (vi) improving the handling of infringement cases on the part of member states.

First, as part of expanding knowledge and raising awareness of single market law, the Commission envisages a number of actions such as: providing more detailed guidance to national authorities, improving access for businesses to information on rules and requirements, creating an online platform to facilitate compliance with product requirements, providing training for national judges and other legal professionals, building capacity in national public administrations, and building the capacity of public procurement professionals and enhancing cooperation between national authorities. The actions presented should be assessed positively as they address the problem of national authorities' and businesses' lack of awareness of the opportunities and benefits of single market law, in particular among SMEs. In the context of the free movement of goods, the proposal to update the guidelines for the application of Articles 34 to 36 TFEU and the publication of guidelines on the principle of mutual recognition are particularly interesting.

Secondly, on transposition, the Commission proposes to create a structured dialogue and partnership for better implementation of EU legislation. This would consist of a structured dialogue with member states already during the transposition period. The aim is to prevent fragmentation of EU law at national level and to simplify the compliance procedure. In this context, the Commission plans to place particular emphasis on reducing the use of *gold plating*. Moreover, workshops on implementation are planned in order to reduce the burden on member states and to increase the efficiency of the transposition processes. In the assessment of the Union of Entrepreneurs and Employers, the proposed actions may significantly counteract the practice of excessively strict implementation of Union law and should therefore be assessed positively.

Thirdly, the Commission plans to implement actions to improve the use of the preventive mechanism. These actions will include: improving *ex ante* assessments of restrictive regulations in accordance with the directive on the proportionality analysis, improving the functioning of the Single Market Transparency Directive, preventing new barriers to the provision of services in the single market, and unlocking the full potential of the notification mechanism of the e-Commerce Directive. A tighter application of the Proportionality Directive is particularly promising in the context of the functioning of the single market.

This instrument obliges member states to carry out an in-depth analysis of the proportionality of national regulations before they enter into force, and thus will make it possible to find excessively restrictive regulations before they create obstacles for businesses and consumers.

Then, as part of the detection of incompatibilities in the single market and at external borders, the Commission envisages rationalising single market information systems and creating an online enforcement platform, working towards a more effective fight against counterfeit and illegal products, more effective enforcement in the agri-food chain, and developing labelling and traceability systems. There are currently several systems for exchanging information on illegal industrial and consumer products, leading to a lack of coordination between the various services. Therefore, the proposal to introduce common IT systems for EU institutions and member states could lead to greater efficiency and facilitate cross-border business.

By the same token, the Commission intends to improve the enforcement of EU legislation by creating an EU product compliance network and improving the operation of the SOLVIT system. Under SOLVIT, national officials assist free of charge in resolving disputes arising from the incorrect application of Union law. There are currently various instruments for resolving such disputes, but awareness of their existence is low, and their multiplicity leads to fragmented enforcement. The Commission's aim is to strengthen SOLVIT and to make it the default tool for the out-of-court resolution of disputes arising from the application of common market law.

The Commission also plans to improve the handling of disputes concerning member states failing to fulfil obligations. The following actions are envisaged in this respect: better prioritisation of enforcement, clarity and consistency in the handling of cases, better use of the EU Pilot system, and regular periodic package meetings. The proposal to supplement the written exchange of information within the framework of infringement proceedings with so-called package meetings devoted to particular areas of the common market is important in this context. The aim of these meetings is to help member states find solutions that are compatible with Community law and to avoid an escalation of disputes. These meetings seem to be a form of out-of-court settlement of disputes between the Commission and the member states, which may lead to faster and more effective implementation of single market law.

In the assessment of the Union of Entrepreneurs and Employers, the proposals presented by the European Commission are comprehensive and far-reaching. One should welcome the fact that the Commission has recognised and analysed in depth the problems affecting the common market. If implemented correctly, the proposed measures may lead to greater harmonisation of national legislation and more effective enforcement of EU legislation. Nevertheless, a serious threat to the success of these measures is their dependence on the goodwill of member states. Most of these measures, however well planned and implemented, may remain in vain in the absence of commitment on the part of national administrations and national political decision-makers. Therefore, in the next part of this study, the Union of Entrepreneurs and Employers makes proposals to improve and complement them.

The proposals of the Union of Entrepreneur and Employers for better functioning of the common market

Decisive steps are needed to improve the functioning of the common market and to restore the competitiveness of the European economy. That is why the Union of Entrepreneurs and Employers calls for the appointment of an Internal Market Ombudsman and the introduction of a horizontal effect of the free flow of goods.

First of all, we call for the appointment of an Internal Market Ombudsman. The Ombudsman's task will be to inform entrepreneurs operating in other member states about their rights under Community law and to issue positions defining those laws. The main mission of this office will therefore be to improve the functioning of the single market.

The Internal Market Ombudsman is to be an EU official, independent of national administration. This person will be employed by the European Commission, but will not work in its headquarters in Brussels, but in the European Commission Representations in the member states. Entrepreneurs who encounter protectionist practices will thus be able to apply to one of the 33 Representative Offices located in cities in the member states.

The Internal Market Ombudsman should be an independent office, not linked to any Directorate-General. This is how the Legal Service of the European Commission, which is answerable directly to the President of the European Commission, and the European Semester Officers, who are delegated by the Secretariat-General of the European Commission, currently operate.

The Internal Market Ombudsmen must have two key competences: to have a thorough knowledge of the law of the single market and to know the law of the member state where they are to work. An ombudsman equipped with such skills will, on the one hand, be able to understand the problems faced by foreign entrepreneurs in a given member state and, on the other hand, be able to provide reliable advice and authoritative legal opinions on EU law.

The Internal Market Ombudsman is needed despite the Commission's efforts to strengthen SOLVIT's position. Firstly, SOLVIT's main weakness is that it relies on national officials. As research by the Union of Entrepreneurs and Employers and by the European Commission has shown, member states are still engaging in practices which are contradictory to the law of the single market in order to generate short-term benefits for themselves. Secondly, one of the barriers to the single market identified by the Commission is the insufficient level of expertise among national officials. Thirdly, SOLVIT cannot intervene in disputes between businesses. The appointment of the Internal Market Ombudsman addresses all these weaknesses.

Unlike the Financial Ombudsman or the Consumer Ombudsman that we are familiar with through the Polish legal system, the Internal Market Ombudsman could not join court proceedings. Although this would increase the efficiency of the office, it would mean that the European Commission would support Europeans against member states, which would have negative political consequences and would be counter-productive. However, the Ombudsman could have soft intervention powers, such as the right to ask questions to national administrations and entrepreneurs. Furthermore, on the basis of these activities, the person holding this office would draw up an annual report on compliance with the rules of the single market in a given member state, which would be presented directly to the President of the European Commission. This would be complementary to the existing *Single Market Scoreboard*, which monitors the functioning of the single market from a systemic perspective (implementation of directives etc.).

Secondly, we call for the introduction of a horizontal direct effect of free movement of goods. Currently, private individuals can only invoke the provisions of the free movement of goods in disputes with the administration. The introduction of a horizontal direct effect will open the way for these provisions to be invoked in disputes between private individuals before national courts, thereby revolutionising the functioning of the single market.

The principle of direct effect, established in the *Van Gend en Loos* case in 1963, allows private parties to invoke European standards before the courts of the member states, even if the standard has not been correctly implemented or not at all (after the transposition deadline) in national law. The range of standards that can be invoked by individuals has been narrowed down to those that create clear, unconditional and not invoking additional measures, either national or Community-level, obligations for member states. Thus, regulations always have direct effect, whereas directives only when certain conditions are met.[85]

Within this principle, we distinguish between vertical and horizontal direct effect. The first regulates the relationship between individuals and the member state, which means that citizens can invoke the European standard against the country.

[85] *In the Van Duyn case, the Court considered that a directive has a direct effect if its provisions are unconditional and sufficiently clear and precise, and if an EU country has not transposed the directive within the prescribed period.*

The second regulates relations between individuals, which means that citizens can invoke the European standard in relation to each other. The vertical direct effect exists for all four freedoms. The horizontal direct effect of the free movement of workers, services and establishment was recognised by the CJEU decades ago. However, the Court has consistently refused the horizontal direct effect of the free movement of goods. The CJEU argues its position by stating that the right of movement of goods relates to the conduct of public institutions and not of individuals. This inconsistency in the CJEU's arguments is a source of criticism from academics, who show that, as a result, not all freedoms have the same scope of application[86].

Interestingly, in light of the principle of *effet utile*, Article 34 TFEU could have a horizontal direct effect. Kobler analysed the use of the principle of *effet utile* to establish the horizontal direct effect of Articles 45, 49 and 56 TFEU and divided it into four stages[87]. This analysis was adopted and applied by Krener to Article 34 TFEU:

1. The wording of Article 34 is neutral, which essentially allows private entities to be included among its addressees.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. The free movement of goods serves the objective of the internal market by ensuring free movement.
3. The functioning of the single market can be jeopardised not only by states, but also by private entities.
4. Consequently, Article 34 TFEU must apply to the conduct of private parties[88].

The likely reason why the CJEU avoids extending the direct effect of the free movement of goods to private individuals is the conflict with the right to freedom of business activity, guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union. However, an analysis of the possible threats to the functioning of the single market for private individuals allows the application of Article 16 of the Charter to be delimited. Known from judicial decisions and literature, the activities of private individuals threatening the single market are: strikes and blockades on import routes; private campaigns promoting the purchase of domestic goods; magazines which print only domestic advertisements; refusal of a quality check on foreign products by a private consumer organisation; or an insurance company which does not have a dominant position on the market and refuses to insure imported cars[89]. The common feature of these measures is their effect, that is, the refusal of market access. Excluding the protection of Article 16 of the Charter of Fundamental Rights to situations where the actions of private operators lead to a denial of market access would be in line with the latest trend stemming from the CJEU judicial decision initiated by the *Mickelsson case*.

The introduction of the horizontal direct effect of the free movement of goods will not only revolutionise the functioning of the single market, but will also lead to the systematisation of the CJEU judicial decisions and better protection of Europeans' rights. Given the need to rebuild the competitiveness of the European economy, the time has come to start exerting pressure on the CJEU to expand the doctrine of direct effect and to invest in strategic judicial proceedings which will lead to a change in the judicial decisions.

86 *Christoph Krenn, A missing piece in the horizontal effect "jigsaw": Horizontal direct effect and the free movement of goods, in Common Market Law Review 49 (2012) 177-215.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

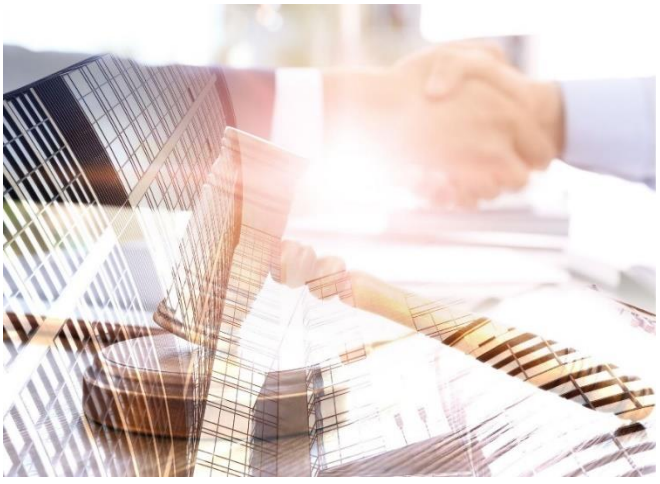
6. POLITICAL PERSPECTIVE

The revision of the Posted Workers Directive is an example of legal protectionism within the European Union. It is legal, because the Directive has been amended in accordance with EU law, justifying the restriction of the freedoms of the single market by an overriding public interest, which, in the opinion of the initiators of the amendment, was to ensure appropriate social standards and eliminate the phenomenon of so-called social dumping. Poland and Hungary demanded that the amendment of the Directive be annulled before the CJEU, arguing that it violates the freedom to provide services, hinders competition and deepens divisions among member states. Although we still have to wait for the judgment, it is important that the Advocate General has proposed rejecting the complaint. The case of posted workers illustrates the political dimension of protectionism within the EU. The aim of this chapter, however, is not to analyse the EU's political environment, but to propose actions that need to be taken so that Poland can defend its interest more effectively in the EU.

It should be noted that member states, although bound by the principle of solidarity, remain sovereign states, which have the right, and even the duty, to look after their own interests. It is also naïve to say that the issue of posted workers or other similar matters is directed against the interests of Poland. Rather, they are the result of consistently safeguarding the interests of one's own country – at whatever cost – and the ability to build a position and coalition within the European Union.

An attempt to quantify the phenomenon of protectionism within EU institutions was made by the Polish Economic Institute (Państwowy Instytut Ekonomiczny) in its report entitled "Economic Protectionism in the European Union". In our view, the authors put forward the partly accurate thesis that "in combating certain aspects of protectionism, the European Commission appears to treat certain member states or groups of countries unequally"[90]. While one can agree with the statement that the European Commission sometimes does not seem to apply an equal measure to all member states, the methodology adopted by the PIE raises some doubts (comparing the duration of certain phases of proceedings in relation to specific countries alone may not produce a reliable result, given the multiplicity of factors that may affect the length of proceedings).

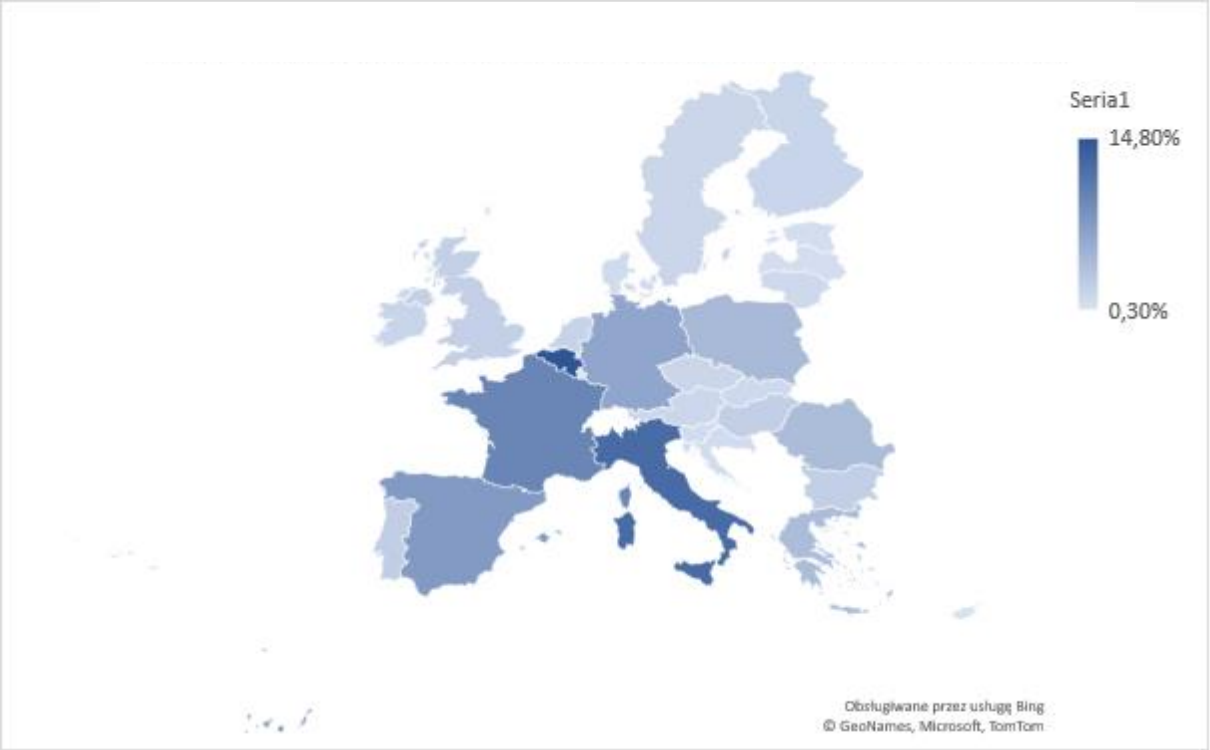
In the search for an alternative way of quantifying the problem of protectionism within the EU institutions, we have looked at personnel policy, namely the number of senior EU positions held by different nationalities. The chart below shows the percentage of posts occupied by a given nationality in the European Commission. The most numerous groups in the Commission are Belgians (14.8%), followed by Italians (12.5%), the French (9.8%), the Spanish (7.7%), Germans (6.5%) and Poles in sixth place (4.5%), Czechs represent 1.6% of the Commission staff, and Slovaks – 1.3%[91].



90 *Państwowy Instytut Ekonomiczny (Polish Economic Institute), Protekcjonizm gospodarczy w Unii Europejskiej (Economic Protectionism in the European Union), https://pie.net.pl/wp-content/uploads/2019/01/Raport_Protekcjonizm_gospodarczy_w_Unii_Europejskiej.pdf (last access 07.11.2020).*

91 *European Commission, Key HR Figures, https://ec.europa.eu/info/sites/info/files/european-commission-hr_key_figures_2020_en.pdf (last access 07.11.2020).*

Percentage of positions held by a given nationality in the EC[92]

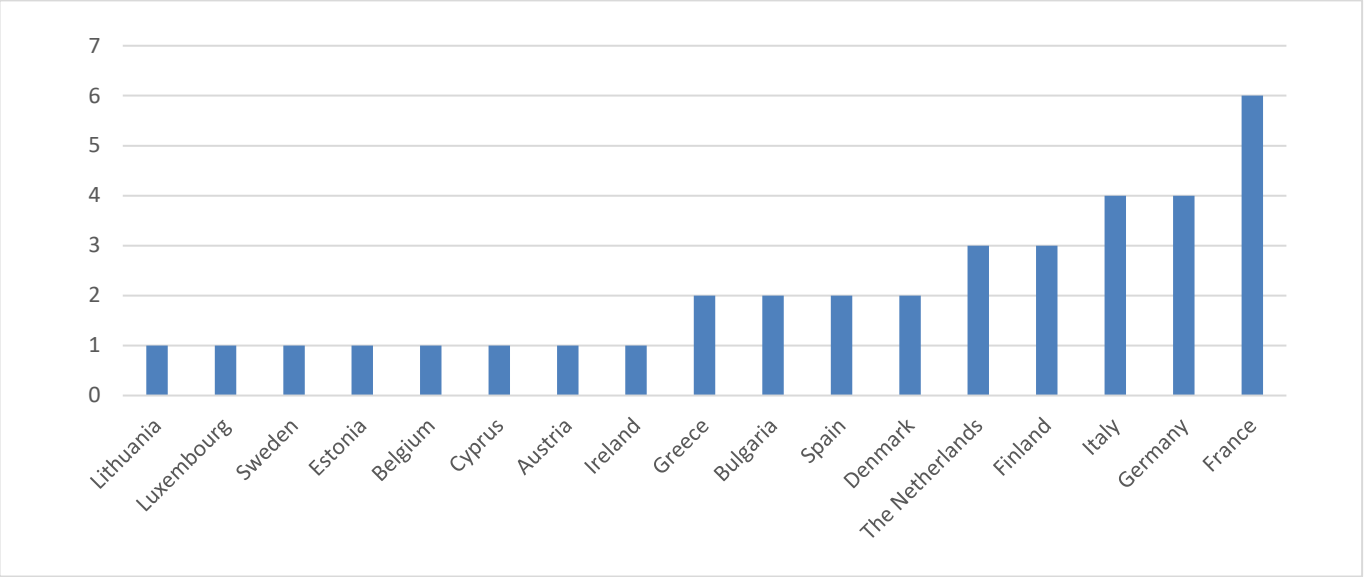


Ranked sixth in terms of the number of posts occupied, Poland has a relatively large informal representation in the EC structures. However, these numbers refer to the total number of all positions in the European Commission, from directors to officials to assistants. Although the number of positions held is important, senior positions are crucial for European policymaking.

The most senior official of the European Commission after the Commissioner is the Director-General. The chart below shows how many officials of what nationality hold these positions. The French are the most represented group and hold 6 positions. Germans and Italians hold 4 positions each, the Dutch and the Finnish 3 positions, the Danish, the Spanish, Bulgarians and Greeks – 2 positions each, and the Irish, Austrians, Cypriots, Belgians, Estonians, Swedes, Luxembourgers and Lithuanians – 1 position each, while there is not a single Pole among the Directors-General. This shows that despite the relatively large number of Poles in the European Commission, their significant influence on shaping European policy is considerably scarce.

92 *Own study based on: European Commission, Key HR Figures, https://ec.europa.eu/info/sites/info/files/european-commission-hr_key_figures_2020_en.pdf (last access 07.11.2020)*

Fig. 6: EC Directors-General by nationality[93]



One of the reasons why Poland is in such a bad position is the systematic neglect of personnel policy in Polish diplomacy and public administration in terms of EU institutions[94]. The ineffective system of appointing positions, the lack of support programmes for Polish candidates for EU institutions, and the preference of internal political disputes over the interests of Poland understood as the highest possible number of Poles in high EU positions, make it impossible to conduct an effective personnel policy[95].

Many positions in international institutions, including those of the Union, are available to so-called *seconded nationals* – people who are permanently employed in the diplomatic corps and public administration and who are then transferred to an international post. In order to qualify for these positions, candidates must demonstrate appropriate education, experience and pass through a series of demanding competitions and interviews. Usually, after successful competitions, the delegation must be accepted by the posting institution, in our case the Ministry of Foreign Affairs. Unfortunately, there are situations in which Polish candidates at this last stage of recruitment do not receive support, which gives rise to misunderstandings and tensions with EU institutions, and as a result hinders an effective personnel policy.

Good representation in the EU institutions does not happen by chance. Member states whose citizens hold numerous prominent positions have set up appropriate support programmes for this. The best organised countries include Italy and Spain[96]. Support programmes, together with active lobbying, translate into 12.5% of positions, including four Directors-General in Italian hands, and 7.7%, including two Directors-General in the hands of the Spanish. Until recently, these two nations were ahead of Germans[97]. Candidates put forward by our neighbours to the West had difficulties in passing the tests and passing interviews – that is why a training system was created in Germany to prepare candidates for EU competitions[98]. The solution has proved to be effective, as Germany today boasts 6.5% of posts and four Directors-General. Meanwhile, in Poland, no one has heard of such programmes,

93 *Own study based on: European Commission, The Official Directory of the European Union, https://op.europa.eu/pl/web/who-is-who, (last access 07.11.2020).*
94 *Magdalena Cedro, Szklany Sufit (Glass Ceiling), in Dziennik Gazeta Prawna 82 (2019) A18-A19.*
95 *Ibid.*
96 *Ibid.*
97 *Ibid.*
98 *Ibid.*

and the Ministry of Foreign Affairs funds only a few scholarships a year to the College of Europe, the forge of EU staff, where the cost of annual education amounts to EUR 24,000[99]. Moreover, the number of scholarships is steadily decreasing – in 2018, there were six, and a year later only five.

In order to build Poland's position in the European Union, it is necessary to fill senior official positions with Poles, to conduct a stable and substantive personnel policy for Polish diplomacy towards EU institutions and to shape coalitions. Of course, this task requires defining of a cross-party national interest. Nonetheless, in view of the fact that member states such as Germany, Sweden and the Netherlands are able to define such an interest, Poland has no other choice, but to defend itself effectively against protectionism from EU institutions and other countries.

99 *Justin Stares, To Brussels, on the gravy train, in The Guardian (2005), https://www.theguardian.com/education/2005/mar/01/internationaleducation news.highereducation (last access 09.11.2020)*

7. CONCLUSIONS

This study analysed the problem of protectionism in the single market from a historical, economic, practical, legal and political perspective.

The European Union has faced periods of crisis and rising protectionism in the past. However, history shows that the way out of crisis situations is towards greater economic liberalism and integration. The situation in which the EU finds itself today is in many ways reminiscent of the early 1980s, a decade of problems has damaged confidence between member states, an unexpected crisis has had serious negative economic and social consequences, and the competitiveness of the European economy is falling in comparison with partners from other parts of the world. Breaking this deadlock requires counter-intuitive action: protectionist practices must be replaced by the renewal of the single market, and the impetus for this initiative must once again come from entrepreneurs.

Studies using gravity models show that economic integration accounts for a significant part of economic growth in Europe. Economists have also calculated that there is still much room within the single market for deepening economic integration, which can bring benefits in the form of investments and jobs – key factors for restoring the competitiveness of the European economy.

The results of studies carried out independently by the European Commission and the Union of Entrepreneurs and Employers show that, despite the ban on protectionist measures such as customs duties, protectionism within the EU is present and usually takes the form of various administrative practices.

EU law offers tools to combat these practices. The right of free movement of goods within the EU contains a wide range of prohibitions and does not allow the application of: import and export duties or charges having equivalent effect, discriminatory taxation of products from other member states, quantitative restrictions and measures having equivalent effect to quantitative restrictions on imports and exports. The extensive body of judicial decisions of the European Court of Justice interprets the rules and makes it possible to determine precisely which measures are compatible with the internal market and which ones threaten it.

However, the current legal framework is insufficient to address all current protectionist practices. The European Commission, under Ursula von der Leyen's leadership, has submitted comprehensive proposals for action to improve the quality of the single market. If implemented correctly, these measures may reduce the degree of fragmentation of national legislation and lead to a more effective application of EU law. Unfortunately, we note that the effectiveness of most of the actions presented will depend to a large extent on the will and commitment of individual member states. That is why the Union of Entrepreneurs and Employers puts forward proposals to improve and complete them.

The Union of Entrepreneurs and Employers calls for the appointment of Internal Market Ombudsmen and the introduction of a horizontal direct effect of the free movement of goods. Every Representation of the European Commission should have an Internal Market Ombudsman. Independent of specific Directorates-General, the European Commission

official would help entrepreneurs struggling with problems in conducting cross-border business activity by informing them of their rights and issuing appropriate legal opinions. Furthermore, the introduction of the horizontal direct effect of the free movement of goods will allow private parties to invoke the law of the single market where the actions of other private parties restrict their access to the market of a given member state. To this end, pressure should start to be exerted on the CJEU to harmonise the body of judicial decisions and to invest in strategic judicial proceedings that will enable change.

Unfortunately, certain protectionist practices escape the current legal framework. The revision of the Posted Workers Directive is an example of legal protectionnism within the European Union and the result of Poland's inability to defend its own interests.

An analysis carried out by the Union of Entrepreneurs and Employers shows that, despite the relatively large number of Polish citizens in the European Commission, the real influence of Poles on shaping European policy is considerably limited by the lack of representation in senior official positions. The years-long neglect of personnel policy in the Polish administration and in relation to EU institutions is responsible, among other things, for this state of affairs. Reasonable and stable personnel policy is a prerequisite for building Poland's strong position within the Community. However, this requires that a cross-party national interest be defined. In view of the fact that other countries are able to undertake such a task, Poland has no choice but to follow in their footsteps.

The Union of Entrepreneurs and Employers

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ZPP

Partner

CBF NOWY ŚWIAT
GRUPA MARS

THE UNION OF ENTREPRENEURS AND EMPLOYERS