German and European Studies of the Willy Brandt Center at the Wrocław University

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Robert Grzeszczak [ed.]

Renationalisation of the Integration Process in the Internal Market of the European Union

Nomos

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Introduction

Robert Grzeszczak

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

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

The changes in international law are to a large extent related to the fact that the condition of states is deteriorating. This process has been gaining momentum since the turn of the century and has greatly affected global governance as well as the foundations which allow the international community to support the states (Fukuyama, 2004: 2). However, the research on modern global societies forecasts renationalisation and the escalation of conflicts between nations resulting from the fact that globalisation makes politics independent from borders and national states. With reference to the view described above, Juergen Habermas brings to mind Kant's hopes for a global internal policy(Habermas, 2011: 36-42). Samuel Huntington,

in turn, claimed that politics would be dominated by clashes between civilisations. International conflicts will result from cultural differences, which stem from religious divisions (Huntington, 1996: 81-125). These opinions are currently becoming reality in the EU (Grzeszczak, 2014: 98 and following). Jan Klabbers even argues that constitutionalisation, fragmentation and verticalisation form "*the holy trinity of international legal debate in the early 21st century"* (Klabbers, 2009: 18). These features are accompanied by disintegration and its derivative in the functional meaning – renationalisation of integration. Yet, Giuseppe Matinio, following the view of Fredrich Hayek, points out that while the process of law-making is not only targeted, but is also very often spontaneous, it is this feature that currently prevails in the process of constitutionalisation of the European Union (Martinico, 2012: 64).

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

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

Renationalisation of integration processes is understood as an attempt to redefine the relations of a state with the European Union and takes different forms: of political decisions and demonstrations, administrative practice or formal legislative amendments. Renationalisation is reflected particularly in the taking back of certain EU competencies by national authorities, strict state control of EU regulations by national parliaments and,

to a certain extent, also governments (especially in the area of economic and social policy as well as the regulations related to performance of work and economic activity) as well as the growing dominance of centralised politics. Such a state of affairs is inter-related with economic stagnation, financial crisis and increasing strains on social care.

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

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

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

consumer protection standards, infringement of the principle of non-discrimination in socio-economic terms.

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

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

This book is divided into seven chapters. In the first "*From integration to fragmentation? Late and incorrect transposition of the EU directives"* Jędrzej Maśnicki argues that the harmonisation of the Member States legal orders leads to the ongoing development of the integration tendencies. Within the area of the shared competences this process means the far-reaching limitation of the Member States competence to adopt legislation which does not have an EU-oriented origin. However, the so-called "positive integration" is diminished by several limitations. Member States are still empowered to choose the most adequate methods of adapting the national legal order to the requirements following from the EU legislation. The unavoidable processes of transposition and implementation also bring undesirable results; notably fragmentation of the EU legal framework. This is an effect of the "slow march" of the EU legislation, which is additionally postponed by the transposition delays. The negative results of the delayed transposition are evident in all areas covered by the EU legisla-

tion, which requires the implementation of measures necessary to ensure the effectiveness of the EU law within the national legal order. Even the fully-effective regulations (especially when they include the specific reference to the directives) are mostly dependent on the Member States' legislation. Moreover, even if the timely transposition is ensured, several compliance drawbacks caused by the incorrect transposition may be raised. This develops the on-going legislation and implementation cycle, which leads from the integration provided by the measures adopted by the EU institutions (e.g. directives, regulations, decisions) to the fragmentation caused by the different transposition and implementation practices amongst the Member States. Therefore, the complete legal unification within the EU is the "Holy Grail" of the European integration, but it is worth searching for it.

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

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

Issues concerning renationalization in the union's social rights is the subject of chapters by *Piotr Kwasiborski* and *Magdalena Gniadzik*.

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

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

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

of the Union and at the same time can lead to renationalisation of this policy.

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

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

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

Jędrzej Maśnicki[1]

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

Abstract[2]

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

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Integration through the EU legislation

One of the main specifics of the EU decision-making process is indicated by the fact that the existing legislation is the subject of constant evaluation and revision (Luchetta 2012: 561-562). Due to this process some directives and decisions are replaced by regulations[3] and numerous other acts are replaced by a single piece of legislation[4]. These tendencies appear to be additionally justified in the light of the already adopted "Better Regulation" agenda[5]. Moreover, the further development of EU legislation is made through highly detailed sectoral packages such as the recently published "Clean Energy for All Europeans package", the "Banking reform package" or the already adopted "Clean Air Policy Package". This package method of providing proposals is the result of the implementation of the legislative action plans, which constitute the most important part of the Commission's political agenda (Osnabrügge 2015: 242). One of the Commission's priorities is definitely to explore the EU's legislation in the new fields, within the competences, which would otherwise still be prescribed to the Member States (Haghighi 2008: 475). Moreover, as far as there are only a few Treaty-based limitations in the transfer of competences (e.g. Articles 194(2), 153(4), 168(7) of the TFEU), there is no limitation to completely diminish the Member State's competences in the shared competences area (Ciclet 2015: 252-255). Thus, it is of crucial importance to focus on the method of harmonisation and the scope of the EU-originated provisions, which empower the Member States to act.

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

3 See: COM(2016) 482 final, Brussels, 20.7.2016.

4 See: Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17–119.

5 COM (2015) 215 final, Better regulation for better results - An EU agenda, Strasbourg, 19.5.2015.

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

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

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

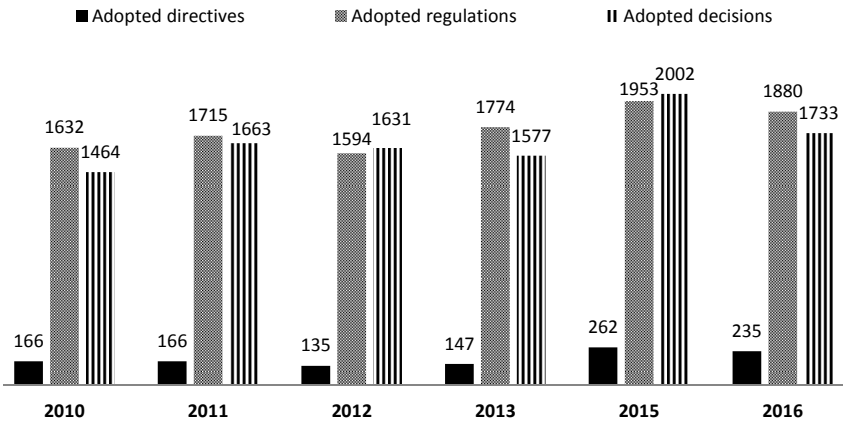
However, even under exhaustive harmonisation method some differences at the national level may occur due to the optional clauses provided by the directive itself. If Member States are given a wide discretion to decide whenever to make a choice between various regulatory outfits some

6 Recital 7 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88.

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

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

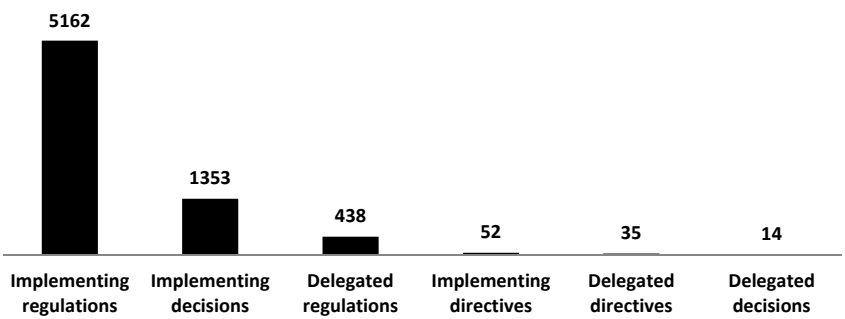
Figure 1: Number of legal acts adopted 2010-2016, source: EUR-Lex database.



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

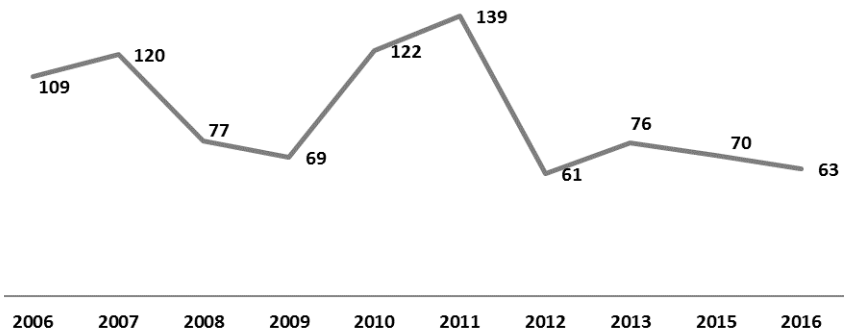
This mass-routinisation of the EU legislation is partially understandable by the fact that the greater part of the legal acts adopted within the post-Lisbon period are of the non-legislative (predominantly of implementing) nature, which is depicted by the Figure 2:

Figure 2: Number of non-legislative acts adopted 2010-2016, source: EUR-Lex database.



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

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



The average number of acts, which shall be transposed into national legislation within the last ten years, was 91 per year. However, we may observe that there are specific periods, in which that number was progressively increasing. The first such period was observed between 2006 and 2007 and the second between 2009-2012. The second period may be explained by the immense legislative activity which was undertaken in order to implement the Lisbon Treaty. Those acts were adopted one or two years before the Treaty's entry into force (01.12.2009) and their transposition deadline

expired in 2010-2011. On average, the number of the acts to be transposed is relatively low in comparison not only with the number of the regulations and decisions but even the number of the adopted directives.

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

Obligations imposed on the Member States

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

The EU law defines only non-extensive requirements to the national implementing measures – unquestionable *binding force*, *precision* and *clarity* requirements in order to satisfy the need for *legal certainty* (case C-427/07 Commission v Ireland, ECLI:EU:C:2009:457, points 54-55). Thus, the Member States are granted wide discretion in choosing an appropriate form of the legal act, which should transpose the directive and in the choice of the transposition methods, which may be used in drafting national implementing measures. Only incidentally has the CJEU limited that discretion by stating that the transposition with general clauses does not meet clarity and precision criteria (case C-530/11 Commission v Unit-