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CHANGES IN THE EU SINGLE MARKET IN THE AFTERMATH OF THE CRISES¹

Abstract

The objective of this article is to present the most important single market changes in the aftermath of the crises that hit the EU after 2008. As a result of various economic and social problems, European societies have been reluctant to adopt liberal solutions. Furthermore, an increasing number of leading politicians, both in EU member states and within EU institutions, have ceased to support the single market's previous direction of liberalization, which consisted in extending the four treaty freedoms (i.e., movement of persons, goods, services, and capital in this market) and removing protectionist barriers in each individual country. Crises have strengthened the tendency to introduce minimum EU regulatory standards in individual markets. These standards do not always increase the freedom of exchange and sometimes even reverse previous gains in the internal market or strengthen protectionism by national administrations. EU regulations also have a growing influence on the competitiveness of specific players in the single market, as well as on the distribution of costs and benefits between the actors involved in economic exchanges. Another feature of the change is the gradual closure of the EU to external rivals, and the introduction of arbitrary, individualized, and politicized management of their access to investment and economic activity in the single market.

Keywords: single market, EU, four treaty freedoms, protectionism, crises.

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INTRODUCTION

With the adoption of the Single European Act in 1986, building the single market became the basis for the development of integration. Since then the rivalry of European institutions in relation to integration has become evident. The European Commission (EC), the European Court of Justice (later the Court of Justice of the EU), and the European Parliament have most often supported the development of a single market, which involves the promotion of regulatory harmonization, enacting new EU rules, and extending the powers of EU technocracy over the market. In turn, intergovernmental institutions have repeatedly tried to stop this tendency to protect the powers of states and to restrict those of the technocratic institutions (particularly the European Commission). The situation can be illustrated by the introduction of so-called framework legislation. Such legislation distinguishes regulations (which have direct effect in national law) from directives, especially particular framework directives, which are mandatory only for the purpose indicated and leave the member states free as to implementing them in the national legal order. State authorities were thus given the space to implement legal objectives flexibly, in line with local conditions, as well as social and economic interests.

This does not mean that all countries have objected to the liberalization of the internal market. On the contrary, those with strong and competitive business entities have sought to liberalize more and more areas. They have also supported the Commission in actions aimed at breaking the resistance of those countries that have sought to protect their own markets, either because of the weakness of their domestic enterprises, or for the protection of jobs, or due to the pressure of voters or trade unions who fear excessive external competition.² For example, the largest pharmaceutical corporations were interested in removing national barriers to freedom of action in the European market. They advocated for allowing the registration of new medicines in a single institution, for example, an EU agency, instead of successively in all member states. The idea was dictated by the desire to reduce costs during such an operation. Over time,

² A. Smith, "How the European Commission's Policies Are Made: Problematisation, Instrumentation and Legitimation," *Journal of European Integration*, 2014, 36:1, pp. 55-72; R.D. Kelemen, A.D. Tarrant, "The Political Foundations of the Eurocracy," *West European Politics*, 2011, vol. 34, no. 5, pp. 922-947.

the idea was recognized not only by the EC but also by those member states whose pharmaceutical industries are strongest in the EU. As a result, in 1993 the member states decided to set up a European Medicines Agency, which gradually began to take over the task of monitoring and registering medicines from similar agencies or administrative offices operating across individual EU countries.³ The Commission may thus receive support (from some member states) to widen the scope of single market freedoms in certain economic sectors, or to enforce EU regulations in a more stringent manner.

One of the ways in which institutional support was provided to the Commission was that the task of establishing detailed executive regulations was progressively transferred from the Council to the Commission (under the third level of Community legislation). The transfer has been underway, increasingly, since the 1990s, although it has occurred under the watchful eyes of the representatives of member states (under the comitology procedure). It has facilitated the harmonization at the EU level of specific standards or technical criteria related to the functioning of the single market, and before the European crises was usually a tool for a more liberal approach to the single market.

Another way of enforcing liberalization was the introduction of the principle of “mutual recognition,” by a judgment of the European Court of Justice in 1979 (Cassis de Dijon). According to this principle, states could not use local regulatory standards as protectionist barriers in the EU internal market. The principle not only opened local markets for the activities of entities registered in one of the member states, but also served to liberalize the conditions of business operations across Europe.⁴ Having gained access to the entire single market, the companies registered their activities (and paid the public taxes involved) in countries with the most liberal—and therefore favorable—legislation. In turn, this introduced regulatory competition between EU countries and the pressure to reduce the burden on business entities (not only through taxation, but also in regard to corporate governance, labor law, etc.) The phenomenon is referred to as the “race to the bottom.”⁵ In an effort to counter this trend some member states

³ R.D. Kelemen, A.D. Tarrant, “The Political Foundations of the Eurocracy,” p. 20–22.

⁴ More about these phenomena is written by F. Scharpf, *Governing in Europe: Effective and Democratic?* Oxford University Press, Oxford 1999.

⁵ J.-M. Sun, J. Pelkmans, *Regulatory Competition in the Single Market*, Journal of Common Market Studies, 1995, 33:1, pp. 68–69.

have tried over time to introduce European minimum standards in all the European Communities. In this way, a very important regulatory tendency has emerged: a striving for harmonization of rules in the European market, which hinders the “race to the bottom,” and thereby reduces or even eliminates the pressure for further liberalization of the single market. Such attempts have generally been made by the most influential EU states as well as by those with a strongly coordinated national economy⁶ (or highly institutionalized economy) in order to defend a variety of social interests (unionists, other working groups, consumers, small businesses, etc.).

These influential and well-organized voters advance arguments about social dumping and jobs being taken by EU citizens of other member states. As a result, European regulations have had an increasing influence on who will benefit from the single market, thus controlling the conditions of economic competitiveness within it. In this respect, the winners and losers in economic competition could be defined more by protectionist regulations rather than by the rules of the free market or the four treaty freedoms. The change is attributed to the transfer of domestic solutions to the EU level, giving the most influential local players an edge over their rivals from other EU countries.⁷ Such tendencies have deepened since the European crises that started in 2008. Increasingly, new regulations may reduce the competitiveness of businesses and states based on cheap labor and liberal labor laws (including those resulting from liberal industrial relations) for the benefit of entities driven by competitiveness stemming from capital intensity and technological advancement.

In summary, there have always been two conflicting tendencies with regard to the European internal market: on the one hand, the tendency for liberalization, and on the other hand, the tendency for exclusion and national protectionism. Initially, the pursuit of market liberalization was the dominant approach, although European policy makers assumed only a gradual extension of the scope of liberalization.⁸ The Commission did not resign from

⁶ This group includes for instance Germany and France. They are referred to in literature as the Coordinated Market Capitalist or State Capitalist systems. Comp. P.A. Hall, D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, Oxford–New York 2001.

⁷ Comp. L. Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions*, Princeton University Press, Princeton 2000.

⁸ D. Howarth, T. Sadeh, “The Ever Incomplete Single Market: Differentiation and the Evolving Frontier of Integration,” *Journal of European Public Policy*, 2010, 17:7, p. 922.

initiating further steps even when the climate for liberalization was clearly deteriorating. Simultaneously, the Commission has more frequently surrendered to the largest member states and tolerated their flexible regulatory approach (or their national regulatory practices derogating from community rules). This led to an asymmetry of economic benefits between the stronger and the weaker within the single market. It seems that the recent European crises have led to a further correction in the Commission's strategy. There is a tendency to limit the progress of liberalization and to rig the regulatory environment in favor of enterprises from one part and to the detriment of the other part of the single market. The Commission ceases to be an impartial arbitrator between member states, guided only by European law and the desire to expand the four freedoms of the single market. Thus, it ceases to be an ally of the smaller, economically or politically weaker countries.⁹ Increasingly, its actions show political commitment to the current agenda for change in the European market demanded by the largest and most influential EU states: France and Germany.

The objective of this article is to analyze changes in the EU single market in the context of the impact of the crises after 2008.¹⁰ They have increased the aversion of western European societies to liberalization and globalization, and thus increased pressure on national politicians to protect local markets and jobs more effectively. Protectionist activity has been directed on the one hand at non-European players (mainly American and Chinese corporations), and on the other hand, at internal competition on the part of enterprises based primarily on cheaper labor or lower public taxes. The crises have also weakened the Commission itself and its ability to realize its traditional postulates regarding deepening economic freedoms in the internal market. A similar phenomenon can also be observed in the case law of the Court of Justice of the EU, which was previously active in deepening liberalization in the European market. Another trend resulting from the crises is the departure from the clear and transparent rules of the single market toward increased arbitrariness of regulatory decisions and the introduction of exceptions as

⁹ "Poland: Multi-Speed EU Could 'Break Apart'," *EUobserver*, 6.09.2017, <https://euobserver.com/political/138903> [access: September 6, 2017].

¹⁰ This article uses and develops some of the theses of the earlier paper: T.G. Grosse, "Przemiany na rynku wewnętrznym UE pod wpływem kryzysów" ["Transformation of the EU Internal Market under the Influence of Crises"], *Nowa Europa-Przegląd Natoliński*, 2017, no. 1(20), pp. 142–164.

required by the current political and economic situation. Such arbitrariness is related to the strong politicization of EU institutions, especially technocratic ones, and involves the growing informal influence of the largest member states and their economic operators on the functioning of regulators in the EU.¹¹ Protectionist tendencies in Europe will probably be further strengthened by the influence of Brexit and other external events, especially the changing foreign economic policy of the US administration.

A SERIES OF CRISES AS A FACTOR IN CHANGES IN THE SINGLE MARKET

At the start of the 21st century, a series of crises hit Europe, beginning with the great recession triggered by the collapse of the financial markets in 2008, and continuing through eurozone problems, the subsequent influx of immigrants to the EU, the geopolitical tension over Ukraine, and the decision of the British to leave EU structures in 2016. These problems have had a considerable impact on the debate about the future of the single market. Of course, the most important crises were the economic ones (in finance and in the euro area), but the economic situation was also aggravated by the sanctions imposed on Russia. In turn, the migration crisis (which intensified after 2012) had a negative impact on the perception of social and labor migrants in the single market coming from poorer EU countries. Thus consecutive crises have reduced the willingness to progress with the liberalization of the market and have also strengthened protectionist tendencies among the largest or richest EU countries. Increased political pressure was exerted on the weakest states (those in crisis) in line with the interests of the large member states. For example, financial aid to Portugal and Greece during the crisis was made conditional on the consent of both states to abolish the golden shares in their legislation.¹² Additionally, on Germany's initiative, a similar loan for Ireland was made conditional on an increase in the tax threshold

¹¹ More widely discussed in the literature on this topic: T.G. Grosse, "Introduction," in: T.G. Grosse (ed.), *European Union Policies at a Time of Crisis*, Scholar Publishing House, Warsaw 2017, pp. 9–32.

¹² B. Werner, "National Responses to the European Court of Justice Case Law on Golden Shares: The Role of Protective Equivalents," *Journal of European Public Policy*, 2017, 24:7, p. 996.

for companies in Ireland (above 12.5%.) The Irish government did not agree to this offer.¹³ The Commission's autonomy for legislative initiatives declined in the crisis and this institution has become more politicized. Essentially, the way the Commission operates is increasingly affected, informally, by the most powerful EU countries (France and Germany). The tendency can be exemplified by the European Commission's hesitation to act against the extension of Nord Stream (Nord Stream II), despite reasonable suspicion that it violates EU law and the third energy package.¹⁴ Such sluggishness may have occurred because of the involvement of energy companies from influential western European countries,¹⁵ as well as dedicated support from the German administration.¹⁶ However, when the United States imposed sanctions in 2017 on all companies cooperating with Russian Gazprom on the construction of a new line of the same gas pipeline, the EC's chairman, Jean-Claude Juncker quickly reacted by threatening US companies with retaliatory sanctions.¹⁷ He was joined by high representatives of Germany and Austria who protested the sanctions imposed on their energy corporations.¹⁸

¹³ P. Lever, *Berlin Rules*, London: I.B.Tauris & Co. 2017, p. 259.

¹⁴ It should be noted that at the end of 2017, the EC intensified its efforts to extend European law to cover Nord Stream II. At the same time, the Council Legal Service supported Germany's position and advocated the construction of the pipeline without the need to adapt the investment to the third energy package. Cf. K. Yafimava, *The Council Legal Service's Assessment of the European Commission's Negotiating Mandate and What It Means for Nord Stream 2*, Oxford Institute for Energy Studies, Energy Insight: October 19, 2017.

¹⁵ Engie, OMV, Shell, Uniper, Wintershall, representing French, Austrian, British, Dutch, and German capital. Other commentators also see double standards in the EC approach to Gazprom and Google, for example. From 2012 onwards, the Commission has been investigating Gazprom's use of monopolistic gas-supply practices in Poland and seven other central European countries, which are not expecting a satisfactory solution from officials in Brussels. Cf. "Podwójne standardy KE. Dla Amerykanów szybkie kary, dla Gazpromu – rozgrzeszenie" ["Double Standards of the EC: For Americans, fast penalties, for Gazprom—Absolution"], *Gazeta Wyborcza*, May 22, 2017, <http://wyborcza.pl/7,155290,21836799,podwojne-standardy-ke-dla-amerykanow-szybkie-kary-dla-gazpromu.html> [access: June 29, 2017].

¹⁶ S. Fischer, *Nord Stream 2: Trust in Europe*, Policy Perspectives, 4:4, ETH Zurich 2016, <http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/PP4-4.pdf> [access: June 29, 2017]. Germany's influence on energy policy is best illustrated by the words of Hosuk Lee-Makiyama, director of the Brussels-based think tank the European Center for International Relation. In his opinion, the EU's energy policy "speaks with a German accent." Cf. "Europe Caught in Crossfire as US Turns Screw on Russia," *Financial Times*, July 27, 2017, p. 3.

¹⁷ "Senate Backs Russia Sanctions, Setting Scene for EU Clash," *Euobserver*, July 28, 2017, <https://euobserver.com/foreign/138637> [access: July 28, 2017].

¹⁸ "Germany and Austria Warn US over Expanded Russia Sanctions," *Politico*, June 15, 2017, <http://www.politico.eu/article/germany-and-austria-warn-u-s-over-expanded-russia-sanctions/> [access: July 28, 2017].

Even before the 2008 crisis, the Commission's experts drew up the principles of the regulatory offensive that was to make a breakthrough in several areas of the single market, including digital services, tenders (including the ones carried out by electronic means), rail, air and maritime transport, energy, telecommunications, financial services, business environment, taxation, mobility of EU citizens, and consumer rights.¹⁹ The crisis became an opportunity to act. The liberalization of the single market was, on the one hand, a means of overcoming the crisis while, on the other hand, an opportunity to reduce protectionist tendencies, which, it was feared, might be aggravated by the worsening economic situation.²⁰ The Commission, in accordance with previous practice, commissioned a report on the matter from international authority Mario Monti, former Commissioner for the Internal Market and an economist at the University of Bocconi in Milan. According to Monti, there was a need to deepen freedoms in the European market. The report identified 140 problem areas and presented 67 recommendations to improve the functioning of the internal market.²¹ Based on the report, the Commission prepared an announcement of the introduction of about 50 reform proposals by the end of 2012 under the "Single Market Act."²² Since only one of the planned actions was successful within the planned timeframe, the Commission made another attempt and announced a new list of projects to realize its earlier plans.²³ According to the scholars, this program was generally not very ambitious and selective as it chose only some recommendations, which were not always related, from Monti's original proposal.²⁴ Furthermore, the second set of proposals was adopted without enthusiasm by the member states and its

¹⁹ *A Single Market for 21st-Century Europe*, COM (2007) 724 final, European Commission, December 20, 2007.

²⁰ I. Camis o, M.H. Guimar es, "The Commission, the Single Market, and the Crisis: The Limits of Purposeful Opportunism," *Journal of Common Market Studies*, 2017, 55:2, pp. 223-239, p. 6.

²¹ M. Monti, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society. Report to the President of the European Commission Jos  Manuel Barroso*, 2010, http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf [access: December 27, 2016].

²² *Towards a Single Market Act for a Highly Competitive Social Market Economy*, COM (2010) 608 final, European Commission, October 27, 2010.

²³ *Single Market Act II: Together for New Growth*, COM (2012) 573 final, European Commission, October 3, 2012.

²⁴ J. Pelkmans, *What Strategy for a Genuine Single Market?* CEPS Special Report, no. 126, January 2016, p. 3.

implementation was delayed.²⁵ The scholars noted that this was due to increased protectionist sentiment and a growing desire to look for ways to improve economic conditions not through ambitious reforms in the single market but through independent national government action.²⁶ The economic crisis has not become a catalyst for liberalization but rather a source of the increasing aversion of EU states and societies to the further development of European integration in this direction. The liberal single market has also ceased to be regarded as a universal means of preventing trouble in the EU. Adequate support has not been given to liberal reforms, notably in the largest western European countries.²⁷

One of the ambitious projects that was initiated under the influence of the crisis in 2015 was the “Capital Markets Union” (CMU). It was to be complementary to the banking union and expected to complete integration within the monetary union.²⁸ The Capital Markets Union dealt with the activities of financial institutions in the single market, offering services involving financial instruments (including, but not limited to, securitization), the issuing of securities of companies both in public offerings (open subscription) and non-public offerings (private placement) or venture capital. This project was strongly supported by the UK government, as well as by the EU Financial Stability, Financial Services and Capital Markets Union Commissioner, Jonathan Hill (coming from UK). The idea was also backed by the president of the European Central Bank and the head of the European Commission. They both asserted that it would provide entrepreneurs with access to financial services, with at least €100bn in additional funds for European businesses.²⁹ However, France and

²⁵ On delays in the dissemination of electronic public tenders, more broadly: S. Khorana, K. Ferguson-Boucher, W.A. Kerr, *Governance Issues in the EU's e-Procurement Framework*, Journal of Common Market Studies, 2015, vol. 53, no. 2, pp. 292–310.

²⁶ I. Camisã, M.H. Guimarães, “The Commission, the Single Market, and the Crisis...,” p. 230.

²⁷ Another example of the same tendency was the 2009 anti-crisis plan prepared by the Commission. The European Economic Recovery Plan has proved very general and has relatively limited financial and regulatory resources. The main burden of response to the crisis was borne by national governments, which gave generous public aid to the banking and industrial sectors (mainly automotive). T.G. Grosse, “Władze publiczne wobec kryzysu gospodarczego: przykład działań antykryzysowych podejmowanych w latach 2008–2009” [“Public Authorities in the Face of the Economic Crisis: An Example of Anti-Crisis Measures Taken in 2008–2009”], *Myśl Ekonomiczna i Prawna*, 2009, no. 2 (25), pp. 57–107.

²⁸ *Action Plan on Building a Capital Markets Union*, COM (2015) 468 final, European Commission, September 30, 2015.

²⁹ J.-C. Juncker, *State of the Union Address 2016: Towards a Better Europe—A Europe That Protects, Empowers and Defends*, Strasbourg, September 14, 2016,

Germany were skeptical of the initiative, as they were concerned about the return of historical financial instruments, which had been one of the causes of earlier global troubles. The finance ministers of these countries wrote a letter to Commissioner Hill in which they expressed skepticism about copying the American financial model.³⁰ At the same time, they defended the interests of their own financial sectors, both the national champions and smaller regional banks, which provided loans to business entities.³¹ These countries have relatively homogeneous financial systems and the competition from foreign entities is moderate on their local markets (foreign banks represented only 8% of the financial sector in France and 12% in Germany at the end of 2013).³² However, what is most interesting from the Polish perspective is the fact that central Europe,³³ which, given its poorly developed financial sector, could only benefit minimally from the CMU, turned out to be indifferent to the Commission proposal. The UK's exit from the EU could seriously change the project in line with Franco-German ideas. To add emphasize to this idea, shortly after the referendum of 2016 in which the British voted to leave EU structures, Commissioner Hill resigned. The work around the Capital Markets Union has since focused on issues related to Brexit, including the introduction of clearing houses for the transfer of activity from London to the eurozone. Additionally, the coverage of financial institutions and non-performing loans in the balance sheets of these institutions has been broader than before. There is also an issue with the introduction of pan-European pension products in the CMU.³⁴

Notably, during the eurozone crisis there have been many initiatives that have implications for the functioning not only of the zone itself but also the entire single market. These initiatives pertain

European Commission, Speech/16/3043, http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm [access: December 27, 2016].

³⁰ W. Schäuble, M. Sapin, *Letter*, 2015, http://www.economic.gouv.fr/files/files/PDF/2015-07-06_letter-about_capital-markets-union_6-july-2015.pdg [access: June 29, 2017].

³¹ L. Quaglia, D. Howarth, M. Liebe, "The Political Economy of European Capital Markets Union," *Journal of Common Markets Studies*, 2016, vol. 54, Annual Review, p. 193.

³² At the same time, the share of foreign banks in the size of the entire sector was 45.5% in the UK, and 65% in Poland. Comp. L. Quaglia, D. Howarth, M. Liebe, op. cit., p. 190.

³³ This indifference was expressed due to the fact that none of the countries in the region had participated in consultations on the project of the Union of Capital Markets initiated by the European Commission in 2015. Cf. L. Quaglia, D. Howarth, M. Liebe, op. cit..

³⁴ "EU Wants to Fast-Track the Capital Markets Union," *EUobserver*, June 9, 2017, <https://euobserver.com/economic/138157> [access: July 29, 2017].

to the regulation of the financial sector, including supervision, and the uniform mechanism for the restructuring or orderly liquidation of banks (Single Resolution Mechanism) within the banking union. Many experts point to the incompleteness of these regulations, including in terms of joint guarantees of deposits.³⁵ The first cases of applying the restructuring mechanism have also revealed another phenomenon. During the rescue of the collapsed Spanish and Italian banks in 2017, the purpose of the national authorities was primarily to find a strategic investor among other large national financial institutions to maintain national ownership within the financial sector. Moreover, against the expectations of the banking union, the rescue of Italian banks took place with significant support from taxpayers (€17bn).³⁶ Interestingly, the Italians bypassed European regulations and resorted to their own bankruptcy laws. Protecting national interests was, therefore, still of key importance for policy-makers.

In 2010, under the influence of the crises, the European Commission launched the European Digital Agenda.³⁷ It involved building a single market for digital services, with the standards for such services, the facilitation of electronic payments and invoicing, and the security of internet users. Another aim of the initiative was to combat hacking in Europe and to establish the EU Agency for Network and Information Security (ENISA). The agenda was also designed to increase access to high-speed and very high-speed internet, stimulate investment in research and innovation, and broaden the range of publicly available electronic services. These were actions that could rebuild the economic climate in Europe during the crisis while at the same time provide the opportunity to introduce new harmonizing regulations and another EU institution. Last but not least, the initiative has been extended by another goal—one that is very important for the Commission in the era of increased terrorism, Euroscepticism and populism—namely, the intensification of efforts aimed at combating terrorist propaganda and online radicalization in connection with cultural

³⁵ For a review of the literature on this subject: T.G. Grosse, "Dylematy unii bankowej" ["Dilemmas of the Banking Union"], *Analiza natolińska*, 2013/2 (60), Centrum Europejskie Natolin, <http://www.natolin.edu.pl> [access: March 29, 2017].

³⁶ "Why the €17bn Italian Bank Rescue Reverberates in Rome and Brussels," *Financial Times*, June 27, 2017, p. 3.

³⁷ *A Digital Agenda for Europe*, COM(2010) 245 final, European Commission, Brussels, August 26, 2010.

diversity.³⁸ The controversial nature of this proposal is that political groups expressing Eurosceptic views and criticizing the EU institutions' position on immigration could also be blamed, including those groups criticizing the idea of multiculturalism and other European policies. This could seriously limit free democratic debate within the member states. Moreover, according to some opinions, many proposals within the digital agenda are an attempt to over-restrict legislation, which hampers business in the single market.³⁹

The most important change resulting from the crises was the European Commission's adoption of a different approach to the single market than in the past. The new approach was primarily oriented toward expanding the market to more areas and introducing new EU regulations, especially those harmonizing and increasing its own regulatory and control powers. These goals could be achieved by other means than by liberalizing the rules, though. The Juncker Commission continued part of the agenda left by former President José Manuel Barroso and was particularly interested in incorporating new areas of EU law (including the European Digital Agenda). However, the Commission has bought into the protectionist preferences of the largest member states. In turn, it may propose further harmonization measures or new provisions amending previous regulations in the single market, and the expansion of its power in the European market. It can expect greater political support from major EU capitals and thus be more effective. Examples of these tendencies will be discussed more thoroughly in the following sections.

THE IMPACT OF CRISES ON THE CASE LAW OF THE CJEU

In this part of my article I will briefly present my thoughts on the evolution of views on the single market in the case law of the Court of Justice of the EU, which largely influences trends in the practical implementation of rules in force in the market. It also has a large (though indirect) impact on the emergence of new regulations in the EU and is generally a relatively rare subject of

³⁸ J.-C. Juncker, "State of the Union Address 2017," Brussels, September 13, 2017, European Commission, http://europa.eu/rapid/press-release_SPEECH-17-3165_pl.htm [access: September 16, 2017].

³⁹ N. Wallace, "Clock Ticking for EU to Fix the Digital Single Market," *EUobserver*, May 19, 2017, <https://euobserver.com/opinion/137956> [access: June 29, 2017].

in-depth expert review. First though, I would like to mention the concept of European constitutionalism, which recognizes that the development of integration is primarily through the law and attaches importance to the CJEU as the equivalent of a constitutional court in the EU, having the final say in the interpretation of European law.⁴⁰ Accordingly, the Court not only protects constitutional law in the EU (i.e., treaties) but actively participates in shaping a uniform interpretation of EU law within the member states. Additionally, since it has used extensive legal interpretations, it has contributed to the development of integration in Europe. In the case of the single market, it has been involved in broadening the four freedoms of the treaty in a liberal spirit, as well as removing barriers to the freedoms in the member states.

During the crises, the Court made judgments that many lawyers found controversial, as these judgments allowed for the use of eurozone crisis-prevention instruments such as the European Stability Mechanism and the European Central Bank's Outright Monetary Transactions Program. The Court of Justice of the EU also consistently refused to pass judgment on the protection of individual rights violated by eurozone aid programs.⁴¹ Its case law from this period was therefore characterized more by a surrender to the political context of the crisis and less by compliance with European treaty standards.⁴² According to some opinions, in the crisis the Court endorsed an authoritarian and undemocratic decision-making mechanism, far from the concept of European constitutionalism.⁴³

Given the existence of such a viewpoint, it is worth looking at the Court's changing approach to the single market. At the beginning of the crisis in 2008 the CJEU issued a judgment in the famous case of Dirk Rüffert, concerning workers posted from certain EU countries

⁴⁰ J.H.H. Weiler, *The Constitution of Europe*, Cambridge: Cambridge University Press 1999; A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford: Oxford University Press 2000; F. Schimmelfennig, B. Rittberger, "Explaining the Constitutionalization of the European Union," *Journal of European Public Policy*, 2006, 13:8, pp. 1148–1167.

⁴¹ C. Barnard, "The Charter, the Court, and the Crisis," *Legal Studies Research Paper Series* 18/2013 (University of Cambridge Faculty of Law); C. Kilpatrick, "On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts," *Oxford Journal of Legal Studies*, 2015, 35:2, pp. 348–352.

⁴² M. Everson, "An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht," *European Law Journal*, 2015, 21:4, pp. 474–499.

⁴³ Ch. Kreuder-Sonnen, "Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance," *Journal of Common Market Studies*, 2016, 54:6, pp. 1350–1366.

(usually the poorer ones) who provide services in other member states (usually the richest). The court objected to the application by a member state of protective barriers in the form of national legislation imposing an obligation on the contracting authority to award public works contracts only to those enterprises which, when submitting tenders, undertake in writing to pay their employees at least the remuneration agreed through collective bargaining at the place where the contract is performed.⁴⁴ This was a liberal-minded ruling and meant to increase the Treaty freedom of movement of persons in the single market. In a completely different spirit, a judgment was handed down a few years later in a similar case concerning workers posted from Elektrobudowa SA to Finland.⁴⁵ The Court considered that the minimum wage for Polish workers should be calculated in accordance with the Finnish collective agreement, that is, the agreement between the local union and the employer. Additionally, the agreement should define a fixed rate of pay for local workers (such as for their delegation within Finland), compensation for the time required to get to work, and a holiday allowance that includes adequate paid leave in Finland. It is important to recall that the CJEU rulings are not only applied locally but are enforceable throughout the EU. A similar judgment was passed regarding external temporary workers from Hungary employed in Finland.⁴⁶ This ruling attempted to limit the influx of cheaper foreign workers through local collective bargaining. Such interpretations create wide possibilities for the introduction of protective barriers hindering the freedom of movement of workers in the single market. It seems that the evolution of CJEU jurisprudence could be connected with the change in political climate in western Europe under the influence of crises. The change has been linked to social sentiment in some member states as well as to the increasingly changing approach to the single market in other European institutions.

Also, other studies show that during the economic crises the CJEU's jurisprudence began to change. The Court has ceased to invoke the rights of EU citizens to move freely in the internal market as a superior value. It has increasingly recognized that the possibility of using the social security systems of other countries

⁴⁴ Judgment of the CJEU of April 3, 2008 in Case C-346/06.

⁴⁵ Judgement of the CJEU of February 12, 2015 in Case C-396/13.

⁴⁶ Judgment of the CJEU of March 17, 2015 in Case C-533/13.

by UE citizens should be conditional. It has referred to the need to protect the public finances of wealthier countries.⁴⁷ Scholars following this change in CJEU jurisprudence were asking themselves what had happened. According to some opinions, the Court took into account the change in mood of voters in Western and Southern Europe, who during the crises became much more critical of liberal principles in the single market and of globalization. According to another opinion,⁴⁸ the Court allowed for the growing opposition to the liberal rules of the largest and most influential countries, primarily France, Germany, and Italy.

INTERNAL DIVISION BETWEEN THE EAST AND THE WEST IN THE EU

From a historical standpoint, the consecutive attempts at further liberalization of the single market would not be possible without the substantial support of the wealthiest corporations and the largest member states. Liberalization was conditioned by the benefits resulting from such changes. For instance, when another wave of liberalization hit the energy market halfway through the first decade of the 21st century, the governments of France and Germany supported the expansion of their corporations' investment capacity on the European market.⁴⁹ Similarly, at the time the telecommunications market was being liberalized, the largest European corporations (which also held the status of national champions) focused on expanding their activity to include other states within the single market. The situation reflected the ambivalent attitude of the governments. The same states

⁴⁷ Comp. M. Blauberger, A. Heindlmaier, D. Kramer, D.S. Martinsen, J. Sampson Thierry, A. Schenk, B. Werner, "ECJ Judges Read the Morning Papers: Explaining the Turnaround of European Citizenship Jurisprudence," *Journal of European Public Policy*, 2018, DOI: 10.1080/13501763.2018.1488880; T.G. Grosse, "The Prospect of Euro Egoism: The European Union on the Way towards Protectionism," Report for the Centre for the Analysis of the Jagiellonian Club, 2017, <http://cakj.pl/2017/09/21/the-prospect-of-euro-egoism-european-union-on-the-way-towards-protectionism/> [access: December 27, 2017].

⁴⁸ C.J. Carrubba, M.J. Gabel, *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union*, New York: Cambridge University Press 2015; O. Larsson, D. Naurin, "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU," *International Organization*, 2016, 70(1), pp. 377–408.

⁴⁹ J.D. Clifton, J. Diaz-Fuentes-Revuelta, "The Political Economy of Telecoms and Electricity Internationalization in the Single Market," *Journal of European Public Policy*, 2010, 17:7, pp. 988–1006.

that encouraged the expansion of national champions were simultaneously and purposefully delaying opening their own markets to external competition.⁵⁰ This in turn led increasingly often to the Commission practicing contradictory politics. On the one hand, the Commission seemed to tolerate deviations from EU law in some states, typically the most politically influential ones.⁵¹ An example was the Commission's turning a blind eye to the practice of protecting national corporations or halting the process of privatization of national enterprises in sectors of strategic value. On the other hand, the EC put intense pressure on weaker EU member states, including the new member states from central Europe, to liberalize. The opening of their markets to external investors and the acceleration of privatization was one of the conditions laid down in accession negotiations with these states. The Commission not only advised them to set up specialized national agencies tasked with privatization issues but also provided funds for establishing such agencies from the EU budget.⁵²

POSTED WORKERS

A good example of the conflict between the eastern and western part of the EU is the issue of posting workers, in the framework of the provision of services in another state belonging to the single market. In March of 2016, the Commission presented a proposal to revise the 1996 directive. The difference this time was that the European institution with almost exclusive right of legislative initiative and a long-time proponent of liberal solutions on the single market now proposed changes leading to a reduction of freedom on the market. Juncker claimed that the purpose of the revision was to "guarantee the same pay for the same work done in the same place."⁵³ In this case as well, Juncker announced the intention to form a new European body for inspection and enforcement of labor

⁵⁰ S. Eyre, N. Sitter, "From PTT to NRA: Towards a New Regulatory Regime," in: *European Telecommunications Liberalisation: Too Good to be True?* K.A. Eliassen, M. Sjøvaag (ed.), Routledge, London 1999, pp. 39–52.

⁵¹ M.P. Smith, "Single Market, Global Competition: Regulating the European Market in the Global Economy," *Journal of European Public Policy*, 2010, 17:7, pp. 936–952.

⁵² G. Medve-Bálint, "The Role of the EU in Shaping FDI Flows to East Central Europe," *Journal of Common Market Studies*, 2014, vol. 52, no. 1, pp. 35–51.

⁵³ J.-C. Juncker, *State of the Union 2015: Time for Honesty, Unity and Solidarity*, Strasbourg, September 9, 2015, <http://europa.eu/rapid/press-releaseSPEECH-15-5614pl.htm> [access: December 27, 2016].

law, especially in the context of posting workers.⁵⁴ The directive's aim was to increase the burden on companies (particularly from less regulated and lower labor-cost countries) that posted workers on the single market and therefore could inhibit the movement of workers within the EU. These companies had to respect the minimum wage of a given local market, and conform to any other specific remuneration policies in the host country, such as allowances for working in inclement weather, overtime, and other rules established by collective agreements with trade unions. The policy was favorable for states with a high level of regulation and a strong presence of trade unions (mostly the western European ones). It was more detrimental to the interests of the central European states. The European regulation was intended to protect workplaces in heavily regulated western Europe while reducing employment in less regulated central Europe, where the average employment costs are often several times lower compared to the west. Experts assess that implementation of this directive in its first proposal could lead to as many as 500,000 Poles losing their jobs.⁵⁵

Therefore, in May of 2016 Poland initiated the subsidiarity control mechanism (the "yellow card"), which allows for a certain number of national parliaments to request the Commission to change or withdraw from a legislative initiative. What is unusual about this procedure is that it has only been initiated three times in history. This time it was supported by the united front of all the central European parliaments (with the notable addition of the Danish parliament, which also supported the application, despite its geographical location).⁵⁶ On the other hand, some chambers of western European parliaments (lower chambers in Spain, Portugal, and Great Britain, both chambers in Italy, as well as the French senate) issued opinions under the political dialogue procedure, in which they claimed that the directive was in line with the principle of subsidiarity. In a heated dispute, which included not only national

⁵⁴ "We should make sure that all EU rules on labor mobility are enforced in a fair, simple, and effective way by a new European inspection and enforcement body." See J.-C. Juncker, *State of the Union Address 2017*...

⁵⁵ "Jeśli prezydent Macron przeforsuje swoje zmiany w dyrektywie o pracownikach delegowanych, Francja zyska niewiele, a stracą polskie firmy, ZUS i budżet." ["If President Macron pushes through his changes to the directive on posted workers, France will not gain much while Polish companies, the Polish Social Insurance Institution, and the Polish budget will suffer.] *Gazeta Wyborcza*, August 23, 2017.

⁵⁶ V. Kreiling, "A Yellow Card and the Political Damage," Jacques Delors Institut, Berlin, July 20, 2016.

governments but also most of the member states' parliaments, the Commission clearly sided with western Europe. In a very curt response to the procedure initiated by the central European parliaments, the EC claimed to have found no indication that the principle of subsidiarity had been violated and stated that the controversial legislative initiative should proceed.

Finally, the Council adopted a new version of the directive in 2017. In relation to the Commission's initiative, the amended directive limited the time of posting workers to 12 months (with the possibility of extending the period to 18 months). Poland and other liberal-oriented states managed to force the issue of calculating the costs of employees' food, accommodation, and transportation according to the rates of the posting member states. A four-year transitional period for businesses to adhere to the new regulations was introduced. However, it was not possible for the pro-liberal camp to exclude transport workers from the directive but only to postpone the discussion on the detailed rules in this regard. For these reasons, Poland, Hungary, Croatia, Latvia, Lithuania, the United Kingdom, and Ireland have not supported amendment of the directive.

THE HARMONIZATION OF SOCIAL BENEFITS

The strife between the eastern and western part of the EU continued with the Commission's initiative of December 2016 on reducing social benefits in the single market. The aforementioned proposal introduced a mandatory requirement for employees to work for a minimum of three months before being able to apply for social benefits in a given member state. The regulation was especially aimed at unemployment benefits.⁵⁷ According to proponents of this solution, it would solve the issue of "welfare tourism," where citizens of the poorer member states could overuse the freedom of movement and employment in the EU single market and take advantage of the more generous social benefits in western European countries. However, the change further restricts the free movement of persons on the single market while simultaneously undermining the interests of citizens of the central European member states. Notably, the proposal is a direct result of the demands made by Great Britain

⁵⁷ J. Brunsten, "EU to Clamp Down on Jobless Payouts," *Financial Times*, December 12, 2016, p. 4.

just before announcing its referendum on leaving the EU. At that time, Great Britain postulated changes to reduce social benefits for employees from other member states.⁵⁸

In the spring of 2017, the Commission proposed to establish the European Pillar of Social Rights⁵⁹ in an effort to introduce minimum standards in the areas of labor law and social welfare, including an EU-level minimum wage. This is probably the most conspicuous evidence of withdrawal from liberal tendencies on the internal market. Its purpose is to regain the trust of EU societies, which due to recessions have become resentful toward the ongoing liberalization of labor law and social benefits, as well as the general austerity policy. Nevertheless, the project may also prove to be a serious fiscal burden placed on the poorer and most indebted member states. It may also reduce competition on the single market in reference to the regulations concerning employees and social security. A Swedish MEP⁶⁰ defined the aim of the Pillar as shifting the focus of competition within the internal market from conditions of employment, labor costs, and more or less generous social packages to employees' skills, knowledge, and qualifications. The direction of these changes is possibly beneficial for the Swedish economic model. However, it would require considerable effort from—and be rather costly for—those EU member states that have built their competitiveness on cheap labor costs and liberal employment relationships.

Various European crises deepened the feud between the eastern and western part of the EU over the shape of the single market. Furthermore, it has become more apparent that the liberal camp is coming up short, partly due to the fact that it is losing its two key players. First, Great Britain, whose vote was previously significant in European political disputes, is now leaving the EU. Notably,

⁵⁸ In February of 2016 Great Britain negotiated the conditions of its further presence in the EU with the other member states. One of the four main conditions was granting the British government the ability to temporarily restrict access to social benefits for immigrants from other EU member states in the case when the social benefits system is particularly strained (the so-called emergency brake). Cf. "Britain's EU Deal: The Results and the Verdict: Has a Seven-Month Journey Ended in a Successful Summit Finale for Cameron?," *Financial Times*, February 19, 2016, p. 2.

⁵⁹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights*, COM(2017) 250 final, European Commission, Brussels, April 26, 2017.

⁶⁰ M. Ulvskog, "Social Pillar: Reasons Why MEP Hoekmark Is Wrong," *EUobserver*, May 31, 2017, <https://euobserver.com/opinion/138034> [access: June 29, 2017].

even before the official decision to leave the EU, London's stance on the free movement of people in the single market had changed fundamentally. Second, the European Commission tends increasingly often to follow the opinion of the most politically influential member states, namely Germany and France. The Commission's politics are no longer based on unwavering and unequivocal support for the idea of expanding freedoms on the EU internal market. On the contrary, it accepts the ideas of the largest member states, even in cases where those ideas lead to relinquishment of the previous achievements of the single market.

THE CLOSING OF THE SINGLE MARKET

The basic principle of the EU internal market was that the market would be open to third parties and would provide equal conditions of investment and conducting business for both European and non-European companies.⁶¹ The European Union is gradually departing from these principles, taking more and more initiatives to close its single market for external competition. The economic crisis, Brexit, and the election of Donald Trump to be president of the United States all seem to support the direction of these changes. EU actions also constitute a reaction to protectionist measures coming from external competitors, for instance, restrictions in European investors' access to the Chinese market. Emmanuel Macron is one of the avid proponents of the idea of a more protectionist approach to the single market. He perceives such change on the market as a valuable tool for the protection of national businesses and workplaces, as well as a chance to increase the competitiveness of French enterprises in the EU.

The aforementioned changes were most significantly influenced by society's deteriorating opinion of globalization and, what follows, of the policy of the open single market.⁶² The largest western European states saw a rise in resentment toward neoliberal

⁶¹ For more on this topic: T.G. Grosse, "Dlaczego Zachód traci, a Chiny zyskują na globalizacji?" ["Why the West Loses, and China Benefits from Globalization"], in: *Polska w Europie wielu prędkości* [Poland in a Multi-Speed Europe], A. Kukliński, J. Woźniak (eds.), Biblioteka Małopolskiego Obserwatorium Polityki Rozwoju, vol. VI, Kraków 2013, pp. 235–259.

⁶² For instance, 70% of Austrians and nearly 60% of Germans are against the TTIP. Cf. K. Pomorska, S. Vanhoonacker, "Europe as a Global Actor: Searching for a New Strategic Approach," *Journal of Common Market Studies*, 2016, vol. 54, *Annual Review*, p. 210.

economic principles, while trust in EU trade policy dwindled. All of this coincided with the finalization of several important bilateral agreements, including those between the EU, Canada, the USA, Japan, and Singapore.⁶³ The agreements approached the issues of trade and investment very ambitiously. They removed regulatory barriers and accepted the principle of mutual recognition of quality standards for goods and services. However, they also introduced controversial solutions pertaining to the resolution of future disputes between investors and state authorities.⁶⁴ Experts indicate that supporting the settlement of disputes by transnational arbitration, rather than by national courts, is beneficial for investors but not state authorities. Consequently, governments and national parliaments may in the future be discouraged from taking legislative action in many areas of public affairs for fear that investors will perceive the actions as undesirable.⁶⁵ Although this is merely one of the many controversies related to the negotiated agreements, it had a strong social impact. It created the impression that trade agreements were advantageous only for the largest corporations, while societies could lose their decision-making sovereignty under the conditions of European integration.⁶⁶

In 2015 the Commission sensed the political climate and proposed a new trade and investment strategy in external relations.⁶⁷ One of its fundamental assumptions was increasing the transparency of economic negotiations. The strategy was to mitigate the accusations of a lack of sufficient information and

⁶³ The agreements between: the EU and the USA [the Transatlantic Trade and Investment Partnership, TTIP], the EU and Canada [the Comprehensive Economic and Trade Agreement, CETA], the EU and Japan [the Free Trade Agreement between the EU and Japan], and the EU and Singapore [the EU-Singapore Free Trade Agreement].

⁶⁴ Within the framework of the TTIP it is the Investor-to-State Dispute Settlement (ISDS). Cf. T.G. Grosse, *Artykuł recenzyjny* [Review article]: Maria Dunin-Wasowicz, Aleksandra Jarczeńska (eds.), "TTIP—Transatlantyckie Partnerstwo w dziedzinie Handlu i Inwestycji: nowy etap instytucjonalizacji współpracy UE–USA," *Sprawy Międzynarodowe*, 2015, no. 4, pp. 121–133.

⁶⁵ M. Barlow, "Fighting the TTIP, CETA and ISDS: Lessons from Canada," 2015, <https://www.globaljustice.org.uk/sites/default/files/files/resources/fighting-ttip-ceta-isds-lessonsfrom-canada-maude-barlow.pdf> [access: December 30, 2016]; L. Oręziak, "TTIP—Transatlantyckie Partnerstwo w sprawie Handlu i Inwestycji—źródłem zagrożeń dla gospodarki i społeczeństwa" ["The TTIP—Transatlantic Partnership on Trade and Investment—a Source of Threats to the Economy and Society"], *Studia z Polityki Publicznej*, 2015, no. 4(8), pp. 81–106.

⁶⁶ T.G. Grosse, "Sovereignty in the European Union: a Critical Appraisal," *The Polish Quarterly of International Affairs*, 2016, no. 3, pp. 106–123.

⁶⁷ *Trade for All: Toward a More Responsible Trade and Investment Policy*, Luxembourg: Publications Office of the European Union 2015.

adequate popular authorization for the actions taken by the EU technocracy. Growing public pressure had some unexpected results—surprising even EU policymakers themselves. Jean-Claude Juncker decided that the agreement with Canada (CETA) should be ratified by the national parliaments (in all, there are 38 such authorized institutions at national and regional levels) rather than simply be approved by EU institutions. Former trade commissioner Karel De Gucht stated that Junker thus made a historical mistake, as the decision led to weakening the Commission's position in negotiations with external partners. Furthermore, it allowed national electoral politics to influence the negotiations, which previously had been the exclusive domain of the Commission.⁶⁸ Juncker's 2016 decision led to a peculiar situation where the agreement could be vetoed by the parliament of the tiny Belgian region of Wallonia. Shortly afterwards, therefore, the Commission asked the Court of Justice of the European Union if ratification of the agreement with Singapore required a similar procedure.⁶⁹ Its aim was to reduce the influence of negative social attitudes toward economic globalization and liberalization on future negotiations of trade and investment agreements. As it turned out, with distrust growing toward European integration and the Commission's officials, democratic procedures in member states may block or seriously handicap negotiations that have been conducted over many years and are at their final stage. However, the CJEU recognized the right of national (and some regional) parliaments to ratify these agreements.⁷⁰

All of these elements indicate that signing further economic trade agreements between the EU and external partners may be more difficult. European voters seem to have a much greater influence on trade negotiations than they used to. This, combined with the present social sentiments, lowers the chance of concluding any ambitious agreement that would liberalize economic exchange with the outside world. Additionally, the unfavorable political climate for constructive negotiations is also an issue for the EU's external partners. For instance, Donald Trump has withdrawn from a trade

⁶⁸ A. Beesley, J. Brunsten, "Canada-EU Trade Accord Teeters on Verge of Collapse," *Financial Times*, October 22, 2016, p. 2.

⁶⁹ A. Beesley, "Brussels Talks with Japan Dogged by Ceta Struggle," *Financial Times*, December 5, 2016, p. 3.

⁷⁰ "Trade Deal Ratification Needs Member States, EU Court Says," *EUobserver*, May 16, 2017, <https://euobserver.com/economic/137919> [access: July 27, 2017].

and investment agreement with Asian countries (the TPP)⁷¹ and suspended the negotiations of a similar agreement with Europe (the TTIP). According to experts, even if the talks resume, Europe would not make substantial concessions, for example, in relation to environmental standards (including allowing a greater number of genetically modified plants into the EU) and collectively hindering consumer's rights.⁷² Such an attitude on the European side may well lead to the failure of these negotiations.

It is worth noting that transatlantic economic relations had already been strained, an example of which is the conflict between Boeing and Airbus in the WTO.⁷³ In 2016 the attitude of Europeans toward the USA became even more assertive. The shift in attitude was exemplified by introducing higher capital requirements for American banks operating within the EU.⁷⁴ This served as a response to similar regulations implemented by Washington in 2014. At that time the EU claimed that the regulations imposed a disproportionately heavy capital burden on EU financial institutions compared to American ones.⁷⁵ Furthermore, in response to President Trump's electoral promises, European politicians claimed that they would take corresponding actions to any protectionist steps of the new American administration.⁷⁶ A crucial part in the process of taming American companies on the single market was played by Margrethe Vestager, the Commissioner for Competition. Interestingly, the penalties imposed by the Commission on American corporations were also influenced by the fact that both European enterprises

⁷¹ The fragment refers to Trans-Pacific Partnership (TPP), a regulatory trade agreement originally made on October 5, 2015 by twelve countries in Asia or the Pacific region (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam).

⁷² G. Chazan, "German Industry Fears Trump Trade Backlash, Manufacturers Fear Knock-On Effects of US Protectionism on Global Economy," *Financial Times*, November 27, 2016, p. 5; M. Dunin-Wąsowicz (ed.), *TTIP in Retreat? Evaluating the Strategic Significance of Transatlantic Free Trade*, Scholar Publishing House, Warsaw 2017.

⁷³ P. Hollinger, S. Donnan, A. Beesley, "Boeing Lifted as WTO Rules EU Failed to End Billions in Airbus Aid," *Financial Times*, September 22, 2016, p. 1.

⁷⁴ A. Barker, J. Brunsden, M. Arnold, "US Banks Face Higher Costs after Tit-for-tat Brussels Blow," *Financial Times*, November 22, 2016, p. 1.

⁷⁵ Moreover, in September of 2017, the Commission proposed to increase control over nineteen foreign banks, including subsidiaries of financial institutions from America, China, Switzerland, and Japan. This will require the foreign banks to consolidate their subsidiaries and branches in the EU. Cf. "EU to Put Foreign Banks under Extra Scrutiny," *EUobserver*, 4.09.2017, <https://euobserver.com/tickers/138872> [access: September 4, 2017].

⁷⁶ M. Stothard, "Europe Will Fight Trump Protectionism, French Minister Vows," *Financial Times*, December 13, 2016, p. 4.

and public opinion in many EU member states demanded not only compliance but also severe financial penalties.⁷⁷ In 2018, in the period of growing differences between European decision-makers and President Trump, Vestager imposed the highest financial penalty in the history of the EU on the American company Google.⁷⁸ A similarly assertive stance was adopted toward other external actors. For instance, in 2017 the EU refused to grant China market-economy status within the WTO, thus hampering the opportunities for Chinese investment in Europe. At the time, the Chinese inquired why the German Chancellor would not fulfill her promise of granting their country the status. In her response, Angela Merkel said that the European Commission is the body responsible for trade policy.⁷⁹ For the largest EU member states, it is often more expedient to leave awkward and contentious single market issues in the hands of EU officials.

Simultaneously, in December of 2016, the EU tightened the regulations related to imposing penalties on entities that abuse their trading position. Prior to this date, the EU had followed the lesser duty rule when imposing anti-dumping tariffs, resulting in the lowest possible fines.⁸⁰ According to the new European law, in justified cases, the Commission will be able to deviate from the lesser duty rule. All of the above illustrate a tendency to gradually close the EU internal market to unfair competition or as a response to unilateral protectionist actions of the other party. It also demonstrates that the intra-European political climate shifts in line with changes in the external environment, creating a mutually reinforcing mechanism.

A specific example of this phenomenon is the growing role of European institutions in Foreign Direct Investments (FDI), including takeovers of European companies by external entities. The Treaty of Lisbon conferred control to the Commission over these investments

⁷⁷ At first, Vestager reached a preliminary settlement with Google (2014) without resorting to financial penalties. Later, the EU withdrew from the agreement and ordered a very high compensation to be paid by Google for taking advantage of its dominating market position. Cf. "EU's Vestager Hits Google with €2.42 Billion Fine," *Politico*, June 27, 2017, <http://www.politico.eu/article/vestager-hits-google-with-e2-42-billion-fine/> [access: July 27, 2017].

⁷⁸ "Margrethe's Magical Fine Machine—And How It Works," *Politico*, July 18, 2018, www.politico.eu [access: July 27, 2018].

⁷⁹ "China WTO Rift with EU Mars Climate Pact," *Financial Times*, June 13, 2017, p. 4.

⁸⁰ This is why in 2016 the customs tariff imposed on Chinese steel in Europe was only 21%, while in the US it reached 266%. Cf. "EU Countries Agree to Reinforce Trade Defence," *EUobserver*, December 13, 2016, <https://euroobserver.com/economic/136260> [access: December 30, 2016].

as part of its competences surrounding trade policy. Most member states support the EC in its attempts to open foreign markets for European FDI, demands for reciprocity in the treatment of these investments in comparison to external investments on the EU market (e.g., from China), as well as negotiations of conditions for FDI in economic agreements.⁸¹ However, in 2017, France, Germany, and Italy increased their political pressure to extend the Commission's competences with respect to supervising foreign investments on the single market. Of concern were cases of foreign investors overtaking companies in sectors that are especially strategic or important for maintaining the technological advantage of the European economy. This applied mostly to Chinese investments in the EU, which in 2016 increased several times and reached €75bn, as well as to other rivals within the global economy, including American corporations. The purpose was to block investments not only in the most technologically developed states such as Germany, but also in the rest of the EU. One expert commented that the Germans would like to be able to block risky investments in their own country, while at the same time preventing any other EU member state from allowing them.⁸² This requires increasing competences at the union level as well as introducing harmonizing investment rules on the single market. For instance, as early as 2011, a proposal was made to establish a supervisory institution similar to the American Committee of Foreign Investment, to control FDI in the EU. This plan could backfire in smaller states where, especially after the recession, the economic development model has been based on attracting foreign investors. Therefore, the Franco-German proposal was received coldly by some other member states. For instance, the states that had previously participated in the anti-crisis programs in the eurozone were afraid that European institutions would once again be entitled to make decisions concerning the privatization of their strategic industries.⁸³

Such investments have one more strategic element that makes clear the division between EU member states and especially between the western and the eastern part of the EU. In the State of the Union

⁸¹ S. Meunier, "Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment," *Journal of Common Market Studies*, 2017, 55:3, p. 599.

⁸² "Macron Set for EU Clash on Foreign Takeovers," *Financial Times*, June 16, p. 2.

⁸³ "Free-Traders Dilute Macron's Takeover Controls," *Financial Times*, June 24, 2017, p. 3.

Address in 2017, Juncker announced the introduction of a new framework for monitoring investments such as the development of energy infrastructure or a port in a member state.⁸⁴ This could refer to Chinese investments in Greece's Piraeus and other ports in the Mediterranean and the Baltic Sea. The new competences of EU institutions could therefore potentially be used to interfere with Chinese investments, including those that are a part of the new Silk Road initiative (One Belt One Road program). Some EC representatives, together with western European politicians, expressed their concern about these investments and about the openness of Central Europe to them.⁸⁵ The program was claimed to be of a geo-economic character in the sense that it could both improve China's economic relations and increase its geopolitical influence in the eastern part of the EU.

CONCLUSIONS

The purpose of this article was to present the most significant changes on the single market resulting from the crises that affected the EU since 2008. The crises have weakened the willingness of societies—and therefore politicians—to further the integration process in the direction of economic liberalism. For instance, Jean-Claude Juncker said that if Europe did not respond a bit better to citizens' expectations, they would turn against integration. According to one of the Swedish MEPs, French president Emmanuel Macron represents a growing trend across the bloc, where governments push protectionism to fend off the threat of populist parties.⁸⁶ Amid all of this, the prescriptive attitude toward the EU internal market has fundamentally changed. The same protectionist tendencies that have for years been apparent in the conduct of the Chinese, and more recently of American authorities, are now becoming acceptable in Europe as well. This is clearly exemplified

⁸⁴ "This is why today we are proposing a new EU framework for investment screening. If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate." Cf. J.-C. Juncker, *State of the Union Address 2017...*

⁸⁵ "China Seeks to Ease Belt and Road Strategy Concerns," *Financial Times*, May 15, 2017, p. 5.

⁸⁶ N. Vinocur, "Emmanuel Macron, Anti-European," *Politico*, December 2, 2017, <https://www.politico.eu/article/the-two-faces-of-emmanuel-macron/> [access: December 2, 2017].

by the shift in the Commission's attitude and the expected adjustment of the stance of the CJEU in this field. The crises have fuelled the tendency to establish minimum regulatory standards on particular markets. The standards do not always increase the freedom of economic exchange, and sometimes even reverse the previous achievements of the single markets and strengthen national protectionism. More frequently, EU regulations from the top down influence the competitiveness within the single market as well as the costs and profits of entities from various parts of the EU. Above all, such actions aim to introduce solutions that will function in highly regulated states at the community level. These tendencies depart from the initial logic of expanding the four freedoms of the single market, which used to be the unquestionable foundation for the development of European integration. It is difficult to predict whether such a substantial transformation of single market processes will have a negative impact on European integration itself. Unilateral transfer of the costs of economic adjustments by politically stronger states (e.g., France) to weaker ones (mostly from central Europe) may engender political tensions and difficulty in further integration. Therefore, discussion about the future of the single market ought to be more balanced and should consider the interests of all the parties, not only the most politically influential ones. If the proposed changes to the functioning of the European market attempt to eliminate competition on the part of the member states where labor costs are lower, the EU should provide the necessary financial assistance to allow these states to convert the profile of their economies and push them toward innovation and a heavy technological saturation of production and services. In this context, it is essential to widen the range of funding options for the cohesion policy and to properly change the priorities of such options in central European member states. It is also vital to establish transition periods for introducing new regulations, as was the case with the posted-workers directive.

Another sign of change in the single market is its gradual closing to external competition, as well as the introduction of arbitrary, individualized, and politicized management of the competition's access to investment and economic activity in the single market. This provides an interim advantage for EU institutions, as well as for the largest member states in their relations with non-European partners (and adversaries). It also hinders the process of developing stable

economic exchange, based on transparent principles of cooperation, with the outside world.

Social skepticism toward liberalization and globalization, both in Europe and outside its borders, create a risky vicious-circle mechanism, which can clearly be seen at work. Assuming the current trend continues, it may undermine relations between the EU and its most important world partners, including the USA and China. Additionally, it may also have a negative impact on post-Brexit relations with Great Britain.