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**Limitations of Freedoms of the Internal Market
in View of the Protection of Constitutional
Values of Member States**

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1. General remarks

In the early years of the European Communities, internal market freedoms were regarded as the foundation of integration and the realization of the common market, later internal market, was the highest value. With the development of integration, the strictly economic character of communities was linked with European values. EU's interest began to focus also on the implementation of individual sphere of the citizen of the EU, and eventually of the individual. At the same time, the distinctiveness of Member States shows more clearly, especially in the context of constitutional values. The development of case law of Constitutional Courts of the Member States illustrates the need to maintain balance between the EU law and constitutional orders of the Member States¹.

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¹ E. KRZYSZTOFIK, *Charakterprawaunijnego w orzecznictwie Trybunału Sprawiedliwości i sądów konstytucyjnych państw członkowskich [The Nature of the EU Law in the Case Law of the Court of Justice and the Constitutional Courts of Member States]*, *Roczniki Nauk Prawnych*, Vol. XXIV, No. 2 – 2014, 23 – 25.

The subject of this article is the problem of limitation of freedoms of the internal market. At this point two main issues should be noted. Firstly, internal market freedoms are interpreted as one of the fundamental objectives of the EU. The Court of Justice defines the content of the freedom itself and determines, usually by extension, the claims owed to eligible entities². Secondly, restrictions are defined differently at the national level, controlled by the courts of the Member States. Giving the final position regarding the compatibility of a measure with the European Union lies within the competence of the Court of Justice. The indicated mechanism also reflects the meaning of the internal market freedoms. As the EU objective, they should be defined in a uniform way, common to all Member States. However, their limitation is dictated by premises that need to reproduce the specificity of Member States³. Nevertheless, the application of the restrictions may not lead to the isolation of the domestic market and constitute a means of disguised protectionism⁴.

The development of the EU law has created mechanisms that restrict the freedoms of the internal market. Derogatory clauses are essential in this case and they have been regulated in the founding treaties. Simultaneously, the doctrine of mandatory requirements has been developed and it allows the Member States to invoke the protection of important goods in order to limit the freedoms of the internal market. The Treaties provide also so-called safeguard clauses, the use of which may result in a limitation.

² A. CIEŚLIŃSKI, *Wspólnotoweprawogospodarcze* [Community Economic Law], Vol. I, Warsaw 2009, 47.

³ C. BARNARD, *The Substantive Law of the EU. Four Freedoms*, Oxford 2007, 462.

⁴ E. KRZYSZTOFIK, *Ograniczeniaswobódpersonalnychryнкуwewnętrznegow UniiEuropejskiej* [Restrictions on Personal Freedoms of the Internal Market in the European Union], in: A. Kuś, *PrawomaterialneUniiEuropejskiej w zarysie* [Substantive Law of the European Union – General Overview], Lublin 2011, 216 – 217.

In the implementation of the personal freedoms of the internal market, the treaties have established conditions for the retention of order, public safety and health with regard to residence rights and prohibition of exercising supreme power in relation to the free movement of workers, services or businesses. The use of derogatory clauses in the first case makes it impossible to realize one of the fundamental rights of citizens, i.e. to move freely and reside in the territory of the host country. In the second case one aspect of the freedoms is excluded, namely performing the part of vocational activities which involves working on «those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality»⁵.

The application of the EU law influenced the formation and development of the doctrine of mandatory requirements, which enables protection of vital interests of the Member States. The first time the Court of Justice ruled on this issue was in the *Cassis de Dijon*⁶ case in the context of limitation of free movement of goods. In subsequent rulings, the Court expanded the concept of protection of general interest by including restrictions on the free movement of persons, services and entrepreneurship. The premises indicated by the Member States go beyond the interpretation of the above derogatory clauses. It should be noted, however, that any Member State can invoke the theory of protection of the general interests of the state in certain situations. These situations are when: a specific good valued in a Member State has been identified;

⁵ Judgment of the Court of Justice of 3 July 1986, case C 66/85 Deborah Lawrie-Blum v Land Baden-Württemberg.

⁶ Judgment of the Court of Justice of 20.02.1979 in the case C 120/78 *Rewe-Zentral AG against Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, ECR 0649.

the national measure is not discriminatory and is not only applied to restrict access to the domestic market; uniform EU rules regulating the protection of a given good were not adopted. In addition, the measure must be directly focused on the protection of the good – it has to be proportionate.

A separate issue is the so-called safeguard clauses, which find their origin in the treaties. Their goal is not to limit the freedoms of the internal market, although they may result in their temporary limitation. Substitutions show two situations in which a Member State may take specific actions. Firstly, there are serious internal disturbances threatening public order in the territory of the country, in the event of war, serious international tension constituting a threat of war. Secondly, actions of states may be dictated by the duty to fulfill the undertaken obligations in order to maintain international peace and security⁷.

Thus, the environments in which a measure is applied differ. The derogatory clauses and the imperative requirements are used in the case of a stable internal situation, when the state takes steps to prevent the occurrence of a threat to its fundamental interests. In the second case, the country is in the state of emergency when the basic institutions of the country are already shaken or if international obligations are being pursued. Essentially, the measures taken by the state should not disturb competition within the internal market. Furthermore, Member States are obliged to inform other members of the EU and its institutions.

2. The concept of “constitutional values of the Member States”

The second element of the scope of the present article that requires clarification is the concept of constitutional values. In this context, one

⁷ Art. 347 TFUE The Treaty on the Functioning of the European Union, Official Journal of the European Union, C 326 of 26.10.2012, Art. 347 (hereinafter TFUE).

should refer to the provisions of the EU law and the jurisprudence of the constitutional courts of the Member States, as only these have the exclusive competence to define the content of the discussed concept at the level of the Member States.

2.1 The importance of the principle of respect for national identity in the European Union law

In the context of the EU law appealing to constitutional values is directly connected with the implementation of the principle of respect for the national identity of the Member States. It was introduced for the first time when it was included in the regulations of the Maastricht Treaty⁸. According to the wording of the Treaty, «The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy». The next normative step was the changes adopted by the Treaty of Amsterdam. It distinguished the values of the EU and specified the meaning of the principle of respect for national identities of the Member States. Under the Treaty, the principle in question was not one of the values of the EU, but the rule binding the EU. It is the source of the responsibilities of the EU, both positive and negative⁹. This laconic reference to national identity was clarified in the Treaty of Lisbon, the provisions of which did not only change the position of the principle of respect for national identities of Member States, but

⁸The Treaty on European Union, Art. F TUE, http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf

⁹ J. MALISZEWSKA-NASTOROWICZ, *Zasadapozszanowaniatożsamościnarodoweypaństwczłonkowskich* [The Principle of Respect for National Identities of Member States], J. BARCZ, *ZasadyustrojoweUniiEuropejskiej* [Constitutional Principles of the European Union], Warsaw 2010, 168 – 169.

they complemented its content by making a reference to the fundamental political and constitutional structures of the state, including regional and local government. One should also pay attention to the content of the preamble to the Treaty on European Union. It emphasizes that one of the objectives of the EU is the desire to deepen the solidarity between their peoples while respecting their history, culture and traditions¹⁰. Polish Constitutional Court stressed that the above-mentioned reference is an idea to realize individual national identities of the Member States in solidarity with other countries. It is the «essential axiological basis of the European Union in the light of the Lisbon Treaty»¹¹.

More references to national identity or some of its individual aspects found their source in the Charter of Fundamental Rights of the European Union (hereinafter CFR)¹². According to the wording of the preamble, «The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels»¹³. *In another article, it was emphasized that* «The Union shall respect cultural, religious and linguistic diversity»¹⁴. The reference to the diversity of the cultures and traditions of the peoples of Europe seems to indicate that EU is based on individual, diverse countries with their own identity and characterized by

¹⁰ The Treaty on European Union (Consolidated Version), Official Journal of the European Union C 326 of 26 October 2012, 1–390.

¹¹ Judgment of the Constitutional Tribunal of the Republic of Poland of 24 November 2010. K 32/09 (hereinafter K 32/09).

¹² *Charter of Fundamental Rights of the European Union*, Official Journal of European Communities. C 326 of 26 October 2012 (hereinafter CFR)

¹³ Paragraph 3 of the Preamble to the CFR.

¹⁴ Art. 22 of the CFR.

their own culture and tradition. This is a kind of added value of the whole EU.

The Court of Justice stressed that the EU «...is to respect the national identities of its Member States...»¹⁵ and that national identity is «...a legitimate aim respected by the Community legal order... »¹⁶ According to Advocate General Maduro, «The national identity concerned clearly includes the constitutional identity of the Member State»¹⁷. He emphasized that Member States have a legitimate right to identify and determine the significance of legitimate interest, within certain limits, which may be the basis of restrictions of one of the EU freedoms. Moreover, Member States referring to this principle have the right to evaluate constitutional means that serve the implementation of the principles and rules under the EU law. However, this is not tantamount to absolute respect for all constitutional principles, as that could become an instrument for Member States to avoid applying the EU law in specific areas.

While summing up the above considerations, one should assume that the content of the concept of *national identity* includes two dimensions: ethical and institutional. The first is related to culture, language, religion, customs, history and tradition. The latter, on the other hand, should be understood as fundamental constitutional principles that have developed together with the history and political consciousness of the nation¹⁸. Respect for the national identity has to be seen in two aspects. The first (negative) should be seen as the EU's commitment to refrain from

¹⁵ Judgment of the Court of Justice of 22 December 2010 in the case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Official Journal UE 2010, C 83.

¹⁶ Judgment of the Court of Justice of 2 July 1996 in the case C 473/93 *Commission of the European Communities v Grand Duchy of Luxembourg*, ECR 1996 pp. I-3207

¹⁷ Opinion of the Advocate General M.P. MADURO in the case C 213/07 *Michaniki AE*, 31.

¹⁸Cf. A. WRÓBEL, *Objaśnienia do preambuły [Explanation of the Preamble]*, A. WRÓBEL, *Karta Praw Podstawowych Unii Europejskiej. Komentarz. [Charter of Fundamental Rights of the European Union, Commentary]*. Warsaw 2013, 22.

any action that, in the opinion of the Member States, may violate national identity. In this context, it should be assumed that this applies to possible exemptions from EU regulations. The second (positive) should be understood as an obligation of the EU to take actions aimed at preserving the diversity of the Member States¹⁹.

2.2 The concept of constitutional identity in the case law of Polish Constitutional Tribunal

Considerations on the principle of respect for national identity, including constitutional identity, should also be based on the analysis of the case law of constitutional courts. A link between national identity and constitutional identity may be seen in the jurisprudence of the Constitutional Courts of the Member States, e.g. Poland, Germany, the Czech Republic, Austria, Hungary and the French Republic, especially after the entry into force of the Treaty of Lisbon in the context of the controversial overpass procedure. While referring only to the case law of the Polish Constitutional Court, one should emphasize that the Court attempted to define the concept of national identity in its judgment on the Treaty of Lisbon²⁰. It indicated that there is dependence between the national identity and the constitutional identity and stated that «constitutional identity is related to the concept of national identity, which includes tradition and culture»²¹. Thus, according to the Constitutional Court, the national identity is a broad concept that includes the constitutional identity, the tradition and culture of the nation. It stressed that the concept of constitutional identity should be understood as the

¹⁹ J. MALISZEWSKA-NIENARTOWICZ, *op. cit.*, 172 – 173.

²⁰ Judgment of the Constitutional Tribunal of the Republic of Poland of 24 November 2010, K 32/09

²¹ *Ibidem*.

values on which the Constitution is based²². Consequently, this concept designates the area excluded from the scope of the transferred competence of areas that are the foundation, the basis of Polish political system. Działocha emphasizes that the constitutional identity sets the boundaries of «exclusion from the jurisdiction of the transfer of matter belonging to ... 'the permanent nucleus', the cardinal basis for the constitution of a state»²³. On the other hand, according to the Constitutional Tribunal, the scope of non-transferable competence includes «the supreme rules of the Constitution, the provisions on the rights of individuals defining the identity of the state, protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity and the requirement to ensure better implementation of constitutional values and the ban on the transfer of constitutional power and competence to create competence»^{24 25}.

²²Cf. L. GARLICKI, *Normy konstytucyjnej relatywnie niezmienniane* [Constitutional Norms Relatively Unchanged], [in:] *Charakter i struktura norm konstytucji* [The Nature and Structure of Constitutional Norms], ed. J. Trzeciński, Warsaw 1997, 148.

²³ K. DZIAŁOCHA, Comment on art. 8 of the Constitution of the Republic of Poland, [in:] *Konstytucja RP. Komentarz* [Constitution of the Republic of Poland. Commentary], ed. L. Garlicki, vol.5, Warsaw 2007, 34

²⁴*ibidem*.

²⁵ German Constitutional Court took a similar position on the content of the concept "constitutional identity", saying that «Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology». The Decision of the Federal Constitutional Court of Germany of 30 June 2009,

Literature provides the view that the indicated position does not resolve the problem, does not define it, and does not specify the meaning and content of the concept²⁶. The situation is dictated by the fact that the Constitutional Tribunal focuses essentially on the definition of the competence of the EU, rather than on the concept of national or constitutional identity. From this perspective, it is seen as the border between the competencies that can be transferred and those that are non-transferable. On the other hand, it is important to define the content and scope of the concept of competence identity in a situation when EU law is applied and this application may lead to a breach of the national identity of a Member State. According to Safjan, protection of the constitutional identity may exceptionally result in «their casu decrease in efficiency and consistency of European regulations»²⁷. In the discussed situation, it is not a breach of the principle of primacy of the EU law. The principle of respect for national identity has its source in the treaties. It is a principle of European Union law and, as indicated above, obliges it to refrain from taking actions that could undermine national identity. Thereby, by invoking this principle a Member State can protect its constitutional autonomy. For this purpose, they invoke derogatory clauses or imperative requirements that are identified on the national level, but are assessed at the EU level in the jurisprudence of the Court of Justice.

To conclude, it should be assumed that the “*constitutional identity*” is an integral part of the concept of “*national identity*”. The first has a broad meaning and refers to the values cherished by the nation that are

Ref. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 249

²⁶ M. SAFJAN, Prawo Unii Europejskiej w porządkach prawnych państw członkowskich [European Union Law in the Legal Systems of the Member States], [in:] R. ADAM, M. SAFJAN, A. TIZZANO, Zarys prawa Unii Europejskiej [European Union Law. An Outline.], Warsaw 2014, p. 232.

²⁷*Ibidem*, 232.

recognized by it as the part that distinguishes it from other nations. The second is restrictive and focused on constitutional achievements. It is an expression of legal culture and achievements of the political thought of a particular nation that was shaped together with its history. Both of these aspects determine together the place of the state and nation in international relations. The principle of respect for national identity is one of the constitutional principles of the EU. On the one hand, it means the EU's duty to take actions that do not affect the national identity, including constitutional identity, of the Member States. On the other hand, it requires the EU to ensure the preservation of the diversity of Member States. Polish Constitutional Tribunal attempted to define the notion of "constitutional identity of the Member States". It found this concept to be identical to the national identity of the state. The views expressed in the judgment in the K32/09 case indicate that it sees them as constitutional principles that are defined as non-transferable and are the essence of the Polish state. However, it does not specify the meaning and content of the concept in the context of application of the EU law.

3. Respect for the constitutional identity of the Member States as the basis for imposing restrictions on the freedoms of the internal market in the case law of the Court of Justice.

The Court of Justice has repeatedly referred to the issue of imposing restrictions on the freedoms of the internal market in a situation when states invoked the protection of national and constitutional identity.

In the context of the current discussion, one should refer to the judgment in the *Schmidberger* case²⁸. The facts of the case concern an agreement to organize a demonstration that would cause a complete traffic holdup on the Brenner highway during that period. The company Schmidberger brought an action before the Landesgericht Innsbruck (Austria) against the Republic of Austria. They sought damages of ATS 140 000 and interest due to the inability of five of their trucks to use the Brenner motorway for over four consecutive days (a holiday, then a meeting and then two days off work with truck traffic prohibited on public holidays). The Austrian court asked the Courts of Justice questions within the framework of the preliminary ruling procedure that focused on the impact of the issued consent for the realization of free movement of goods in the internal market of the EU. The argument presented by the Court of Justice clearly shows that in this case a collision between two values occurs. The first is one of the main objectives of the EU, namely the free movement of goods. The other is the realization of a fundamental right, i.e. freedom of expression and freedom of assembly. The Court emphasized that the restriction on the free movement of goods is possible on the grounds of derogatory clauses regulated in art. 36 of EC and on the doctrine of mandatory requirements, when the State has invoked the need to protect important interests. There is no doubt that in the discussed situation the national authorities limited the freedom on the grounds of the premise of respect for fundamental rights that have their source in both the ECHR and the national constitution. Protection of fundamental rights is one of the elements shaping the constitutional identity of Member States. The Court of Justice stated that the protection of fundamental

²⁸ Judgment of the Court of Justice of 12 June 2003 r. in the case C 112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria*, ECR 2003, I-5659

rights is the duty of both the European Union and the Member States. It said that «The protection of those rights is a legitimate interest that, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods»²⁹. It also emphasized that the purpose for which the congregation was organized was not to restrict the free movement of goods, but *to express public opinion, which they considered essential to society*. The Court of Justice also drew attention to the fact that the measure applied in that situation was proportionate.

Another ruling to which attention should be paid in the context of restrictions on the freedoms of the internal market due to the protection of constitutional values is the *Omega* case³⁰. The subject matter of the dispute was the German legislation prohibiting the provision of services that consisted in providing accommodation for the so-called "playing at killing", that is aiming at others with an imitation of laser weapons. The German government invoked its constitutional obligation to respect the dignity of a human being. In this case it indicated the premise of protection of public order, while emphasizing that «both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services»³¹. It emphasized that this game of "killing" «infringed a fundamental value enshrined in the national constitution, namely human

²⁹ Judgment of the Court of Justice of 12 June 2003 r. in the case C 112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge vs. Austria*, ECR 2003, I-5659

³⁰ Judgment of the Court of Justice of 14 October 2004 in the case C - 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH against Oberbürgermeisterin der Bundesstadt Bonn 1*, ECR 2004, I-9609.

³¹ *Ibidem*.

dignity»³². It also referred to the already settled case law of the Court of Justice on the general principle that refers to the protection of fundamental rights in the EU. What is more, it indicated that«It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected»³³. It recognized the right of Germany to restrict the free movement of services on the grounds of protection of a constitutional value, which is to protect the dignity of a human being. At the same time, it stressed that the measure was proportionate in the context of its intended purpose.

In the context of the discussed issue, one should also refer to the position on the Court of Justice in the case C208/09 *Ilonka Sayn-Wittgenstein*³⁴. The subject of the question referred to the ECJ was the interpretation of the provisions of art. 21 of the TFEU in the context of the Austrian legislation that had constitutional status abolishing the nobility, the associated honorary privileges, titles and ranks granted only for awards, not connected with holding any office, performing any profession or with any scientific or artistic achievements. In the discussed case, Austria invoked the premise of public order. The Court emphasized that«public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society»³⁵. Moreover, it indicated that«the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State

³²*Ibidem.*

³³ Judgment of the Court of Justice of 14 October 2004 in the case C - 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH against Oberbürgermeisterin der Bundesstadt Bonn 1*, ECR 2004, I-9609.

³⁴ Judgment of the Court of Justice of 22 December 2010 in the case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Official Journal UE 2010, C 83.

³⁵*Ibidem.*

to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty»³⁶. Each Member State has its distinct culture, history, tradition and defines its individual paramount values. Their specificity may affect the content of the limiting condition. The Court also indicated that «it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State»³⁷.

4. Conclusions

The above considerations indicate that the constitutional identity is recognized at both national and EU level as a protected interest. There is no doubt that each Member State sees its own sovereignty in the context of having their constitutional identity. It covers a range of “non-transferable” competencies that determine the character of the state. It defines its essence and is the foundation of the constitutional system on which a given state is based. The position of the Polish Constitutional Tribunal cited above emphasizes the importance of constitutional values in the Polish legal system. It indicates a directory of constitutional principles that are the essence of the Polish constitutional system and include an order of implementation of constitutional values. The ultimate normative source in Poland is the Constitution, which was confirmed by Polish Constitutional Court in each of the decisions in which it referred to the relationship EU law – the Constitution. Its provisions unambiguously impose an obligation

³⁶*Ibidem.*

³⁷*Ibidem.*

to implement the constitutional values both at the national level, i.e. within the non-transferable competence, and in areas that are within the limits of the powers conferred upon the EU. Thus, within the limits of the powers conferred upon the EU a Member State is required to take appropriate measures in order to implement and protect constitutional values. It should also be noted that these values are interpreted in accordance with the constitutional traditions of the Member State.

At the EU level, a reference to the constitutional identity of the Member States was introduced directly into the content of the principle of respect for national identities of Member States. In addition, the Court of Justice strengthened its effectiveness in its case law. Referring to the doctrine of the mandatory requirements, it emphasized that the protection of individual components of the concept of constitutional identity (e.g. the protection of fundamental rights) is an important state interest. This means that they can limit the effectiveness of EU law in a situation where the implementation of treaty obligations would violate an especially protected good of a Member State. At the same time it should be emphasized that the measures of protection must be non-discriminatory and proportionate.