Iga Bielejewska
Jean-Marie Bryl

‘A SPECIAL STATUS FOR THE UK?’

INTRODUCTION AND THE CURRENT ‘SPECIAL STATUS OF THE UK IN THE EU

“*United in diversity*” is one of the big slogans of the European Union (EU) introduced in 2000 to celebrate differences among member states and their overarching cohesion at the same time.
But given the currently inflationary use of catchwords like “*Grexit*” , “*Polexit*” “or “*Brexit*” in mass media, the question inevitably arises: does the catchphrase “*United in diversity*” still apply to today's situation when there are not only big economic gaps between member states, but also countries like the United Kingdom (UK), which have diverse or more precisely diverging views with regard to further European (non-)integration?
In order to assess this overall question, this essay analyses the 'renegotiated deal' between the UK and the EU.

Beginning with the ambitious project of a “*federation of Europe*” in 1950 at the ery latest[1], the founding members of the EU and many current European governments envisaged a so-called “*ever closer union*”, to which other member states, above all the United Kingdom (UK), were and are utterly reluctant to adhere to for a variety of reasons.[2] Especially in terms of rather political or 'national' policy areas, some of the EU Member States managed to anchor opt-out clauses and other individually, possibly advantageous provisions in a few EU treaties or agreements.

Hereby, the UK already disposes of a kind of “*special status*” in some policy areas under the current EU treaties. The most previous British opt-out was from the Social Chapter negotiated during the Treaty of Maastricht, but in 1997 Tony Blair abolished those provisions. The other opt-out is from the Monetary and Economic Union, and it means that the UK has no obligation to change its currency into euro. The UK is also not a member of the Schengen Agreement, The other policy, in which UK does not take part, is the area of freedom, security and justice.[3]Another factor of creating a special status for the UK in Europe, which cannot be called an “*opt–out*” is creating a special Polish-British protocol about the Charter of Fundamental Rights of the EU, which limits the extent of the jurisdiction of the European courts. The last factor is the so-called “*UK rebate*”, which was negotiated by Margaret

[1]Robert Schuman, Declaration 9th May 1950

[2]For more concrete information on the various views of British citizens on the EU:
http://openeurope.org.uk/today/blog/what-explains-british-attitudes-to-the-eu/ or
http://ec.europa.eu/public_opinion/topics/eb40years_en.pdf

[3]Moreover, the UK is further entitled to cease to apply as from 1 December 2014 a large majority of Union acts and provisions in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty while choosing to continue to participate in 35 of them (Article 19 (4) TFEU and (5) of Protocol No.36).

Thatcher - the result was the first occurrence of giving UK any '*special treatment*'. The British rebate was the final piece of a long-term argument about how much money was spent on the Common Agriculture Policy - the rebate varies each year around 6 billion euro.[4]

By justifying the UK's demand for a "*special status*" within the EU, David Cameron also refers to two past provisions or "*special stati*", which were granted to Denmark and to Ireland. However, there may be a difference between those situations, because Danish and Irish governments wanted only to ratify treaties to bring them into force, while UK is voting on the forms and amendments to the treaty which is already in force and on which they previously agreed on. The Irish, for example, provided themselves in the Irish Protocol to the Lisbon Treaty that the neuralgic for Irish issues related with the traditional Irish policy of being neutral, such as fiscal policy, aspects relating social policy and security would not be affected by the Treaty of Lisbon.

In order to prevent further "*special stati*" or a "*Europe à la carte*", above all the European Commission did not allow any substantial flexible provisions to the enlargement candidates in their accession processes prior to 2004 and 2007 even though different views over f.e. the adoption of the euro by the accession states existed and still exist.[5]
In sum, the two clashing viewsof the UK and other EU member states between the concepts of "*deeper EU integration*" and "*Europe à la carte*" culminate in the recent "*deal*" for a "*special status*". Yet this "*deal*" does not only gain in importance because of its impact on the legal relations between the EU and the UK, but it also appears to be a basis of decision-making for British votersin the upcoming referendum on EU membership on the 23rd of June 2016.[6]

IN OR OUT – WHICH JUDICIAL WAYS CAN THE UK GO?

As editor-in-chief of Bloomberg News John Micklethwait said: "[...] *in the Tories party being against Europe is like in republicans being against abortion – it's the easiest way to make a political career*". The whole Brexit public debate was implicated by the internal fight over the power in the Tories Party and of course in later perspective – by the willingness to pull on their side more conservative and anti-European part of the society before the upcoming elections.

While the Government is trying to convince society that staying in the EU is better option, his competitors in the Conservative Party are pleading for voting for no. The potential split may be decisive for the Tories Party and the chance for the Labour Party to win the next elections.

[4]Additionally, British banks are able to access the eurozone payment system TARGET in line with the principle of single market equality, which equally enables the City of London to become the biggest player in euro-denominated transactions. (The economic consequences of leaving the EU,p. 53 London: Centre for European Reform, 2014).

[5]http://ec.europa.eu/enlargement/archives/2012/5years/documents/impact/publication14078_en.pdf

[6]According to most survey polls, British voters proportionally advocated for staying in the EU if the British government managed to renegotiate the UK's membership conditions (YouGov, ...).

The effect of this internal and pre-electoral dispute is that the Government has to find the way to reconcile those interest, which was the main basis for creating the discussed deal and the referendum held on 23rd of June. It is important to emphasize that the referendum seems to be not legally binding according to the British Referendum Act [7],which is silent about the legal implications of the referendum's result. Technically, British Peers could not listen to the people and block Brexit. This however may become a political suicide to the governing party, whose ratings are falling down (especially after Panama Papers scandal in which David Cameron may be implicated). The fact is that the Parliament still has to legally pass the bills which will make Brexit possible (starting with repealing the European Communities Act 1972) with the ratification of the House of Lords. All of this factors create Brexit referendum more political plebiscite than the legally binding decision process.

If the result of the Brexit referendum is positive, the British government will declare that they invoke the mechanism from the article 50 of the EU Treaty which will equate with leaving EU. Article 50 of the EU Treaty states that the Member State can make the decision on leaving EU in accordance with their national, constitutional norms (doctrine calls it the consensual leaving the EU[8]). Later Council negotiates and concludes the terms of leaving the EU and terms concerning future relationships with the EU. In practice this agreement may be very similar to the contracts signed in the future with countries of European Economic Area such as Norway.

Second path will become an option for the UK if the referendum's result will be negative and British will declare willingness to stay in the EU. At this point it should be emphasized that meeting David Cameron's expectations (expressed in his letter to the European Council from 10th of November 2015) deal contains a provision [9]that any other provisions from this document will be possible only by "common accord of the Heads of State or Government of the Member States of the EU". According to some authors[10] due to the fact that there is no given any legal basis for establishing this deal this document should not be considered neither as an legal act enacted by the European Council as a EU institution (art. 13 subsection 1 of EU Treaty) nor decision about Treaty revision. The same author considers that due to the fact that there was an clear and explicit willingness from the Heads of state or government, this deal should be considered as simplified international agreement – in that case there would be a possibility to use the procedure of changing its provisions according to Vienna Convention on the Law of Treaties. This complexed problem concerning the formal aspects of this deal and the reversibility of its provisions will be elaborated in the subsequent part of this essay.

THE FORMAL STRUCTURE OF THE 'DEAL'

[7]Political Parties, Elections and Referendums Act 2000

[8]A. Łazowski, A. Zawidzka-Łojek (red.) „Instytucje i porządek prawny Unii Europejskiej. Vademecum", EuroPrawo 2013

[9]Section I (United Kingdom and the European Union) subsection 3 point 3 of the European Council meeting conclusions (18 and 19 February 2016) , EUCO 1/16

[10]Barcz, Jan: "Wielka Brytania – prawne aspekty porozumienia nakierowanego na zapobiegnięcie Brexitowi" [in]:"Europejski Przegląd Sądowy", April 2016

Before outlining the formal structure of the "*deal*", it its necessary to mention that the legal binding force of the so-called "*deal*" comes only into being provided that the British society votes for remaining in the EU in the referendum.[11] Otherwise, all parts of the "*deal*" become legally nugatory.[12] In addition to this, even though the drafts are supposed to deal with "*a newsettlement of the UK within the EU*" as the title of the draft suggest, the texts and especially the therein included (potential) legislative changes apply to all Member States by modifying partially the very legal substance of the EU. Thus, the "*deal*" will not only open the legal possibility for other Member States to hinder some of the implicit legislative proposals under certain circumstances a posteriori, but Member States will also be able to make use of the 'new' legal changes.

The whole "*deal*" takes formally the status of so-called "*conclusions of the European Council meeting*". Overall, the draft takes the form of six draft legal texts: a Decision of the EU Member States' Heads of State and Government within the European Council, a Statement of the Heads of State and Government (which consists of a draft Council Decision), a Declaration by the European Council and three declarations by the Commission. Implicitly, it also includes EU legislative proposals. Furthermore, the UK government may also be involved into tabling some domestic legislation with regards to the drafts.
The essential question of the formality of the "*deal*" can be pinned down to its sheer legality and consequential legal enforceability.
It can be argued that there is not such a '*clear and explicit willingness or intention on behalf of the heads of state or governments'* to identify the "*deal*" as a common international treaty, since in none of its parts the '*deal*' it is defined as an 'international agreement' nor is the intention expressed to officially register the '*deal*' as an international agreement or treaty. Moreover, any potential dispute between Member states about the application of the Decision is supposed to be brought before the European Council[13], but there is no provision on bringing a dispute before the CJEU, which undermines the overall enforceability of the "*deal*" under EU law.

Nonetheless, even if the "*deal*" bound all its parties under international law, it would leave the question open to what extent the European Council can force the European Commission (EC) to implement its decisions of the "*deal*", as the EC is not part of the Decision of the EU Member States' Heads of State and Government within the European Council. In other words, besides the difficulties arising from defining the legal ground, on which this "*deal*" is based, international law does not ensure legal security and particularly enforceability of this "*deal*". Any legal or institutional interdependence between the European Council and the European

[11]Annex I (United Kingdom and the European Union) subsection E point 2 of the European Council meeting conclusions (18 and 19 February 2016) , EUCO 1/16.
[12]Since one of the final conclusions of this essay is that the overall legality of the "deal" can be questioned, indeed, the self-declared character of this statement can be, paradoxically, seen as legally not fully binding, either.
[13]Annex I (United Kingdom and the European Union) subsection E point 1 of the European Council meeting conclusions (18 and 19 February 2016) , EUCO 1/16

Commission (or even the Council of the EU)[14] has thus to be scrutinized under EU law. Consequently, it needs to be initially determined, which kind of legal form the "*deal*" takes under EU law, since if the conclusions and above all the Decision of the EU Member States' Heads of State and Government within the European Council had some legal effect under EU law, it could legally urge the EC to follow suit (Art 265 TFEU).

In general, the overall document cannot be considered as a legal act enacted by the European Council as a EU institution (Art 13(1) TEU) for that the treaties do not include a general provision that the European Council works through the adoption of conclusions. However, in terms of the EU's foreign and security policy, the European Council can "*identify the strategic interests and objectives of the Union*" (Art 22 TEU) in form of conclusions, to which the Council is bound in its policy-making processes (Art 26(1) TEU). Similar legal obligations of taking European Council conclusions into consideration by the Council occur only under certain conditions in the context of the provisions on the adoption of broad economic policy guidelines (Art. 121(2) TFEU) and on the review of the EU's employment situation in preparation for the employment guidelines (Art 148(1) TFEU). Yet none of the above-mentioned 'conclusions' have any legal binding force on the EC, what also applies to its status within the "deal".[15]

Moreover, in sharp contrast to the implicit legislative proposals within the Decision of the EU Member States' Heads of State and Government, the European Council is not given any formal legislative competences within the EU ("[…] *shall not exercise legislative functions"* (Art 15 TEU)), not to mention its general character of defining not specific yet "general political directions and priorities thereof" (Art 15 TEU).[16] However, in practical terms, over the last decades the European Council got used to 'task' the Commission and Council to prepare a report or to pre-negotiate a particular decision for upcoming conclusions. Yet in some other cases, the European Council simply asked the Commission and the Council to implement particular decisions even through direct legislation.[17] Thus, conclusions became

[14]Since the Council of the EU consists of national ministers of the participatory governments (Art 16 (2) TEU), which have signed the Decision of the EU Member States' Heads of State and Government within the European Council, it can be argued that they are directly bound by the legal drafts .

[15]Possibly, the four declarations made by the European Commission in the annex of the Decision of the EU Member States' Heads of State and Government within the European Council could be regarded as interpretative declarations and therefore as having legal binding force under international law. However, this throws one back to the initial matter of the legal ground of the "deal". In the context of former European Council Decisions, declarations constitute rather a recital of points agreed by the European Council, whereby having no status in law but creating a framework forCommunity legislation and policy formation (O'Neill, Aidan: "EU Law for UK Lawyers", Hart Publishing; 2nd ed.,July 2011). Following, the declarations by the European Commission can be seen rather as legally non-binding yetpolitical declarations of its future intentions.

[16]As for instance the wording of the Helsinki conclusions in 1999 reveal that the authority of the conclusions lie primarily on the fact that they "reflect a prevailing political consensus within the European Council and do not constitute a contract between European Council members that has relevance beyond the actual debates within the forum" (Puetter, Uwe "The European Council and the Council, New intergovermentalism and institutional change" Oxford University Press,2014, p.135).

[17]Furthermore, by communicating decisions yet not formally amending the EU treaties, the European Council also altered the structures of important decision-making procedures and the functioning of core EU institutions (so-called informal constitutional decision-making ('INF-CON')). As f.e. the establishment of the Eurogroup in 1997, although it was codified in the Lisbon Treaty a decade later.

usually "*a key reference document in the various policy coordination processes*" in the post-Maastricht period with the effect that the more conclusions are made by the European Council, the more its leading influence on Council and Commission activities will increase. By doing so, the European Council obviously challenges the legal legislative competences of the other EU institutions inasmuch as (final) policy decisions are not supposed to be taken at the level of the European Council (Art 15 TFEU). Thus, 'conclusions' became a kind of powerful political instrument developed by the European Council in order to circumvent uncertain, unpopular or painstaking policy procedures.

To sum up, though there does not seem any clear legal basis of the "*deal*" (neither under international nor EU law), which could de jure force the signatory parties, the EC and the Council of the EU to implement it, the political influence of the European Council brings about de facto implications on those actors' behaviour. Hence, it can be assumed that the EU Member States' Heads of State and Government in form of the European Council, the EC as well as the Council of the EU will put efforts into implementing the "*deal*" as far as possible. Nevertheless, the lack of a clear legal basis also breeds the potential of institutional veto players, which needs to be analysed according to each legal change implicit in the "*deal*".

SECTION A – ECONOMIC GOVERNANCE

The first group of provisions by the European Council concerns the economic governance, which was dictated by the necessity to provide protection to the Member States outside the Monetary and Currency Union, which should be provided in the light of the ever-closing consolidation of the Eurozone. The same currency has the aim to strengthen the internal market – to provide the better realisation of the aim of the internal market it is better to use the same currency. The other aspect of the necessity to make special provision to the non-euro countries, is that the national market becomes even more addicted to each other and there are increasing new problems to the proper functioning of the internal market such as more and more popular e-banking and online transactions. All of those areas need a strengthened regulations and the EU supervision.

This section contains the provisions of non-discrimination based on the non-euro currency and the obligation to create a mechanisms the purpose of which will be to provide the financial stability of the euro zone. It also provides that the Member States who are neither in the euro zone nor in the banking union will not be financially responsible for the implementation of the measures responsible for establishing financial stability of the euro zone. The deal covers also some institutional guarantees which refers specifically to the Council's competences - especially, there shall be a respect to the Council's powers to strengthen the euro group' s role in the EU, and confirms the competences of the countries outside the Eurozone to have an impact on restructuration the financial institutions of the EU. The deal emphasises also the role of the Council and the Member States' rights to deliver the opinion on each issue concerning the functioning of the EU. There will be further analysed only part of those provisions.

In essence, section A provides that the Member States who are outside the monetary union will not create any obstacles to deepening the monetary union but the whole process will respect rights and competences of Member States outside the union. Furthermore, the Heads of States or governments provided that EU institutions shall simplify coexistence between those blocks (Member States in and outside monetary union) and they shall provide conditions to protect internal market's integrity.

The EU institutions' obligation to protect the internal market's integrity isn't something new – especially Commission has an obligation to guard over obeying the rules concerning functioning of the internal market. To fulfil these competence Commission has the instruments for controlling or putting restrictions upon Member States who may breach those rules.

Going to the merits of the analysis of this section, the first provision about economic governance contains a declaration, that the European Council shall guarantee the respect to the rights of the Member States which are not in the Eurozone. The 'deal' especially confirms the rule of non-discrimination based on the non-euro currency. The grounds of that requirements land on the fact, that UK remains one of the two countries, which are not obliged in any future to change its currency into euro. The fact, that so few countries does not have such an obligation and that there is not a part of a monetary union may create a situation in which European authorities may forget, not remark or even not respect those countries' rights during proceedings.

The request of non-discrimination is nothing new - article 18 of the EU Functioning Treaty provides that there shall be no discrimination based on the nationality. The problem discussed in this section is the one of the aspects of the rule of the prohibition of 'indirect' discrimination[18] (discrimination based on the grounds different than nationality). Currently, there is a process of deepening monetary union, which wasn't unnoticed by the British government. Having that considered it was necessary for the UK to confirm that those countries who are not in this union will not be discriminated because of their currency and that they would have the same access to the internal market.

As it was said earlier, there is a possibility that the EU institutions and the other Member States may forget about the needs, rights or demands of the non-euro countries. Taking this into account it should be noticed that the discrimination in this section means not only the legal discrimination, but also the factual discrimination - in that sense the term 'discrimination' has more political meaning and it is used to strengthen British demands to guarantee the London financial centrum's interests. Those concerns are definitely understandable – there are visible aspects of the factual discrimination of the Member States which are not in the Euro group. The good example is the fact, that there is a policy that the meetings of the Euro group are being organized a week before the meetings of the Ecofin.

[18]J. Maliszewska –Nienartowicz, "Dyskryminacja pośrednia w prawie Unii Europejskiej", Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika 2012

This means that often Member States from the Euro group has the same position on some issues, which leaves the other Member States from the Ecofin in a worse negotiation position to create a joint position on financial issues – especially when it comes to the establishing the projects of the EU budget.

However it should be noticed that the UK actually agrees to be discriminated somehow, because of the negotiated rebate and because it exists the UK has not as big financial impact on the EU budget.

The other provision of the deal which should be discussed is the creating the safeguard mechanism, which aim would be to stabilize financially the Eurozone. There is also the provision the costs of creating and functioning of this mechanism won't be covered in any percentage by the non-members of the Eurozone or the Banking union. The competence of triggering the discussed mechanism would belong to the Member States outside the Banking Union if the project discussed by the Council, whose topic is connected with the 'economic governance' sector and at the same time it is doubtful that this project is consistent with the rules stated in that section of the deal (f.e. non-discrimination based on the currency).

The last thing which needs a few words of comment are the institutional provisions. It should be noted that the deal here has only the political character and declares nothing new in comparison to the treaties and secondary law. Those provisions consists of the obligation to respect the Council rights to strengthen the role of Euro group (with the emphasis on its legislative competences). The deal also underlines also the general role of the Council and every Member State's right to make a statement even in policies which doesn't directly concern them. The doubtful project would be directed into the deeper discussion in the European Council, in which the Member States' voice could be 'more louder' than in the Council (it is the matter of different majority of the voting – in the European Council the majority of decisions is made by consensus, so there is more pressure to reconcile). Moving the discussion on the European Council panel can make the deciding process certainly harder than on the Council's level[19].

Specific for this section is that the European Council declares that the provisions about economic governance will be incorporated to the Treaties (at least the essence of those provisions), which will be discussed later. The other interesting thing is that those provisions have more 'political' than legal meaning – majority of this section concerns the problems which are already mentioned in the Treaties (such as non-discrimination or the weight of the Council's rights in the legislative procedure). For that reason the doctrine considers that there shall be no problems with incorporation of those provisions.

On the whole, even if this section has more of the political than legal meaning it is hard to

[19]Barcz, Jan: "Wielka Brytania – prawne aspekty porozumienia nakierowanego na zapobiegnięcie Brexitowi"in:"Europejski Przegląd Sądowy", April 2016.

deny, that it may be the closest to create any special status of the UK. The fact that the UK is one of the two Member States outside of the Monetary Union impacts that making any guarantees based on the fact that the UK wants to create its currency creates the feeling that the UK wants to underline its elements of the independence. Especially creation of the mechanism politically gives to the UK power to affect the development of the Eurozone and financial acts – and it is doubtful that in case of the crisis, especially the political and the next wave of anti-European tumult the UK won't use it.

SECTION B – COMPETITEVNESS

Considering 'Section B' of the final draft in combination with the declaration of the European Council on the competitiveness and the declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism, one can find rather vague, non-binding goals and no specific legislative proposal. Thus, statements about strengthening the common internal market, lowering overall administrative burdens and compliance costs, repealing unnecessary legislation or enforcing a more effective subsidiarity implementation mechanism remain comparatively low politicized or uncontroversial. To sum up, it has merely a declamatory, non-binding and comparatively insignificant character.

SECTION C – SOVEREIGNTY

"*The ever closing union*"-clause

In accordance to the demand depicted in the British Prime Minister's letter to the President of the European Council for the exclusion of the UK from further political integration into the EU while remaining a full member, this demand was fully responded to in the "*deal*".
As the 'ever closer'-clause does not fall under the third part of the TFEU (Art 48 (6)), an amendment of the phrase "*ever closer union*" in form of an 'opt-out' cannot be implemented into EU law under the so-called simplified revision procedure.[20] Thus, it will be legally necessary to adopt this 'opt-out' under the ordinary revision procedure, most probably along with other wider treaty changes in accordance with Art. 48 (2) TEU.[21]

From a legal standpoint, the role of the EP is limited to force the European Council to hold a convention, which cannot adopt any amendments of the proposed treaty changes yet could theoretically attain wide public visibility, since the convention involves not only the heads of

[20]The "passerelle clause" would seem improbable, as well, as it necessitates not only the consent of the EP, but also the one of the national parliaments for eventual treaty changes (Art.48 par.7 TEU).
[21]Article 48(2) TEU sets forth an ordinary revision procedure, which can be initiated by any Member State, the European Parliament, or the Commission, any of which can submit to the Council a proposal for amending the Treaties. "The proposal is then transmitted to the European Council and notified to the national parliaments. If, having consulted the European Parliament and the Commission, the European Council decides in favour of the proposal by simple majority, then the president of the European Council will summon a convention" (Rosse Lucia Serena "A New Revision of the EU Treaties After Lisbon?"p.11 in "The EU after Lisbon" by L.S. Rossi and F.Casolari (eds.)).

state or premiers of all Member states, but also members of the EP, of the Commission as well as national parliamentarians. Eventually, even if the national governments are (already) bound by the "*deal*" to give their consent to the treaty changes. Thus, the Treaty amendments can be blocked by the rejections of national parliaments or national referendums with a further long-stop risk of rejection by national constitutional courts.

The wording "*ever closer union*" appears twice throughout the treaties, whereby in both cases the wording "*ever closer union*" is followed by the phrase "*among the peoples of Europe*" suggesting a less political than general character of the union. A derivation from these phrasings to a European political supranational state seem rather far-fetched, especially as its contents rather point to the principle of subsidiarity and the transparency of decision-making processes.

In practical terms, by making use of the term 'ever closer union' with reference to the whole phrases, the ECJ primarily underlined public's right to access to official documents, whereas landmark judgements, such as the 'Costa decision'[22], which set out the supremacy of EU law over national law, did actually not include the "*ever closer union*"-formulation in its argumentation.

Hence, the above-mentioned formulated demand within the British Prime Minister's letter would not only undermine the judicial independence of the ECJ from the executive or legislative political power (if there is no appropriate treaty change), but it will simply not find any practical utility.

Furthermore, despite the current UK's 'non-exemption' from the wording "*ever closer union*", it practically obtained different legal 'opt-outs' from pro-EU integration measures in the past. In this context, the European leaders, though not legally binding, stated in June 2014 that "*the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further*". The call for "*differentiated integration*" rather reiterates the above-mentioned statements and writes legally down what has virtually been practice since some decades[23]

The red card procedure

In addition to the already existing subsidiarity mechanisms, a so-called 'red-card' procedure would give a quasi-veto power to national parliaments in the EU decision-making processes.[24]

[22]Case 6-64 (ECJ) Flaminio Costa v E.N.E.L., ECLI:EU:C:1964:66

[23]Section III (United Kingdom and the European Union) point 27 of the European Council meeting conclusions (18 and 26/27 June 2014) , EUCO 79/14

[24]Namely, if 55% of national parliaments (i.e. 16 national parliaments) objects to a legislative proposal within 12 weeks from its transmission, then the Council will have to abandon it, unless it does not modify it appropriately (Annex I (United Kingdom and the European Union) subsection C point 3 of the European Council meeting conclusions (18 and 19 February 2016) , EUCO 1/16).

Nevertheless, it leaves two vital considerations open: firstly, until today only two cases in accordance to the 'yellow card' procedure took place and none in accordance to the 'orange card' procedure,[25] which undermines the practical importance and effectiveness of the 'new red card' procedure.[26] Secondly, the 'red card' procedure would not automatically block the unwanted legislative proposal, as there is no clarification of to what extent the EU's Council need to accommodate the concerns of the national parliaments and which actor is able to evaluate the decision of the EU's Council.

When it comes to the 'red card' procedure, it will most likely not produce any different outcome from the ordinary legislative procedures. Similar to the case of the 'ever closer union', the 'red card' procedure's right of existence derives rather from its political relevance, since it ostensibly ensures the British parliament a more powerful position and seeming ability to eventually reject 'undesirable' legislation from Brussels.

SECTION D - SOCIAL BENEFITS AND FREE MOVEMENT

The UK's biggest concern remains from many years the increasing inflow of immigrants, especially "*social tourists*"[27]. The issue of the social tourism is indispensably connected with the EU citizenship institution, and the essence of the freedom of movement, which allows each EU citizens the right to reside in each Member State. The UK from many years remains one the most popular immigrant destination for those, who look for better job opportunities and payments. For that reason United Kingdom remains ever since the biggest enemy of unconditional freedom of movement within EU.

One of the fundaments of the functioning of the internal market is the rule of equal treatment (or the rule of non-discrimination – those two are often used in the Treaties as the equivalent terms).At the beginning the rule of equal treatment in the freedom of movement was applicable only to those, who economically active (f.e. workers or job-seekers). Only later this right was expanded on the economically inactive (with some restrictions[28]).

Discussed deal is the another act of the discussion on the issue of how to create distinctions

[25]Information about the concrete cases available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/subsidiarity_en.htm

[26]First of all, it is commonly accepted among the European Commission that the trrigger of a 'yellow card' can be already considered as a veto. In order to prevent such a development, most national parliaments have their own offices in Brussels, by which they can assess and modify draft legislation in connection to their home parliaments in advance(Brady, Huge: "The EU's yellow card comes of age: Subsidiarity unbound?", November 2013, available at https://www.cer.org.uk/insights/eus-yellow-card-comes-age-subsidiarity-unbound).

[27]Due to the Opinion of the European Economic and Social Committee on Social tourism in Europe (2006/C 318/12) social tourism may be constituted whenever three conditions are met: Real-life circumstances are such that it is totally or partially impossible to fully exercise the right to tourism (wide variety of causes which ultimately constitute a real obstacle); Someone decides to take action to overcome or reduce the obstacle which prevents a person from exercising their right to tourism and that this action is effective and actually helps a group of people to participate in tourism in a manner which respects the values of sustainability, accessibility and solidarity.

[28] The nesessity to prove that the individual has the enough measures and the health insurance not to be the burden to the social assistance system of the hosting state

within the status of the migrant workers without breaching the rule of the equal treatment and non-discrimination and this problem will remain one of the challenges which lawyers and politicians will have to face in not distant future.

In the letter[29], which was sent to the President of the European Council Donald Tusk, David Cameron stated that due to the forecasted big growth of the UK's population and ever growing immigration the UK needs to have a better protection from the inflow of the immigrants and to reduce the 'current very high level of population flows from within the EU into the UK'. He also expressed his disapproval to the abuse of free movement, especially in accordance to the 'sham marriages' which he strongly believes as the potential danger to the security system. Cameron criticized also the ECJ judgments, which widened the 'scope of free movement in a way that has made it more difficult to tackle this kind of abuse'. His proposed solutions to lighten this situation and 'reduce the flow of people coming from within the EU' by limiting the access to the welfare system - people coming to Britain from the EU would must there and contribute for four years before they qualify for any in-work benefits or social housing and to end the practice of 'sending child benefit overseas'.

After discussions the British government managed to negotiate four things in accordance to that issues which should be considered as a big win to the UK. In the essence the deal provides that all of the Member States will be able to refuse the access to the social benefit system in case of lack of the sufficient financial measures and to those EU citizens who are job-seekers. The deal also provides the indexation of the benefits to the kids, who are living in the same country than working parents and last but not least – the creation of the mechanism which could be, which could be triggered in case of the big inflow of the workers immigrants if it would put an 'excessive pressure on the proper functioning of its public services'.
The first issue, which will be discussed is the problem of the putting restrictions to the social benefit system. To begin with there should be an brief analysis of the current regulations and judgments.

It should be emphasized that the Member States has the right to establish the most fundamental rules of the social benefit system, especially about the conditions to have the access to social benefits. Even though the Treaty provides a freedom of movement within the EU for the EU citizens and for their family (definition in the article 2 point 2 of the directive 2004/38/EC[30]) without any discrimination based on nationality but the Treaty leaves some discretion for the Member States to put some restriction to it on the grounds of the public policy, public security or public health (article 45 of the EU Functioning Treaty). It is also possible to make restrictions if it necessary to protect a public interest if those restriction's

[29]The Prime Minister David Cameron's letter to the European Council from 10th November 2015 available on: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

[30]"Family member" means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

measures are proportionate to its aim (possibility to use the imperative reasons relating to the public interest was confirmed in the judgement *Bosman*[31]). The lack of discrimination regards employment, access to the job-offers and social advantages. The European law puts also restrictions to the rights of the economically non-active citizens (they should prove that they have sufficient measures to themselves and to their family that they wouldn't be a burden to the national social assistance system (due to the quoted earlier directive 2004/38/EC) Practically for the EU citizens that directive with the rights it provides, remains more important than the Treaty.

European law provides a lot of benefits to the EU citizens who come from the other Member States which are written down and secured in the regulation 492/11[32] - those provisions consist of equal access to the job offers and to the social advantages. Especially the last one was interpreted widely by the European Court of Justice in the case *Even*[33]as the "*advantages which (...) which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community*" this was later expanded and currently it is defined widely (for example *O'Flynn* [34], *Chistini*[35] and *Reed*[36]*).* For that reason citizens from other Member States can apply for huge amount of social benefits which can be very expensive for those countries, which are popular job destination for poorer countries' citizens (such as Poland and other Baltic states).

For some time ECJ slowly departs from the rule of equal access to the social advantages, which was clearly seen in the case *Brey*[37] . To understand a connection between those judgments and British requests, which were later confirmed in discussed document there should a brief outline of presented line of judgements.

In *Brey* the Court held that sole fact that somebody is applying for the social benefits is not enough to prove that this resident has no substantial measures for living. The court also held that while establishing whether applicant could be a burden to the national social system, the Member State should consider its individual situation. The court emphasized that way the weight of the economical aspect of being able to apply for the social benefits in other countries. After that judgement European Court of Justice started helding that there shall be

[31]Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman,ECLI:EU:C:1995:463

[32]Regulation(EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, ECLI:EU:C:2012:538

[33]Case 207/78 (ECJ) Gilbert Even vs Office national des pensions pour travailleurs salariés (ONPTS); ECLI:EU:C:1979:144

[34]Case C-237/94 (ECJ) John O'Flynn v Adjudication Officer; ECLI:EU:C:1996:206

[35] Case 32-75 (ECJ) Anita Cristini v Société nationale des chemins de fer français; ECLI:EU:C:1975:120

[36]Case 59/85 (ECJ) State of the Netherlands v Ann Florence Reed; ECLI:EU:C:1986:157

[37]Case C-140/12 (ECJ) Pensionsversicherungsanstalt vs Peter Brey, ECLI:EU:C:2013:565

restrictions to the 'social tourism' and passed three more judgements: *Dano* [38], *Alimanovic* [39] and the newest one *García –Nieto and others* [40].

The new light on this issue was thrown in case *Dano* is which ECJ stated that the Member state has to have a possibility to decline giving social benefits to the inactive professionally EU citizens, who use the freedom of movement just to use other Member State's social security system when they don't have enough financial reserves to apply for the allowance for permanent stay in this Member State. In other words, preclusion of the Member States' right to refuse EU citizen's access to the social benefit system would lead to such situation in which those citizen could artificially qualify for being able to stay on the economic grounds. The basis this judgement was the case of the Romanian citizen, who lived in Germany with her children in her sister's apartment and to whom was given social benefits. During the procedure it was confirmed that she was not trying to look for a job in Germany. The main statement, which comes from this case is that European law will only protect the EU citizen's right to the social benefits in other Member States if that citizen will not be a "burden for the hosting state" – that will fit for workers, people who benefit from the freedom of establishment and those, who have enough sources to secure his and his family's existence. ECJ reminded also that Member state do not have any obligation to give any social benefit to other Member State's citizen, if he stays shorter than 3 months. If somebody does not follow those conditions, hosting Member State can regulate his situation differently than their own citizens. ECJ stated also that the regulation883/2004 on the coordination of social security systems[41] does not regulate conditions of giving any special non-contributory benefits so that competence belongs only to the Member States.

The next very important case in this matter is the case of *Alimanovic,* which specified and clarified the principle from *Dano*. The case concerned a Swedish women and her daughter, who applied for social benefits for her born in Germany children after having worked 11 months in that Member State and the court established that their right of residence arose of the job-seeker status. More importantly though, ECJ held that the essence of creating the social assistance system in the directive 2004/38[42] was to cover the minimum level of cost necessary to not to have a derogatory live (in keeping with human dignity). ECJ also held that in contrast to the case of *Brey* in those circumstances there is no need assess individual situation of the individual to check whether that individual is an irrational burden to the Member State's social system, because directive itself 'takes into consideration various factors characterizing the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity'. On the whole the Court

[38]Case C333/13(ECJ) Elisabeta Dano,Florin Dano v Jobcenter Leipzig; ECLI:EU:C:2014:2358

[39]Case C-67/14 (ECJ) Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others. ;ECLI:EU:C:2015:597

[40]Case 2-299/14 (ECJ) Vestische Arbeit Jobcenter Kreis Recklinghausen vs Jovanna García-Nieto, Joel Peña Cuevas, Jovanlis Peña García, Joel Luis Peña Cruz; ECLI:EU:C:2016:114

[41]Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

[42]Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

stated that if Mrs *Alimanovic* could benefit from the social assistance system longer after 6 months from the moment of the beginning of being unemployed she personally would not be a burden on German system, but the accumulation of other immigrants' claims could be that burden. For that reason Jobcenter Berlin could have declined her application.

In the newest case *Garcia-Nieto* ECJ confirmed its earlier judgements that Member State can exclude economically inactive EU citizen from the social assistance system if their residing shorter than 3 months. This case concerned a unmarried couple with a child and children from previous relationships. All of them lived in Germany, and whilst they applied for the social benefit system only unemployed men and his son from the previous relationship did not get the benefit on ground that he resided shorter than 3 months. ECJ stated that in situation like in this case, Member State can rely on the principle contained in the article 24 of the directive 2004/38 which states that host Member State has the right to refuse social benefits to EU citizens any other than workers, self-employed or a person which remains that status any social benefit if his residence is shorter than 3 months. However, the hosting Member State cannot demand in those first 3 months to have personal medical cover or any substantial means to cover their existence – for these situations the economical aspect and being a burden to the social system is not as important as for those resident, who stay longer than 3 months. In this judgement confirmed also the line from *Alimanovic*, that the Member State does not have to consider the individual situation of the EU citizen because if the Member State does not have to study individual status of the job-seeker a fortiori a State does not have to study individual situation of unemployed non-seeker - quoted directive establishes a gradual system of keeping the worker status, which goal is to provide the right of residence and access to social benefits and the directive itself takes into consideration "individual characteristics of the person applying for the social benefits, especially if he's economically active.

On the whole, European Court of Justice acknowledges the problem of unlimited access to the social benefit system, which is the biggest concern for the Great Britain. Starting from *Dano*, ECJ clearly limited unconditional necessity to give social benefits to the other Member States' citizens just because they have a right to legally stay in other Member State and that it is justified by the rule of equal treatment. In that way ECJ approximated to limiting the freedom of movement which was the main point of David Cameron's requests. In the light of the discussed judgments there should be conclusion, that the limitations written down in the deal are the reflection of the current tendency in the ECJ and its judicial interpretation of the directive 2004/38 (article 24 subsection 2). The planned regulations discussed here will strike job-seekers and the economically inactive and will not have any influence on the workers in the host Member States - their situation may be changed by the other provisions of this deal.
In order to the request to limitate the inflow of the immigrants, in the same point of the 'deal' it was provided that there would be created a 'safeguard mechanism', which could be triggered in case of the big inflow of the workers immigrants if it would put an 'excessive pressure on the proper functioning of its public services' – it would be triggered after the notification to the Commission, which could 'authorise the Member State concerned to restrict access to non-contributory in-work benefits to the extent necessary' and the Council would authorise putting those limitations on newly-arriving workers for 'or a total period of

up to four years from the commencement of employment' but [43] this authorisation would have be limited in time and 'apply to EU workers newly arriving during a period of 7 years'. There is however a provision that the Member State should loosen those limitations with the growing connection of the worker to the labour Market of the host state. The discussed mechanism would be added to the quoted earlier Regulation 492/2011. To execute that provision the Commission made a declaration to trigger an initiative to change that regulation as quickly as possible ('to ensure the rapid adoption'). What should be noted is that the Commission provided that those amendments would not create a situation in which workers from the EU would be treated less favourable that workers from the third countries in the comparable position.

The important aspect for the British government was to create a mechanism which would prevent the abuse of the right of free movement. That especially concerned the cases of 'fake marriages' with the citizens of the third countries, which were made to use the rights provided in the directive 2004/38 and other rights concerning the freedom of movement by avoiding the national rules of immigration. Currently of course Member States are able to prevent those situations when the regular residence becomes unlawful but sometimes it is very difficult to establish whether marriage for not dictated by the willingness to use EU freedoms. Sometimes in the way to restrict non-EU citizens' right to stay or use the freedoms may stand the fundamental rights such as the right to protect and respect the family life[44] (article 7 of the Chapter of Fundamental Rights). In the case Dereci[45] the ECJ held that the provisions of the Chapter of Fundamental Rights are directed to the Member States in terms of using the European law. It is worth to recall the earlier case Zambrano[46] in which ECJ held that the Treaty provides that the national law is inconsistent with the EU law if it deprives the EU citizens of 'genuine enjoyment of the substance of the rights' conferred by virtue of having the EU citizenship[47]. ECJ also held some judgements in which considered the situation of the 'mixed couples' and the rights of those third-country citizens. A good example here is the case *Carpenter*[48]in which ECJ stated that the guarantee of the protection of the family life may be the justification for the expanding access to using the fundamental freedoms.

The other situation of abusing the right of using EU freedoms, especially free movement ; from which the UK wanted to be prevented was the situation of using the rights by those whose behaviour may be a factual danger to the public security. In this case it should be noted that the ECJ held in many cases that restrictions based on public security shall be based on the actual, not potential behaviour (*Boucherau*[49]) and that those restrictions can be created

[43]Regulation (EU) No 492/2011 of the European Parliament and of the Councilon freedom of movement for workers within the Union

[44]http://www.efap.pl/projekty/analizy

[45]Case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres; ECLI:EU:C:2011:734

[46]Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm); ECLI:EU:C:2011:124

[47]https://www.freemovement.org.uk/article-20-of-the-tfeu-after-zambrano-and-mccarthy-we-now-have-dereci-2/

[48]Case C-60/00 Mary Carpenter v Secretary of State for the Home Department;ECLI:EU:C:2002:434

[49]Case 30-77 Régina v Pierre Bouchereau,ECLI:EU:C:1977:172

only in those situations in which the national could be 'punished' too (*Adoui and Cornaille*[50]). In accordance to the British requests provided in the 'deal' the European Commission declared triggering legislative initiative to specify the directive 2004/38/WE. The amendment would clarify the situation of those citizens from the third countries, which did not have a legal permission to stay in that Member State – if they hadn't in their situation the decisive for they rights (to enter and reside in the EU) would be the immigration law of that Member State in which he resides. To those citizens, as well as to those who could be a 'danger to the public safety or policy' there would be an individual assessment based also on previous history. This remains a bit doubtful, because this kind of clause may leave a huge discretion to the Member States and may lead to annihilate the access to the freedom of movement for third-country citizens - for some officials some behaviour may be a sign of potential danger and to others - not. In case of executing those provisions, the Commission should be careful while preparing the amendment and pay attention not to leave a very wide discretion in order to prevent the aim of the freedom of movement for the family members. Of course it should be reminded that any 'mistakes' may be fixed by the Council or in the Parliament, who may propose amendments to the projects.

Those amendments of course are dictated by the fact, that the UK remains one of the most popular immigration states in the Europe and in the World. Putting restrictions to the rights of the third-countries may be however a very positive change to the other countries, which has also a problem with the immigrants such as Germany or France. If those countries would say yes to those amendments it is possible that those changes would embrace also other Member States – that way it would not create another aspect of UK's special status.

The last point negotiated by the British government was to put some amendments to the regulations 883/2004 on the coordination of social security systems, which would contain the option to index child benefits to the conditions of the Member State in which the child reside – that amendment would relate only to such situations in which the child lives in the other State than its working parent. There shall be however restrictions and this right up to the year 2020 would apply only to the 'new claims made by EU workers in the host Member State'. Starting from the 1st January 2020 there would be a right to extend this indexation to 'existing claims to child benefits already exported by EU workers'. According to that point, the Commission declared that there would be no enlargement of this right to the other benefits such as pensions. As in the previous parts of this section, the Commission declares triggering the legislative procedure, but provides however that there should be included factors, which would allow to take into the account the standard of living of that child and the level of the benefits applicable in the Member States – and that leaves a huge discretion to the EU institutions during the law-making procedure.

Discussed problem is nothing specific for the UK, but it also appeared in public debates in other EU countries such as in Germany, who also deals with huge amount of workers from the

[50]Joined Cases 115 and 116/81 Rezuguia Adoui and Dominique Cornuaille vs Belgian State in the person of the Minister of Justice and City of Liege in the person of the Bourgmestre, ECLI:EU:C:1982:183

other Member States. According to some authors[51] changing those provisions to the regulation 883/12/2004 should be an easy process, because it already contains a flexible mechanisms when it comes to the family members who lives in the other Member States.

On the whole, comparing the British requests to the provisions from the deal it should be noted that the deal certainly meets the goals originally founded by the Cameron in quoted earlier letter. Providing security mechanism would certainly help to stop the inflow of the EU citizens and the amendments which will secure the limitation to the social benefit and the indexation of child benefits will certainly dishearten those whose motivation to come to the UK was only the idea of the social benefits which would wait for them. Cameron's aim was to secure the inflow of the EU citizens in general, without differing workers from non-workers. However the group which will be the most injures will be workers - provisions from this deal will definitely impact on them. Workers, who most commonly use the freedom for movement with the goal to earn more and to provide better living for their family - not to use the social system' s benefits and advantages (which of course are a nice attachment) after amendments will have to face difficulties in any Member State workers, which will decide to introduce such measure – it will definitely dishearten workers to look for a better job in wealthier Member States. Mentioned earlier judgements differentiate the situation of the economically active and inactive EU citizens and they confirm the limitation to the security system only to those inactive ones. The deal will create the opportunity for the Member States to make obstacles also to the workers.

It is difficult to say that the deal would provide a special status to the UK though, those provisions after required amendments to the secondary law, will be addressed not only to the UK but also to the other Member States. It is hard to say that majority of British issues weren't unnoticed either the ECJ or other countries. It may not create another factor of special status of the UK, but those amendments would definitely please the anti-European British part of society which still increases. Who knows, maybe the amendments provided in this deal will change their minds.

Discussed section provides, that the provisions shall be implemented primarily in the secondary law. However, there is an interesting point at the end of this section, which provides that the transitional measures concerning free movement shall be provided in the Acts of the Accession of the future Member States and agreed by the all Member States. Interesting point here is that during the procedure of accession all Member States has to ratify the Accession Act according to the constitutional law. In many Member States, which may not agree with proposed in this deal changes this may be a moment to manifest their point of view and block the act of accession – especially in the 'immigrant' countries and those whose government's choose more and more anti-European position.

Formally it is hard to say that there is a measure to force Commission to initiate a secondary-

[51]Barcz, Jan: "Wielka Brytania – prawne aspekty porozumienia nakierowanego na zapobiegnięcie Brexitowi"[in]:"Europejski Przegląd Sądowy", April 2016

law act procedure. However, due to the inter-institutional agreement on better law-making[52] Commission shall cooperate with the Council and the Parliament when it comes to legislative. Those two institutions also has the power to formally submit an application to the Commission for the initiating the legislative procedure and if Commission fails to initiate that procedure, Council and Parliament can always submit a complaint to the ECJ for the inactivity. Additionally, it should be noted that one of the annexes to the 'deal' was the Commission' declaration to initiate the legal proceedings to amend the provisions from this agreement.

However there is a possibility that Commission may get in the way of fulfilling British requests to put limitations into freedom of movement. Commission remains the only institution who has the law-making initiative when it comes to the secondary law (it should be mentioned that EU citizens also has it is very limited [53]).In practice it means that if we consider the deal as a 'political statement' everything will depend on the Commission.

Things mentioned above is one thing but it should be noticed that the EU institutions should operate in accordance with the rule of loyal cooperation. Normally Commission obeys and executes European Council's decision, but of course Commission can make a few changes while doing that, The other thing, which should be emphasized is that one of the members of the European Council is the President of the Commission. This is all the more significant information because the European Council makes the decision by consensus and it is very difficult to imagine that the President could not help to execute the decision upon which he agreed on. The position of the President of the Commission should be emphasised even more, because he is the one who sets political directions of the EU and according to executing this 'deal' cannot be underrated.

There may be of course other obstacles during executing the provisions from the 'deal' and creating amendments to the directives and regulations. The biggest controversies may be in accordance to indexation benefits and creating the safeguard mechanism for the inflow of the immigrants. The later proceedings of course demand the participation of the European Parliament and of the Council who may also not be in favour of this changes. It should be reminded that in many countries there are more and more anti-European politics who may put a pressure on their representatives in the EU or national governments.

The national parliament's right may create problems and use the mechanism of the yellow or even orange card (more plausible) – this political mechanism can create many problems during the proceedings. It is not so hard to imagine that 1/3 of the Parliaments would say no to regulations, which may will be negative for their residents. It relates especially to 'poorer' Member States, whose citizen often seek in other Member States better living and those kind of regulation may discourage them to use the freedom of movement. The more important is,

[52]European Parliament, Council, Commission Interinstitutional agreement on better law-making (2003/C 321/01)

[53]Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative

that mechanism may be also used by those countries, who has anti-European position such as Hungary or Poland. It is worth reminding that also other countries who may be angry with the European Union for their decisions and initiatives (for example Slovakia and Czech Republic for the relocation key) which may use it as a political statement.

On the whole, executing changes from this section may be a difficult process and there is a possibility, that there will be some changes to the provisions written down in this deal. National parliaments and peers from the EU parliament may use its powers change the primarily project to more in favour to them or even block all the amendments.

THE SOCIO-POLITICAL IMPLICATION OF THE DEAL FOR THE UK AND THE EU

Socio-political implications for the UK

Considering the direct implications of the renegotiated "*deal*" on the public opinion of the British society, the 'new deal' had hardly any influence on the 'resistant' or dominantly Eurosceptic public attitude (in contrast to other European countries).

At the end of the day, UK's renegotiated membership conditions will imply neither a short-term nor a mid-term drift for more EU integration among British citizens, but could rather strengthen views on "British exceptionalism"[54] and the concept of a *Europe à la carte*". Moreover, it will not convince or soften hard Eurosceptics demanding to leave the EU even if British voters will vote for staying within the EU in the referendum. More likely, the possibility of future referendums cannot be ruled out if the deeper causes for prevailing Euroscepticism in the UK are not moderated especially within the governmental parties or if the 'EU issue' becomes more politicized in the British discourse. However, in the medium term it appears rather improbable that British society would ask for a referendum concerning the EU after voting for staying in the EU in June. Yet the more important question is to what extent will the British advocate or oppose EU integration after staying in the EU; will it more frequently make use of 'opt-outs' in accordance with the "*deal*"?

In case of a EU treaty revision being introduced in order to implement the "*deal*", it cannot be ruled out that the UK will need to hold another referendum in the context of the European Union Act 2011 with the (ironical) result that the British voters could possibly vote against the "*deal*".

The realisation of a fundamental EU treaty change, in which UK-specific interests are concerned, may not seem unappealing for the British government, however, the question remains whether other Member States are willing to introduce such an overhauling and risky revision process and to what extent the British government is ready to support EU integration

[54] An attitude encapsulated by Winston Churchill declaring that "we are in Europe, but not of it" (Winston Churchill,"The United States of Europe", Saturday Evening Post, 15. Febr. 1930).

reforms.

Socio-political implications for the EU

As the analysis has shown a treaty revision process in form of the ordinary revision procedure remains a vital, if not necessary option for the eventual implementation of the "*deal*". Regardless of the fact whether the ratification process could prove successful or not, the mere commencement of such an inter-governmental meeting could either a) motivate the Member States to equally adopt pro-integrationist reforms to overhaul the EU institutions to become more effective in some policy areas or b) motivate especially Eurosceptic national governments of member states to follow in the footsteps of the UK and to include similar own amendments on the costs of the EU's cohesion into the Treaties. Given the (currently) apparent political willingness of some governments or societies to follow the latter one[55] the member states prefer to leave the Pandora's box unopened.

Possibly, some kinds of (temporary) gentlemen's agreements for some legislative proposals could be achieved, which further undermine the formal and supranational decision-making processes. Otherwise, parts of the 'deal' will be simply not enforced in the foreseeable future with the results that on the one hand, some British voters would feel 'betrayed', but on the other hand, the ostensible political unwillingness of most member states to alter the Treaties in order to give a 'special status' to one member state would send a signal to especially Eurosceptic countries that renegotiating member state conditions is generally neither wished nor guaranteed.

As most legislative proposals apply to all Member States, the national governments will also be able to make use of above all the 'Emergency brake', which can be used in order to appeal to populist demands in own countries yet eventually undermine the very common internal market. Additionally, states could officially (or already can in accordance to the European Council conclusions in June 2014) refer to the written down principle of 'differentiated integration' emphasizing the already existing gap between some member states in their development of EU integration.

By increasing the informal power of the European Council or other inter-governmental attempts of implementing decisions at the EU level, not only the formal competences of the other supranational EU institutions are undermined, but also the so-called "*democratic deficit*" of the EU is further boosted, in which indirectly democratically legitimized leaders(i.e. the European Council) implements policies without any parliamentary oversight.

CONCLUSION: "INTERNAL MARKET IS NOT A SWISS CHEESE TO MAKE ANY HOLES IN IT"

[55]For instance, a majority of Swedish people could imagine leaving the EU after 'Brexit' (Jacobsen, Henriette: "Poll: Majority of Swedes want to leave EU in case of Brexit, April 2016, available at http://www.euractiv.com/section/uk-europe/news/poll-majority-of-swedes-want-to-leave-eu-in-case-of-brexit/).

All in all, the analysis of the most essential parts of the 'deal' has only emphasized the facts that; firstly, many, if not most, parts of the 'deal' have rather a declaratory, legally non-binding character. However, the overall problematic legality, enforceability and judicial sanctioning concerning many upcoming legislative changes due to the 'deal' can also bring about some kinds of parallel judicial structures based on 'soft law' within the EU.

Secondly, When it comes to the issues concerning the free movement and the social benefits, the biggest challenge for lawyers and politicians lies in the problem of creating distinctions within the status of the migrating workers in accordance with the legal principle of the equal treatment, which namely remains of the basis for the internal market's functioning. The changes introduced in this deal really create only fragmentarily the special status of the UK regarding the security mechanism. Thirdly, there are even more problematic socio-political implications not only for the UK, but above all for the EU member countries. In other words, the 'deal' did not only partly reinforce the already existing 'special status' of the UK, but also the intergovernmentalistic approach of the national governments within (and outside) the EU with the potential result that each of them could try to implement its favoured EU-policies or decision (even) more and more at the level of the European Council.

Conversely, there is still the possibility of 'Brexit' after British referendum in June. The big question is whether even with negative for Europe result (UK leaving EU) of the referendum there would be still hope that UK could stay in EU with a different status. What should be mentioned is that UK leaving EU does not cross out that UK will not have any "unitary" relationships with EU or Member States. With invoking mechanism from article 50 it is connected negotiating an agreement concerning future UK's relationship with EU. Previous experiences show that it is possible to have an economic relationships with countries outside EU. The question is which model could choose UK: Swiss (a series of agreements) or Norwegian (one agreement about creating European Economic Arena). Both of those countries even if are not politically involved in the EU they are still involved in the "union" and they respect freedom of movement which is the most fragile arena for the UK and the most difficult to accept. It could be hardly inacceptable for EU to make any agreement about UK having access to internal market with restrictions to free movement, because as Viviane Reading said "Internal market is not a Swiss cheese to makes holes in it". Both Switzerland and Norway also create funds (instead of making contribution to the EU budget) such as Norway Grants or Swiss Contribution from which poorer countries from EU are making a benefit. These two factors are considered as a price for being able to use European free market. It is easy to see that it involves areas with which UK has biggest problems to accept (free movement and money contribution). On the whole, UK has other options – government could accept creating customs union (likewise Turkey) or free trade area (such as with Canada). Depth of this problem is enormous and should be considered in a separate essay, so it is important to emphasize that this could be also a problem which UK may face with if they don't decide to stay in EU and stick to the discussed deal.

Finally, problematic relations between the UK and the EU will surely not cease to exist in both the case of 'Brexit' and the case of 'Non-Brexit'.

Bibliography:

Monographs/Articles:

1. Barcz, Jan: "Wielka Brytania – prawne aspekty porozumienia nakierowanego na zapobiegnięcie Brexitowi"in:"Europejski Przegląd Sądowy", April 2016.
2. Booth', James "What is British voters' beef with the eu" (available online at http://openeurope.org.uk/today/blog/what-explains-british-attitudes-to-the-eu/).
3. Boffey, D.: 'Out, out, out! Can anybody stem the Eurosceptic tide?', 2013 (available at http://www.theguardian.com/politics/2013/may/18/eurosceptic-conservative-party).
4. Wellings, Ben/ Vines, Emma: "Are EU referendums undermining parliamentarysovereignity?", November 2015 (online available at http://www.democraticaudit.com/?p=17329).
5. Brady, Huge: "The EU's yellow card comes of age: Subsidiarity unbound?", November 2013 (online available at https://www.cer.org.uk/insights/eus-yellow-card-comes-age-subsidiarity-unbound).
6. Crisp, James: "Brexit referendum looms after Tory election victory", May 2015 (online available at http://www.euractiv.com/section/uk-europe/news/brexit-referendum-looms-after-tory-election-victory/)
7. Jacobsen, Henriette: "Poll: Majority of Swedes want to leave EU in case of Brexit, April 2016 (online available at http://www.euractiv.com/section/uk-europe/news/poll-majority-of-swedes-want-to-leave-eu-in-case-of-brexit/).
8. Koenig, Nicole: "A differentiated view of Differentiated Integration", Jacques Delors Institut Berlin, 2015.
9. Łazowski,A/ Zawidzka-Łojek, A. (red.): "Instytucje i porządek prawny Unii Europejskiej. Vademecum"in: "EuroPrawo", 2013.
10. Łazowski, Adam: "EU Withdrawal: Good Business for British Business?" in:"European Public Law" 2016.
11. Maliszewska –Nienartowicz, J.: "Dyskryminacja pośrednia w prawie Unii Europejskiej"in: "Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika", 2012.
12. Mann, Jim: "Britons on Europe: Survey results", (available online at http://www.theguardian.com/politics/2016/mar/20/britons-on-europe-survey-results-opinium-poll-referendum).
13. Nicolaides, Nedelescu/ Hornik, Watfe, Stein: "A new settlement for the UK: A "Leap in the

14. Dark" in "*Bruges European Economic Policy Briefings", 39/2016, 2016.*
15. O'Neill, Aidan: "EU Law for UK Lawyers", Hart Publishing [2nd ed.], July 2011.
16. Puetter, Uwe: "The European Council and the Council, New intergovermentalism and institutional change", Oxford University Press, 2014.
17. Reuters, "David Cameron suffers parliamentary defeat over Brexit referendum rules" (available at http://www.euractiv.com/section/uk-europe/news/cameron-suffers-parliamentary-defeat-over-brexit-referendum-rules/).
18. Rosse Lucia Serena "A New Revision of the EU Treaties After Lisbon?" in: "The EU after Lisbon" by L.S. Rossi and F.Casolari (eds.), 2011.
19. Ruparel, Raoul / Booth, Stephen / Scarpetta, Vincenzo: "Where next? A liberal, free-market guide to Brexit", Open Europe report (available online at: http://openeurope.org.uk/intelligence/britain-and-the-eu/guide-to-brexit/).
20. Ruparel, Raoul / Booth, Stephen / Scarpetta, Vincenzo : "Open Europe's EU reform heat-map: Where do EU countries stand on the UK's EU reform demands?",Open Europe report (available online at: http://openeurope.org.uk/intelligence/britain-and-the-eu/open-europes-eu-reform-heat-map-where-do-eu-countries-stand-on-the-uks-eu-reform-demands/).
21. Ruparel, Raoul/Swidlicki,Pawel: "Open Europe poses ten questions for the EU referendum Remain and Leave campaigns", Open Europe report (available online at: http://openeurope.org.uk/intelligence/britain-and-the-eu/open-europe-poses-ten-questions-for-the-eu-referendum-remain-and-leave-campaigns/).
22. Sir Alan Dashwood: "A 'legally binding and irreversible' agreement on the reform of the EU" in: "Henderson Chambers", February 2016.
23. Swidlicki, Pawel: "Showing the EU the red card: Why national parliaments need to be put back in control" (Open Europe report) (available online at: http://openeurope.org.uk/intelligence/britain-and-the-eu/showing-the-eu-the-red-card-why-national-parliaments-need-to-be-put-back-in-control/).
24. Swidlicki, Pawel/ Ruparel, Raoul/ Booth, Stephen /Howarth, Christopher/ Persson, Mats :"What if...? The consequences, challenges and opportunities facing Britain outside the EU", Open Europe report (available online at: http://openeurope.org.uk/intelligence/britain-and-the-eu/what-if-there-were-a-brexit/).
25. Terpan, F.: "Soft Law in the European Union – The Changing Nature of EU Law."in: "European Law Journal", vol. 21 (1), January 2015.

26. Winston Churchill,“The United States of Europe”, Saturday Evening Post, 15. Febr. 1930.

International treaties/agreements:

27. European Council meeting conclusions (18 and 19 February 2016) , EUCO 1/16
28. European Council meeting conclusions (18 and 26/27 June 2014) , EUCO 79/14
29. The consolidated versions of (both available at http://data.consilium.europa.eu/doc/document/ST-6655-2008-REV-8/en/pdf) :
    1.) Treaty on the European Union [2015]
    2.) Treaty on the Functioning of the European Union [2015]
30. Single Market Act II [2011] (available on: http://europa.eu/rapid/press-release_IP-12-1054_en.htm)
31. Vienna Convention on the Law of Treaties [1969]

EU regulations/ directives:

32. Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
33. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems
34. Regulation(EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, ECLI:EU:C:2012:538
35. Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative

Judgements:

36. Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman,ECLI:EU:C:1995:463
37. Case 207/78 (ECJ) Gilbert Even vs Office national des pensions pour travailleurs salariés (ONPTS); ECLI:EU:C:1979:144
38. Case C-237/94 (ECJ) John O'Flynn v Adjudication Officer; ECLI:EU:C:1996:206
39. Case 32-75 (ECJ) Anita Cristini v Société nationale des chemins de fer français; ECLI:EU:C:1975:120

40. Case 59/85 (ECJ) State of the Netherlands v Ann Florence Reed; ECLI:EU:C:1986:157
41. Case C-140/12 (ECJ) Pensionsversicherungsanstalt vs Peter Brey, ECLI:EU:C:2013:565
42. Case C333/13(ECJ) Elisabeta Dano,Florin Dano v Jobcenter Leipzig; ECLI:EU:C:2014:2358
43. Case C-67/14 (ECJ) Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others. ;ECLI:EU:C:2015:597
44. Case 2-299/14 (ECJ) Vestische Arbeit Jobcenter Kreis Recklinghausen vs Jovanna García-Nieto, Joel Peña Cuevas, Jovanlis Peña García, Joel Luis Peña Cruz; ECLI:EU:C:2016:114
45. Joined cases (ECJ) C-424/10 and C-425/10 Tomasz Ziółkowski and Barbara Szeja and others vs Land Berlin; ECLI:EU:C:2011:866
46. Case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres; ECLI:EU:C:2011:734
47. Case C-60/00 Mary Carpenter v Secretary of State for the Home Department;ECLI:EU:C:2002:434
48. Case 30-77 Régina v Pierre Bouchereau,ECLI:EU:C:1977:172
49. Joined Cases 115 and 116/81 Rezuguia Adoui and Dominique Cornuaille vs Belgian State in the person of the Minister of Justice and City of Liege in the person of the Bourgmestre, ECLI:EU:C:1982:183
50. Case 152-73 Giovanni Maria Sotgiu v Deutsche Bundespost, ECLI:EU:C:1974:13
51. Case 'Lagrand' (Germany v USA) [1999] ICJ No.104
52. Case C-6/64 (ECJ) Flaminio Costa v ENEL; ECLI:EU:C:1964:587

Polls/Statistics:

Polls concerning the British public opinion about 'renegotiated' member state conditions of the UK:

53. http://cdn.yougov.com/cumulus_uploads/document/rvj1k0mcpp/YG-Archive-Pol-Sun-results-200415.pdf

54. https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/avpu0igaec/YG-Archive-Pol-Sun-results-040515.pdf
55. https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/xla59zgzc5/YG-Archive-Pol-Sunday-Times-results-090515.pdf
56. https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/q32gumm58k/ProspectResults_150602_EU.pdf
57. https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/tscgkeooir/BritishInfluenceResults_150119_Europe_Website.pdf
58. https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/m936j3qhqi/EveningStandard_EU_141119_Website.pdf
59. http://ourinsight.opinium.co.uk/sites/ourinsight.opinium.co.uk/files/vi_04_11_2014_tables.pdf
60. https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/pjvdg1r9fz/YG-Archive-Pol-Sunday-Times-results-140525.pdf
61. http://cdn.yougov.com/cumulus_uploads/document/2chabiz0nj/YG-Archive-Pol-Sunday-Times-results-100513.pdf
62. http://cdn.yougov.com/cumulus_uploads/document/dz4ejczj7f/YG-Archive-Pol-Sun-results-180213.pdf

Statistics:

63. British Office of National Statistics report available on: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/february2016#immigration-to-the-uk

Miscellaneous:

64. Official slogans of the EU available at http://europa.eu/about-eu/basic information/symbols/motto/index_en.htm
65. Schuman Declaration 9th May 1950