Why Do We Need Sovereignty?

Ten areas of the proposed surrender of national sovereignty in light of the European Parliament's resolution on proposals for the amending of the Treaties

ed. Jerzy Kwaśniewski

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Spis treści

10 AREAS
WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

- CLIMATE POLICY
- HEALTH
- CROSS-BORDER INFRASTRUCTURE
- NATIONAL BORDERS
- FOREIGN POLICY
- DEFENCE
- INDUSTRY
- EDUCATION
- CURRENCY
- FAMILY ISSUES

A European Empire?

Can we imagine the world without a Polish diplomatic mission and without a Polish embassy in Washington, London, Beijing, Cairo, or New Delhi? Are we the last generation to see the Polish flag flying? In just a few years, will a Polish soldier be pacifying rebellions in sub-Saharan Africa that threaten French interests, and a Territorial Defence Force soldier be securing the relocation of migrants on Lampedusa? Will the Polish border be opened wide to migrants at the behest of a Spanish communist politician? Will the decision not to build the Central Communication Port or expand the port in Gdynia be made in Brussels? Or will the Polish mining industry be extinguished by a decision of a German official of the European Commission? How will we react to the EU's imposition of a single basket of reimbursed health services, including abortion up to the first cry of the baby and free euthanasia for children and seniors?

Finally, are we ready for a common education programme, which is to be identical for all Europeans, from Spaniards to Finns, with a single baccalaureate, a common reading list, and a universal history textbook with mandatory readings from Altiero Spinelli's Ventotene Manifesto?[1]

Why Spinelli? It is quite obvious, after all, that it was his work which was officially cited in the Preamble of the European Parliament's resolution[2] that, on 22 November 2023, initiated the formal process of amending the EU Treaties and transforming the European Union into a centralised "European Empire".

An expert team assembled by the Ordo Iuris Institute has thoroughly analysed a package of 267 Treaty amendments. In summary, the core of the reform comprises ten areas in which sovereignty is ceded entirely, accompanied by the rejection of the right of veto and the relinquishment of the decisive vote on future Treaty changes. EU officials are to assume full control over: (i) climate protection, (ii) health policy, (iii) cross-border infrastructure, (iv) border policy, (v) foreign affairs, (vi) security and defense, (vii) industry, (viii) education, (ix) monetary policy, and (x) family law. Each of the above areas is described in a separate chapter of this report together with the mechanism for the cession of sovereignty, the extent of the national powers surrendered, and the anticipated consequences.

What emerges from the analysis of the whole package of changes is a concrete vision of a "European superstate" being pushed by the reform's proponents, which projects an economically centralised organisation with top-down management and a level of centralisation significantly exceeding the

1 See A. Spinelli, E. Rossi, *The Ventotene Manifesto, with a Preface by E. Colorni. Text – translation [into Polish] – commentary*, Hipolit Cegielski Foundation Centre for Legal, Economic, and Social Studies in collaboration with experts of the Ordo Iuris Institute for Legal Culture, Brussels 2019, https://ordoiuris.pl/pliki/dokumenty/Ventotene_analiza.pdf, accessed 5 December 2023.

2 European Parliament resolution of 22 November 2023 on the European Parliament's proposals for the amendment of the Treaties (2022/2051(INL)).

United States' federalisation. It is also a bloc striving, through a unified educational and cultural policy, to raise a "new European citizen" for whom a pan-European identity takes obvious precedence over ethnic and national affiliation.

It is extremely concerning that the cutting edge of the reform is directed against both transatlantic cooperation and the ambitions of Poland and Central Europe to build strong and effective national armed forces. The co-rapporteur of this package of Treaty amendments, Helmut Scholz, emphasised the Union's responsibility to "contribute to international peace" and to "promote an active commitment to disarmament". He additionally linked the transformation of the Member States' armies into a Union army to the proposed principle of "forces not formed for the purpose of aggression". In this context, his demand that Treaty changes should be accompanied by measures aimed at "independence from NATO"[3] is particularly troubling.

The mandatory monetary union, the obligation to implement the euro and to submit to a central monetary policy, as well as the subordination of all infrastructure initiatives of international importance to the management of Brussels also serve to overturn the national self-determination of the Union's new members, just as they torpedo the regional empowerment efforts of the countries of the Three Seas Initiative. The consequences of these changes will affect millions of citizens in the Visegrad Group and the entire region.

The entire series of thematic considerations advanced by the report's authors confirms what every patriot instinctively feels: the state is the political instrument of the nation. National sovereignty is the guarantor of the national interest, and the means of securing concrete benefits for each of us. The cession of sovereignty is the permanent transfer of these instruments into the hands of a new supranational elite outside the democratic control of the nation. The domestic politicians who are advocating for taking this step will be its sole beneficiaries, trading independence for their inclusion in the ranks of the new undemocratic elite of the "European Empire".

When the originators of the modern concepts of international law – from Paweł Włodkowic to Alberico Gentili, Francisco Suarez, Francisco de Vittoria, and Jean Bodin – set about defining sovereignty, they pointed to such features therein as the ability of a state to control its own internal affairs and foreign policy, to wage defensive war, and to protect defined borders. In light of the adopted draft Treaty amendments, even these elementary features of sovereignty are ultimately being transferred to the EU bureaucracy. Although the authors of the amendments try, even if ineptly, to imitate the principle of the separation of powers by assigning the role of the legislature to the European Parliament, of the executive to the European Commission, and of the judiciary to the CJEU, in essence the reform establishes a completely new sovereign, detached from democratic legitimacy and control.

This must be recognised as a triumph for Altiero Spinelli, who wrote in 1941 in the Ventotene Manifesto that "the fundamental problem that needs to be solved, the existence of which makes all further progress only illusory, is the question of abolishing the definitive division of Europe into sovereign nation-states". Nor did he doubt that in post-war Europe it would be "the dictatorship of the revolutionary party that would create the new state and around it the new true democracy", especially

3 Report on the European Parliament's proposals to amend the Treaties, 7.11.2023 - (2022/2051(INL)), https://www.europarl.europa.eu/doceo/document/A-9-2023-0337_PL.html, accessed 5 December 2023.

since “in revolutionary times, when it is not a question of managing institutions but of creating them, democratic practice fails miserably”.

Europe’s politicians are well aware of the power of symbols. When Brexit’s unexpected success shook the European dream, a surprising gesture and alliance was made in the summer of 2016. German Chancellor Angela Merkel, French President Francois Hollande, and Italian Prime Minister Matteo Renzi went on a kind of pilgrimage to Spinelli’s tomb on the island of Ventotene. Even their means of transportation was symbolic: a ship named after Giuseppe Garibaldi, a Carbonari and a staunch enemy of the Church, who united Italy.

It did not take long to see the fruits of this joint gesture by the German Christian Democrats, French Socialists, and Italian centrists. Following the typical logic of progressive ideologues, the failure of the earlier model of European unification represented by Brexit was interpreted as a sign that the process of tightening structures and federalising the Union needed to be strengthened. This plan was pursued in two ways. On the one hand, by creating instruments of political and financial pressure on the Member States. On the other, by preparing a project for the deepest centralisation of the European Union and giving it the appearance of a bottom-up initiative, so that it could be supported by the broadest political coalition, while at the same time staging the daily theatre of internal disagreements and differences. Historical experience teaches us that Britain’s withdrawal from continental affairs has led to France and Germany taking over the role of choreographers and opens the way for Europe’s strategic collaboration with Russia, in turn distancing the former from the Anglo-Saxon world.

When the Ventotene Manifesto was first translated into Polish five years ago on the initiative of MEP Dobromir Sośnierz, the European Parliament building already bore Spinelli’s name, and the Spinelli Group had brought together European Socialists, Liberals, Christian Democrats, and Greens and is led by the current head of Polish diplomacy, Radosław Sikorski. Our hunch that the Italian communist’s revolutionary proclamation from 80 years ago is taking on new life turned out to be justified.

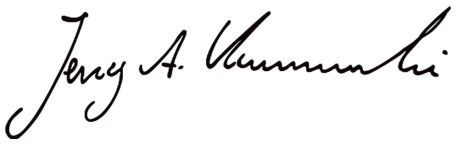
Between 2021 and 2022, a sham European consultation was held under the collective banner of the “Conference on the Future of Europe”, thereby building the foundations for the supposed democratic legitimacy behind the demands for the most profound reform of the European Union to date. The final report of the conference was analysed in detail, and in 2022 a summary on the reform’s most worrying orientations was published.[4] Merely a year later, the Constitutional Affairs Committee of the European Parliament, under the direction of the leader of the Conference on the Future of Europe, Guy Verhofstadt, presented a draft of the changes, which was adopted without revisions by the European Parliament and the Council of the EU before the end of 2023.

It seems like a national tradition that in every generation we Poles are confronted with the need to fight for independence. After all, it is not the first time that the destabilisation of Poland, induced infighting, and growing conflicts have been exploited by the political elite as justification for national betrayal, while surrender to foreign rule is presented as the path to desired prosperity and security.

4 Ordoiuris.pl, *Komentarz do wybranych propozycji Konferencji o Przyszłości Europy*, eds. A. Kubacka, W. Przebierała, https://ordoiuris.pl/sites/default/files/inline-files/Raport_OI_CoFoE.pdf, accessed 20 January 2024

The cession of sovereignty may in fact meet effective resistance, however. We are facing a referendum in which Poles will be asked to agree to surrender their independence in exchange for promises of future benefits in the "European Empire". Our report and its accompanying meetings and debates are an important step in the formation of national opinion leaders who will convince our compatriots that the forfeiture of sovereignty will cause very tangible losses in the lives of every Pole: cultural, spiritual, material, and civilisational. Our common task is to arouse widespread awareness that another Partition Treaty is neither a historical necessity, nor will it "serve to maintain and consolidate peace and improve the future lot of all", as Poland's last king, Stanislaus Augustus, put it in his act of abdication.

In the 21st century, a new attack on national sovereignty must end with the defeat of the traitors to the Fatherland and the victory of those new elites who are committed to the nation and the Republic.



Jerzy Kwaśniewski

President of the Management Board of Ordo Iuris Institute

Introduction

- The EU has the exclusive authority to legislate in some areas (e.g. customs or common trade policy), and it shares power with the Member States in others (e.g. environment, energy, the internal market).

- In areas of shared competence, where Member States may legislate in the absence of any EU legislation, the EU can seize exclusive legislative power to any extent and at any time without the need to further amend the Treaties. This is called the "occupied field effect".

- The amendments proposed by the European Parliament in its resolution of 22 November 20231 provide for a significant expansion of the EU's shared competences in areas which were previously the sole prerogative of the Member States.

- Decisions are currently taken on fundamental matters either by consensus (e.g. European Council conclusions) or unanimously (e.g. on common foreign and security policy, common defence policy, or family law).

- Most EU legislation is currently adopted by the European Parliament, however, where an absolute majority is required, and the Council of the EU, where a qualified majority is required representing affirmative votes by 55% of the Member States (not less than 15) and a minimum of 65% of the Union's population.

- The amendments now being proposed by the European Parliament envisage the elimination of unanimity rule and its replacement by majority rule. This means that the majority will decide in all cases, sometimes against the vital interests of a large number of the Member States.

Sources of EU law

European Union law falls into two categories:

1) Primary law – the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights of the European Union (CFR). These are the legal acts possessing the highest legal force in the EU's legal order. According to some authors, primary law also includes the common constitutional traditions of the Member States;

2) while secondary (derived) law comprises directives, regulations, and decisions. In practice, it is secondary law that gives rise to most of the rights and obligations of EU citizens as well as the Member States themselves.

1 The European Parliament's resolution of 22 November 2023 on the European Parliament's proposals for the amendment of the Treaties (2022/2051(INL)), hereinafter: European Parliament resolution, EP resolution. The amendments considered in this chapter as well as the following ones refer to this resolution.

Institutions of the European Union

The main institutions of the European Union, which are responsible for setting EU policy and creating EU law, are: the European Council, the Council of the EU, the European Parliament, and the European Commission. The latter three institutions form what is known as the decision-making triangle in the area of EU legislation.

The European Council is the EU's highest body responsible for setting the EU's general policy directions, and is composed of representatives of all the Member States at the rank of Heads of Government (prime ministers, chancellors) or Heads of State (presidents). Its directional decisions are usually expressed in the form of conclusions which, although formally non-binding, are in practice taken into account by the Commission, the EU Council, and the European Parliament.

The Council of the EU is the body responsible for setting the EU's more specific policies and coordinating them, as well as co-legislating with the European Parliament. It is made up of representatives of all the Member States of the ministerial rank. The Council of the EU sits in different bodies with the ministers responsible for the particular group of issues being discussed at any given time. The Council of the EU can therefore meet as the General Affairs Council; the Foreign Affairs Council; the Economic and Financial Affairs Council; the Justice and Home Affairs Council; the Employment, Social Policy, Health, and Consumer Affairs Council; the Competitiveness Council; the Transport, Telecommunications, and Energy Council; the Agriculture and Fisheries Council; the Environment Council; and the Education, Youth, Culture, and Sport Council. A Committee of Permanent Representatives of the Governments of the Member States (COREPER) is responsible for preparing the duties of the EU Council.

The European Parliament is the body responsible for co-legislating the EU with the Council of the EU and for scrutinising the activities of the EU institutions, especially the European Commission. It is currently made up of 705 MEPs who are elected for a five-year term via universal vote; direct, secret ballot; and proportional representation. The number of seats per country is based on population. Germany (96), France (79), Italy (76), Spain (59), and Poland (52) have the largest delegations of MEPs.

The European Commission is the body responsible for coordinating the activities of the EU institutions, managing day-to-day affairs, overseeing the application of EU law by the Member States (hence referred to as the guardian of the Treaties), and drafting secondary legislation. It has 28 members, including 27 commissioners (one from each Member State) who are elected by the EU Council, and a president elected by the European Council with the approval of the European Parliament.

The Court of Justice of the European Union (CJEU) is the judicial body of the European Union and is responsible for reviewing the compatibility of secondary law with primary law, clarifying doubts about the interpretation of EU law, and assessing the states' compliance with their Treaty obligations. In the event of a state failing to comply with its Treaty obligations, the CJEU can impose financial penalties on it at the request of the Commission. The CJEU is composed of 27 judges who are appointed by common agreement of the governments of the Member States for a term of six years.

Types of powers in the European Union

Many of the Treaty amendments discussed in this study will extend the European Union's powers. But in order to fully understand their implications, it is necessary to clarify what the powers of the European Union actually are and into which categories they fall.

The European Union's powers are divided into: (1) exclusive (Article 3 TFEU), (2) shared with the Member States (Article 4 TFEU), (3) coordinating the economic and social policies of the Member States (Article 5 TFEU), and (4) supporting, coordinating or supplementing the actions of the Member States (Article 6 TFEU). The amendments do not extend the scope of coordinating or complementary powers, so this chapter will focus on exclusive and shared competences.

Exclusive authority. Exclusive authority of the Union means that only the Union institutions (the European Commission, the Council of the EU, the European Parliament) are responsible for a given area of public policy, and only they can legislate in this area. This type of authority, on the one hand, entitles the Union to act autonomously in a given field (its positive aspect) and, on the other, prohibits the Member States from taking any autonomous action in this field (its negative aspect).[2] There are, however, two exceptions to this second rule: States may legislate in an area over which the EU has exclusive power under the Union's authority or in order to implement Union acts (Article 2(1) TFEU), i.e. *de facto* implementing "guidelines from Brussels".

As it stands, the EU's exclusive authority relates to:

a) the customs union;

b) establishing the competition rules necessary for the functioning of the internal market;

c) the monetary policy for Member States whose currency is the euro;

d) the conservation of marine biological resources under the common fisheries policy;

e) the common commercial policy;

f) concluding international agreements when their conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal power, or insofar as their conclusion may affect common rules or alter their scope.

The amendments proposed by the European Parliament provide for the extension of the exclusive authority in order to include the ability to negotiate international agreements "in the context of global climate change negotiations" (Amendment 69) – a very broad concept indeed, as the climate is affected by everything.

2 R. Schütze, *European Constitutional Law*, Cambridge 2012, p. 164.

Shared competences. Under shared competences, either the European Union or a Member State may legislate, but only on condition that the EU has not previously regulated a particular issue. Thus, there is an automatic pushing out of the Member State (from the field) where the Union has made use of its authority (the so-called **occupied field effect**).[3] The literature has pointed out the unusual nature of this solution: prior to the adoption of the Lisbon Treaty (2009), in an area of shared competence the Union and the Member States could legislate in parallel.[4]

The concept of shared competences thus refers to legislative powers in areas where the Union has primacy over the Member States. Member States may legislate in areas of shared competence only if the Union:

1. has not yet made a legislative proposal,
2. has decided not to do so,
3. or has ceased to exercise its power.

This last situation occurs when the relevant Union institutions decide to repeal a legislative act governing an area of shared authority. Pursuant to Article 241 TFEU, the Council of the EU may request the Commission to submit proposals for repealing the legislative act in question. Although such requests are not of a binding nature, the Commission has declared that it will treat such requests with particular attention.[5] In practice, it is extremely rare for the European Union to withdraw from regulating an area in which it has shared competence, thus giving way to the Member States. A cautious thesis can therefore be advanced that it is likely that the EU will also be keen to take the initiative in the case of external border protection policy, thus preventing the Member States from adopting their own regulations in this area.

On the other hand, it should be kept in mind that as long as an aspect of external border protection policy remains unregulated by EU law, the Member States remain free to regulate themselves. According to Protocol No. 25 of the TFEU, the EU's shared power must be interpreted strictly in the sense that "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area".[6]

In the current state of the law, shared competences include:

1. internal market;
2. social policy in relation to those aspects set out in the TFEU;
3. economic, social, and territorial cohesion;

3 P. Craig, *Competence: Clarity, Conferral, Containment and Consideration*, European Law Review, Vol. 29, No. 3 (2004), pp. 323 and 334.

4 R. Schütze, op. cit., p. 166.

5 J. Barcik, [in:] *Prawo Unii Europejskiej*, eds. J. Barcik, R. Grzeszczak, Warsaw 2022, p. 107.

6 Protocol No. 25 on the exercise of shared competences.

4. agriculture and fisheries, excluding the conservation of marine biological resources;
5. the environment;
6. consumer protection;
7. transport;
8. trans-European networks;
9. energy;
10. the area of freedom, security, and justice;
11. common public health safety concerns in relation to those aspects identified in the TFEU;
12. research, technological development, and space;
13. and cooperation development and humanitarian aid.

In the latter two cases, however, the occupied field effect does not apply – i.e., the exercise of these powers by the EU must not result in the Member States being prevented from exercising their powers (Article 4(3) and (4) TFUE).

The amendments submitted by the European Parliament provide for the extension of the EU's shared competences to include:

1. public health, in particular the protection and improvement of human health, especially cross-border health threats, including universal and full access to sexual and reproductive health and rights, and the "One Health" approach (Amendment 70);
2. cross-border infrastructure (Amendment 71);
3. policy on external borders (Amendment 72);
4. foreign affairs, external security, and defence (Amendment 73);
5. civil protection (Amendment 74);
6. industry (Amendment 75);
7. and education (Amendment 76).

European Union legislative procedures

There are two basic procedures for the creation of EU secondary legislation: the ordinary legislative procedure and special legislative procedures.

The ordinary legislative procedure consists in the joint adoption of secondary legislation by the European Parliament and the Council of the EU on a proposal from the European Commission, which has exclusive power to draft these acts. In a multi-stage procedure, both the European Parliament and the Council of the EU can propose amendments to the draft that is presented by the Commission. But the final version of the act must be approved by both the Parliament and the Council. The European Parliament decides by absolute majority and the Council of the EU by qualified majority (see below). It is under the ordinary legislative procedure that the vast majority of secondary legislation is adopted.

The special legislative procedure is not regulated coherently and uniformly. Two basic forms can be distinguished: the consultation procedure and the assent procedure. In both cases, the Council of the EU adopts an act on its own whereby under the consultation procedure it consults the European Parliament beforehand for a non-binding opinion, and under the assent procedure it must obtain the European Parliament's prior approval. The consultation procedure applies, for example, to the adoption of legislation concerning the harmonisation of legislation relating to turnover taxes, excise duties, and other indirect taxes (Article 113 TFEU). In turn, the assent procedure applies, for example, to measures necessary to combat any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation (Article 19(1) TFEU). There are also cases where it is the European Parliament that adopts an act with the involvement of the Council, i.e. after seeking its opinion or consent.

Decision-making methods in EU law

There are six basic modes of decision-making in EU law:

1) **Simple majority voting** – More votes in favour than against, not counting abstentions. This is how procedural issues (such as the adoption of rules of procedure) are usually decided in the European Council, the Council of the EU, or the European Parliament.

2) **Absolute majority vote** – More votes in favour than the sum of the votes "against" and "abstentions". This is popularly, but not very precisely, referred to by the formula "50%+1", which is only true if there is an even number of voters. This is how the European Parliament most often adopts its decisions.

3) **Qualified majority voting** – This, the main method of decision-making in the Council of the EU since 1 November 2014, is based on the so-called double majority (Lisbon) system. **The double majority system assumes** that each Member State has one vote and that the adoption of a particular decision requires the affirmative votes of at least 55% of Member States (but not less than 15), representing a minimum of 65% of the Union's population.

4) **Voting with a reinforced majority –** A method for the adoption of legal acts by the Council of the EU when it is not acting on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy. A reinforced qualified majority shall represent at least 72% of the Member States, representing at least 65% of the population of the Union.

5) **Unanimous voting –** The method of decision-making in the Council of the EU or the European Council on matters of fundamental importance, e.g. combating all discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation (Art. 19(1) TFEU); the common foreign and security policy (Art. 24(1) TEU); the common defence policy (Art. 42(4) TFEU); family law possessing cross-border implications (Art. 81(3) TFEU); the harmonisation of legislation relating to turnover taxes (Art. 1 TEU); harmonisation of legislation relating to turnover taxes, excise duties, and other indirect taxes (Art. 113 TFEU); and measures significantly affecting a Member State's choice between various energy sources (Art. 192(2)(c) TFEU).

6) **By consensus** – The main method of decision-making in the European Council, which seeks to adopt a common position without a vote. This method is used to adopt conclusions, such as general guidelines for the Union's policy, which, although formally not binding, are in fact taken into account by the Commission, Parliament, and the Council of the EU.

The so-called Member State **veto right** refers to the last two methods of decision-making. Opposition by one state blocks a decision for which unanimity or consensus is required.

The amendments proposed by the European Parliament provide for a radical reduction of the unanimity voting rule, replacing it with a qualified majority ("in favour" of at least 55% of the Member States, and no fewer than 15, while representing a minimum of 65% of the Union's population). This means that an appropriate majority can be achieved by a bloc of states consisting of Germany, one larger partner (France, Italy, Spain, or Poland), and can be supplemented by a group of smaller states. The veto of the other Member States will then be irrelevant.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 1: CLIMATE POLICY

The EU is to acquire exclusive competence for the conclusion of international agreements on climate change. This leads to member states being bound by regulations reorganising fundamental areas of life and the economy, from agriculture, industry, urban planning to demographic policy or education. The general principle of all EU policy becomes climate protection and the limitation of global warming, undermining the priority of the sustainable development of the EU economy in the global market.

Jerzy Kwaśniewski

1. Climate policy

Main theses

- According to the European Parliament's resolution, the general principle of all EU policy will require consideration for "climate and biodiversity protection" (Amendment 83). At the same time, the draft proposes to modify the European Union's objective of taking action for sustainable development by including "reducing global warming and protecting biodiversity in accordance with international agreements" among its indicators.

- These amendments give the European Union the exclusive authority to conclude international agreements "on climate change" (Amendment 69).

- Additionally, the area of the "environment" will be removed from shared competences and folded into the EU's exclusive powers (Amendment 70), which will give the European Union exclusive authority over environmental issues. This is the intention expressed in the Preamble of the EP's resolution to "establish the Union's exclusive authority over the environment and biodiversity, as well as over climate change negotiations".

- In line with the concept of deep ecology,[1] the EP resolution's Preamble emphasizes the need to implement a uniform protection of the biosphere without differentiating or prioritizing between the interests of the animal and human worlds.

- The culmination of these significant changes is the inclusion of environmental crime (including climate crime) as a new item in the category of EU crimes, and equipping Europol with additional powers to prosecute them.

1 The author of the term "deep ecology" is the Norwegian philosopher Arne Naess, who first used it in his article "The Shallow and the Deep, Long-Range Ecology Movement" in the monthly magazine Inquiry in 1973. This thinker makes a distinction between shallow ecology, which sets a goal of combating air pollution and the consumption of natural resources by, for example, promoting recycling in order to ensure a happy life for the inhabitants of the developed countries; and deep ecology, the focus of which is the "technocratic" (a term used by proponents of deep ecology) assumption that man must control nature, and that in the hierarchy of beings, man stands above other organisms (M. Hoły-Łuczaj, *Radical Nonanthropocentrism. Martin Heidegger and deep ecology*, Warsaw 2018, pp. 25-26). It is worth pointing out that this theory is referred to as the "pantheistic religion of the present day" (P. Kozioł, *Arne Naess's deep ecology - a vision of the pantheistic religion of the present day* Humanities and Natural Science, No. 4 (1998), pp. 85-100).

- The proposed changes not only deprive the Member States of explicitly-expressed powers over energy policy or the raw material industries, but will lead to further limitations of the Member States' powers by the EU's accession to global climate agreements and the tightening of so-called climate protection policies and policies limiting global warming.

- In light of the EU's energy policy to date, the direct effect of adopting these amendments will be to strike at Poland's constitutional principle of energy security.

- The amendment in question must be assessed negatively. It is both inconsistent with the Treaty regulations and, above all, a threat to constitutional values.

General comments

Environmental issues and climate policy are covered in the most detailed amendments within the package adopted by the European Parliament . At the same time, the so-called fight against climate change is elevated to the status of a Treaty principle, and as such is to shape EU economic policy.

Amendment 83 modifies Article 11 of the Treaty on the Functioning of the European Union, which is the general principle for defining EU-wide policy. As proposed by the European Parliament, "environmental, climate, and biodiversity protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". The addition of the requirement to take into account "climate and biodiversity protection" among the components of this general principle is a significant change that will have a real impact on the EU's future functioning. What "climate requirements" are is further defined by both the Preamble and Amendment 4.

Amendment 4 amends a key provision of the first subparagraph of Article 3(3) of the Treaty on European Union, which provides for the establishment of the internal market and the pursuit of sustainable development in Europe. Hitherto, this "sustainable development" has been defined as a combination of different factors: (i) sustainable economic growth, (ii) price stability, (iii) a highly competitive social market economy aiming at full employment and social progress, and (iv) a high level of protection and improvement of the quality of the environment with (v) support for scientific and technological progress. **The entry into force of Amendment 4 adds factor (vi) to the catalogue of factors defining "sustainable development", namely "the reduction of global warming and the protection of biodiversity in accordance with international agreements"**. As a result, "sustainable development", which is an EU objective, cannot be a policy that does not lead to a reduction in global warming. However, there is no method to determine how much, or if at all, the drastic policy measures imposed by the EU on the nation-states will have any impact on climate change in either the short or long term. Negative climate impacts are clearly becoming a rationale for blocking economic development initiatives, both on the European and national levels. International agreements that are involved in defining the European Union's primary objective are also becoming particularly important.

This is all the more noteworthy given that another amendment (No. 69) **transfers exclusive powers to the European Union to conclude international agreements "on climate change**". This provision is accompanied by the removal of the area of "environment" from the scope of shared competences

(Amendment 70). A combined reading of Amendments 4, 69, and 70 leads to the conclusion that the European Union is taking over exclusive powers over the environment, which – despite the absence of a clear statement in the wording of the apparently missing amendment (a correction will certainly be made) – is confirmed by the wording of Recital 13 of the EP resolution, which explicitly proposes to "to establish exclusive Union competence for the environment and biodiversity as well as negotiations on climate change".

The Preamble, moreover, indicates the broadest possible interpretation of the addition of "the reduction of global warming" to the EU's objectives. Title 32 of the Preamble of the EP resolution proposes that "the reduction of global warming and safeguarding biodiversity be included as aims of the Union ... adding climate and biodiversity protection to the Union's sustainable development goal ... including sustainability in the Treaty provisions on fisheries". In doing so, it calls on the EU to globalise this radical policy, and "for international obligations of the Union to pursue efforts to limit the global temperature increase to be incorporated into the Treaties". The very title of the Preamble emphasises an approach that is in line with the concept of "deep ecology", whereby the EU is called upon to implement a uniform protection of the biosphere without distinction or prioritisation between the interests of the animal and human worlds – "to protect the natural foundations of life and animals, in line with the One Health approach, as well as to take account of the risk of crossing planetary boundaries" (also Amendments 70, 157)

The culmination of these significant changes is the demand for the inclusion of so-called environmental crimes (including "climate crime") as a new entry in the category of EU crimes, i.e. with mandatory prosecution in all Member States, equipping Europol with additional powers to prosecute these crimes, with "the functioning of the European Public Prosecutor's Office to be governed by the ordinary legislative procedure". This not only means the exclusion of the right of veto, but also leads to subjecting all the Member States to the regulation of sensitive and undefined areas of competence after being adopted by a simple majority of EU members (Title 34. Preamble, Amendment 106 of the EP resolution).

The elevation of the protection of the "**climate**" and the "**limitation of global warming**" to the status of fundamental guidelines in the "**definition and implementation of the Union's policies and activities**" **as well as the defining of** "**sustainable development**" **as an EU objective, gives the EU a skeleton key, allowing it to influence shared competences and the exclusive powers of the Member States in the name of** "**climate protection". In case of any doubt in this regard, the EU will acquire exclusive powers to conduct** "**global negotiations**" **and conclude treaties** "**on climate change", which may define the scope of these exclusive powers accordingly.**

Amendment number 69 would add the words "including in the context of global negotiations on climate change" to Article 3(2) of the Treaty on the Functioning of the European Union, making the provision read: "The Union shall also have exclusive competence for the conclusion of an international agreement, including in the context of global negotiations on climate change, when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

Clearly, this amendment deprives Member States of influence in agreeing on EU positions for COP climate summits. Such positions have so far been decided unanimously by the Environment Council.

Adopting positions by a simple or qualified majority in the Council poses the risk that there will not be a will to develop provisions that suit best all Member States. These may include, for example, commitments to so-called climate targets (e.g. emission reductions, increasing the share of installed capacity from specific energy sources, phasing out specific techniques, time schedules) and financial commitments (e.g. participation in contributions to specific funds). The implementation of these commitments may result in the need to adopt specific national regulations that will affect, for example, the shaping of the national energy mix, and consequently, energy prices.

It should be kept in mind that climate protection issues have a fundamental impact on the energy sector – the energy-climate transition assumes, on the one hand, the abandonment of electricity generation from non-organic sources (e.g. lignite) and the development of renewable energy sources (wind, solar, hydroelectric, geothermal, and biomass energy), and on the other the "greening" of the economy through the introduction of solutions (e.g. electric cars instead of internal combustion engines) that will supposedly be beneficial to the climate, but which require an increase in electricity production. At the same time, however, it should be recalled that – although the ultimate goal of achieving zero emissions in the European Union has been set for 2050 – the process of Poland's departure from coal is regulated by the Polish Energy Policy until 2040.

It should also be recalled that the energy-climate transition is a process that, in a democracy, must take place in a fair manner (in particular, it is worth recalling at this point the *concept* of energy justice[2]), and that the measures taken must account for not only the protection of the environment and counteracting the negative effects of human impact on the climate, but also the interests of those affected. This applies in particular to groups that are at risk of, for example, losing their jobs (the most classic example here being, of course, miners) or having their rights to carry out economic activities that were hitherto permitted legally curtailed (this applies in particular to trends towards the reduction of further branches of agriculture). What is particularly important, however, is that in the end, many of the negative effects resulting from a "top-down" imposition of changes may affect society as a whole (e.g. an increase in electricity prices, transport, and construction costs or of selected food products, and more broadly, restrictions on civil rights and freedoms).

Energy security as a constitutional value

The Constitution of the Republic of Poland refers to the issue of climate protection in several places. For example, it already indicates in Article 5 that the Republic of Poland "shall ensure the protection of the environment guided by the principle of sustainable development". The need to protect the environment can be a justification for restrictions on the exercise of constitutional freedoms and rights (Article 31(3)). The public authorities are obliged to prevent the adverse health effects resulting from environmental degradation (Art. 68(4)). Article 74 ensures that the public authorities pursue policies which will ensure environmental security for the present and future generations (para. 1), and the protection of the environment is a duty of the public authorities (para. 2).

2 M. Sokolowski, R. Heffron, *Defining and conceptualising energy policy failure: the when, where, why, and how,* 'Energy Research & Social Science,' Vol. 11 (January 2016), pp. 174-182.

At the same time, as Poland's Supreme Administrative Court rightly pointed out in the case of the suspension of the execution of the environmental decision concerning the Turów mine (a branch of the company PGE Górnictwo i Energetyka Konwencjonalna, hereinafter: PGE GiEK), energy security should be treated as a constitutional value, as it is one of the guarantees of state independence and national security. The court pointed out that although the obligation of the public authorities to protect the environment derives from Article 74(2) of the Constitution of the Republic of Poland, "there is no doubt, however, that energy security is also a constitutional value, as it is one of the guarantees of the independence of the state and the security of citizens from Article 5 of the Constitution of the Republic of Poland (cf. the Supreme Court judgment of 22 January 2020, ref. I NSK 105/18, LEX no. 2771346). The balancing of these two values from the point of view of the admissibility of suspending the contested decision's execution was not carried out by the court of first instance in this case, despite the fact that it was important in the context of the principle of proportionality referred to in Article 31(3) of the Constitution of the Republic of Poland".[3]

Article 5 of the Polish Constitution indicates not only the need to protect the environment, but also to ensure the security of Polish citizens. Piotr Tuleja, Head of the Chair of Constitutional Law at Jagiellonian University and a retired judge of the Constitutional Tribunal, points out that it is not only military security that is at stake, given that the concept of security "should be understood broadly, as a state giving a sense of certainty, stability, and protection. It includes, *inter alia*, security, political, military, social, and environmental security".[4] This list is only illustrative. In the case of Poland (as the Supreme Administrative Court rightly pointed out in the justification cited above), energy security is particularly important because, for example, Russia uses energy resources as a weapon to influence its neighbouring countries, as well as other European Union countries (including the Federal Republic of Germany and, as a consequence, the whole of Europe).

It should be recalled that:

a) Already during the Cold War, the Kremlin took advantage of

b) anti-nuclear movements to undermine the economic potential of Western countries;

c) Gazprom has repeatedly blackmailed the countries of Central and Eastern Europe (in relation to their policy towards Ukraine and in turn the risk of being cut off from gas supplies);

d) The construction of NordStream I and NordStream II pipelines was intended to make Poland, among others, ultimately dependent on Russian gas supplies;

e) BalticPipe, which is a counterweight to the Russian threat, is considered one of the key investments for Poland's security;

f) Russian hackers regularly launch attacks on Western energy infrastructure.

3 Order of the Supreme Administrative Court of 18 July 2023, reference III OZ 331/23.

4 P. Tuleja, *The Constitution of the Republic of Poland. Commentary*, Warsaw 2019, p. 41.

There is no doubt that energy potential also has a direct bearing on other levels of security – for example, it is impossible today to imagine the armed forces and a well-functioning national defence industry without a stable electrical supply. Of course, it is an undeniable fact that renewable energy sources will also become a source of electricity for the Polish armed forces or the Polish *defence industry* (plants belonging to both the Polish Armed Forces Group and entities from the non-state sector) – but this is a future prospect.

It should also be kept in mind that energy prices – although not necessarily electricity prices – may also have a negative impact on other areas of the economy, such as logistics, transport, or agriculture. In particular, it is worth recalling this year's threat to Poland's food security that occurred when, due to gas prices, Poland's largest chemical plants (Anwil S.A. and Grupa Azoty S.A.) considered discontinuing production, without which the functioning of Polish agriculture would be threatened. This could have a negative impact on our food security.

Selected risks

There is no doubt that different, and often conflicting, interests exist across the various European countries with regard to the future of energy. The clearest example of this is Germany's energy policy, which for decades has assumed a close cooperation with Russia, and is in turn in conflict with Polish interests. Germany's anti-nuclear policy is likewise a threat to France's nuclear potential. It is worth noting that the presence of nuclear energy in the EU Taxonomy[5] has been debated, as its absence would be a major problem from both the Polish and French points of view.

The creation of a single European policy on "climate change", taking into account the interests of all Member States, is *de facto* unattainable, and Poland, due to the current structure of its energy mix, is only just starting to "green" its economy. It should be recalled that the well-known problem with the operation of the Turów mine and its potential future (or lack thereof) is not a consequence of EU climate policy, but rather the negative impact of the Turów mine on the Czech (and German) economy – and just this one neighbourly spat between Warsaw and Prague has put into question the continued operation of the complex, which is responsible for supplying about 6-8% of the country's electricity production. If, for example, as a result of the European Union's climate arrangements Poland were to be forced to abandon lignite mining (and even more so if this also applied to hard coal) and the generation of electricity in Polish coal-fired power stations, our economy would face an unimaginable problem.

It is also possible to imagine a situation where a specific model for the development of renewable energy sources would be imposed on Poland, contrary to the current accepted model. For example, a lot of social controversy is aroused by regulations on the construction of wind power plants in Poland. It is easy to imagine that, as a result of decisions taken by the European Union as part of climate negotiations, this model of renewable energy sources will begin to be developed in our country in a manner contrary to social expectations. The Polish people, however, will have lost their democratic influence on the legislator (as manifested, for example, in the possibility to elect a different parliamentary

5 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198/13.

majority than the one that adopts laws contrary to social expectations), as policy in this area will no longer be within the power of the Polish legislator.

The Polish economy is undergoing an energy transition until 2040, in accordance with the Polish Energy Policy. In this respect, Poland has implemented decarbonisation measures, wind farms in the Baltic Sea are already planned, and a Polish nuclear power plant is on the way. It should be recalled that steps are being taken to decommission successive power units at the Bełchatów power plant, as well as the fact that a law creating the National Energy Security Agency was adopted in the previous parliamentary term (although due to the principle of discontinuing the work of the previous parliament when a new parliament is elected, this legislative procedure was terminated). The act provided for the separation of coal assets from energy groups, concentrating them in one place, i.e. in PGE GiEK, on the basis of which the National Energy Security Agency (NABE) was to be established (which at the same time would enable Polish energy companies to accelerate investment in low- and zero-emission energy sources). Hydrogen-based energy, as well as biogas and biomethane energy, is likewise currently being developed in Poland.

If the European Union would have the authority to make independent, binding decisions regarding the conclusion of international agreements that would affect the Polish energy sector, the Polish economy could be faced with having to abide by the provisions of an international agreement that is incompatible with the Polish *raison d'État*. This would have to mean either Poland's exit from the European Union[6] or exposure to gigantic financial losses resulting, for example, from the need to shut down individual plants that are not deemed environment-friendly, and thus inevitably buying energy from foreign producers.

The energy sector, as well as the closely-related mining sector, are not the only ones in Poland that could feel the negative effects of such changes. Another group is farmers. It should be recalled that climate regulations have a significant impact on the situation of agriculture. Poland is one of the agricultural leaders in the European Union, yet for a long time there have been initiatives in Brussels aimed at far-reaching restrictions on agricultural production. The Fit for 55 program, for example, has aroused numerous reservations among European farmers, as signalled for example by Copa-Cogeca.[7] The proposed changes would *de facto* mean that the Republic of Poland would not be able to defend the interests of Polish farmers. It should also be stressed that limiting Polish agricultural production would result in an increase in food prices, which would be felt by everyone in Poland. It is worth pointing out as well that in the Netherlands, the right-wing Freedom Party, which opposes those political circles which support further restriction of the freedom of agricultural production in this country, has been successful. It was in this country that the farmers' union, the *Farmers Defence Force*, organised mass agricultural protests. In Poland, too, the attempt to introduce a new bill known under the media's name of the "Five for Animals", was met with strong opposition from farming communities.

One further important point is worth noting: although the proposed change concerns "global negotiations", this by no means implies that changes undertaken through a treaty would affect the global economy. We can easily imagine a situation in which a treaty concluded by the European Union

6 See the judgment of the Constitutional Court of 11 May 2005, ref. K 18/04.

7 Ppr.co.uk, *Copa-Cogeca: a one-size-fits-all solution will not work in rural areas, especially on the issue of agricultural transport*, https://www.ppr.pl/wiadomosci/copa-cogeca-jedno-uniwersalne-rozwiazanie-nie-sprawdzi-sie-w-obszarach-wiejskich-a-zwlaszcza-w-kwestii-transportu-rolnego, accessed 20 January 2024.

affects only some countries. Similarly, we can imagine a situation in which the EU concludes a treaty of a regional nature, affecting, for example, only the countries of Central and Eastern Europe.

A further question arises as to whether the voices of individual social groups will be able to be heard effectively in the European decision-making processes. Will individual groups (e.g. farmers, miners, etc.) from a single country (e.g. Poland) in the European Union be able to effectively demand that their demands be taken into account? The transfer of this power to the EU level may result in the voices of these groups being much less easily heard, and thus the decisions taken will have an adverse impact on their economic situation.

The energy and climate transition is a challenge facing all of humanity – including Poland. The European Union, of which Poland is a member, has embarked on an "ambitious" (to use the terminology of the energy transition's proponents) plan that aims at zero emission in 2050, and all Member States, including Poland, have begun to take action to achieve this result. This green transition must be carried out in a fair manner, however, and with consideration for the interests of individual social groups, in a way that is consistent with the provisions of Polish law and the will of the Polish people as sovereign.

Summary

The amendment in question should be assessed negatively. It raises doubts both on grounds of consistency with Treaty regulations and above all poses a threat to the constitutional values of the Republic of Poland. Energy security and sovereignty in this area are key conditions for maintaining national sovereignty. Assuming that Poland remains a member of the European Union, it will – on the basis of the EU rules binding all Member States – make its economy "green", but it should do so as a sovereign state. Amendment No. 69 would significantly limit this sovereignty.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 2: HEALTH

The amendments introduce any possibility of shifting health competences from the member states to the EU. From maintaining a single basket of health services, to a common pandemic policy, to shifting competence to deal with issues in the area of morality and bioethics - by including abortion, surrogacy or euthanasia of children and seniors within the scope of health services.

Katarzyna Gęsiak

2. Health

Main theses

- Some of the the amendments to the EU Treaties adopted by the European Parliament give the European Union control over a broad area of health policy. This would include the hitherto unacknowledged concept of “sexual and reproductive health and rights”, which, to this day, are not recognised in the treaties. This concept mainly refers to abortion and contraception, as well as drastic surgical and hormonal interventions as part of so-called “transitions”, along with the aspect of sexual education that promotes promiscuity.

- The adoption of Amendment 70 could deprive Member States of their sovereign control over a number of elements of health policy, including forcing them to maintain a single reimbursement basket, to choose a single form of the organisation of their health services, or to create a common list of reimbursed medicines.

- At the same time, the proposed amendments to the Charter of Fundamental Rights unequivocally resolve that the European Union would have the power to take control of regulating access to abortion from the Member States.

- The proposed inclusion of the Member States’ health policy under the purview of the EU authority could result in a centralised health policy, including deciding on restrictions on rights and freedoms (including through the introduction of lockdowns, movement restrictions, and compulsory vaccinations) and bypassing the Polish government and parliament, should another pandemic be declared.

Proposed amendments to the Treaties

Among the 267 amendments to the EU Treaties adopted by the European Parliament in November was Amendment 70, concerning Article 4(2)(e) of the Treaty on the Functioning of the European Union (TFEU). The amendment provides that the EU's shared competences would additionally include the following area: "public health matters, in particular the protection and improvement of human health, especially cross-border health threats, including universal and full access to sexual and reproductive health and rights, and the One-Health approach."

Linked to this amendment is Amendment 245 on Article 3 of the Charter of Fundamental Rights of the European Union (CFR), incorporating the previously unrecognised "right to bodily autonomy" in the Treaty's scope. Despite framing the subject in a seemingly positive tone, its true meaning is clarified in the proposed additional paragraph 2a to Article 3 of the Charter: "Everyone has the right to bodily autonomy, to free, informed, full and universal access to sexual and reproductive health and rights, and to all related healthcare services without discrimination, including the access to safe and legal abortion." The essence of the changes proposed to the Charter of Fundamental Rights (CFR) is therefore to introduce a "right to abortion", as previously demanded by French President Emmanuel Macron.

Loss of the Member States' discretionary power

The indicated amendments are thus directly aimed at the EU taking over authority in additional vital areas of social life in which the Member States have thus far retained autonomy. To date (under Article 6(a) TFEU), the field of "protection and improvement of human health" is a national competence, and the role of the EU is only to support, coordinate, or supplement the actions of the Member States. Changing the nature of the Union's authority in this area will mean, for example, that it will be possible to issue binding legal acts in Brussels which all EU countries will be obliged to implement.

Of the package of 267 amendments, this assumption of "public health" power may be the most serious in terms of eroding the sovereignty of the Member States in areas affecting the daily lives of millions of people. Indeed, the amendment concerns the right to shape the area of health services, to organise health care, to determine the conditions of access to services and their funding, as well as issues such as vaccination policy and rules for responding to emergency threats (epidemics and pandemics). The amendment also covers bioethical issues, ranging from abortion, surrogacy, and euthanasia to procedures for "transitioning", cloning, and rules on the use of human cells and cells of human origin.

This chapter will further explore a selection of these issues.

The issue of sexual and reproductive health and rights

At the outset, it is worth noting that the term "sexual and reproductive rights" as used in the body of the resolution and its proposed amendment refers to a category not defined in any of the binding instruments of international law, including the most important ones: the United Nations Charter of 26 June 1945, the Universal Declaration of Human Rights of 10 December 1948, the European Convention on Human Rights of 4 November 1950, the International Covenants on Rights of December 1966, or the EU Charter of Fundamental Rights of 7 December 2000. Consequently, this category is alien to the human rights system. "Sexual and reproductive rights" have for years been exclusively an ideological concept and **a set of political demands made by the contemporary feminist movement and its related currents (LGBT, gender, etc.**). They are often mentioned in non-binding "soft law" acts (resolutions of the European Parliament and the UN, opinions of UN committees...) in the forums of international organisations such as the UN, or precisely the European Union. In international discourse, the term first appeared in the forum of the United Nations before being introduced into the language of the European Union's internal acts. Certainly, the construction of "sexual and reproductive rights" is not an expression of the shared and consensual values of the Member States referred to in the EU treaties, e.g. Article 2 of the Treaty on European Union, but is an alien element which is nevertheless increasingly present in the doctrine and political demands of some countries within the European culture.

Still, some countries such as Poland, Malta, and Hungary have formulated reservations regarding the notion of "sexual and reproductive health and rights" whenever it is referred to in the documents of such international organisations. Examples of "soft law" acts are the recent European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland[1] and the European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health.[2] These resolutions state, among other things, that "access to abortion constitutes a human right, while the delaying and denying thereof constitute forms of gender-based violence and may amount to torture and/or cruel, inhuman and degrading treatment",[3] that "sexual and reproductive health and rights are protected in international and European human rights law",[4] and that failure to respect them constitutes "breaches of human rights, specifically the right to life, physical and mental integrity, (...) privacy and freedom from inhuman and degrading treatment".[5] It should be kept in mind that, while these documents do not have binding force upon the Member States, they do set the course for legislative change in the EU, as reflected in the content of the European Parliament's proposed Treaty amendments. If these Treaty amendments are adopted, the strongly ideologically-driven content of the non-binding resolutions will effectively become law throughout the Union.

For a fuller understanding of the idea of "sexual and reproductive rights" and the dangers of making them normative, it is necessary to recall the underlying theories of radical feminism. A good illustration of the far-reaching implications of this new category of rights can be found in the views of

1 European Parliament resolution of 26 November 2020 on the *de facto* ban on the right to abortion in Poland (2020/2876(RSP)), OJ. EU C.2021.425.147.

2 European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI)), OJ. EU C.2022.81.43.

3 See paragraph F. of the recitals of the EP resolution of 26 November 2020 on the *de facto* ban on the right to abortion in Poland.

4 See paragraph C. of the recitals of the EP resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health.

5 See paragraph F. of the recitals of the EP resolution of 26 November 2020 on the *de facto* ban on the right to abortion in Poland.

Shulamith Firestone: "In much the same way that Marx concluded workers' liberation requires an economic revolution, Firestone concluded women's liberation requires a biological revolution. Like the proletariat who must seize the means of production to eliminate the economic class system, women must seize control of the means of reproduction to eliminate the sexual class system."[6] Firestone openly criticised motherhood, advocating its abolition and replacement by artificial reproduction and, in the long term, the total elimination of the biological family in order to make way for an "intentional family" whose members would choose each other out of friendship or simply for convenience.[7]

At present, EU law does not regulate the availability of abortion in the individual Member States, leaving this issue to the national parliaments. **The hitherto existing principle of sovereign decision-making on the legal permissibility of abortion** by surgical, mechanical, pharmacological, or abortifacient means **may, under the proposed amendments, be replaced by an EU-wide centralisation of abortion policy** (Amendment 70 to Article 4(2)(e) TFEU in conjunction with Amendment 245 to Article 3 CFR). The adoption of the proposed amendments to the TFEU and the CFR will create real opportunities to influence the degree of the protection of life, family policy, bioethics solutions, and demographic policies of individual EU countries. This will be possible through an EU-wide regulation which will take precedence over any law, regulating – in the name of the freedom of movement of goods, services, and persons – the sale of abortion pills and contraceptives in each Member State. It is equally likely that Poland will be obligated, on the basis of "standards" implemented in other EU countries, to make abortions, including so-called "late abortions" (e.g. in the third trimester), available and fully financed out of the taxpayers' pockets. The wording of the proposed provisions of Article 4(2)(e) of the TFEU and Article 3(2a) of the CFR does not introduce any restrictions in this regard.

The adoption of these amendments, including the amendment to the Charter of Fundamental Rights, will obligate all Member States to ensure free access within their territories to all means of achieving the concept of "sexual liberation" (which is in fact prenatal genocide) discussed above – not only those already known, but also, in the absence of a specific framework for the concept of "sexual and reproductive health and rights", those which, via ideological "progress", will be incorporated into this vague concept. The familiar catalogue of surgical methods to perform an abortion such as cervical dilation and curettage, vacuum aspiration, or manual suction, as well as pharmacological methods, such as the RU 486 abortion pill or Methotrexate injection, could realistically be supplemented by further measures which Brussels will deem necessary for the realisation of these undefined "sexual and reproductive rights" (e.g. the extremely cruel so-called partial-birth abortion).

In this context, it should be recalled that under current EU legislation, **Member States can decide whether and to what extent access to abortion is legal**. This also applies to the marketing of abortifacients and contraceptive pills – according to Article 4(4) of Directive 2001/83[8] this act "shall not affect the application of national legislation prohibiting or restricting the sale or use of medicinal products as contraceptives or abortifacients". The proposed Treaty amendments seek to replace freedom in this area with coercion.

6 – R. Tong, *Feminist thoughts. A more comprehensive introduction*, Westview Press 2009, p. 75.

7 Ibid, p. 55.

8 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311.

Staying on the subject of the ideological concept of "sexual and reproductive rights", it should be remembered that already in 2021, European Union bodies adopted, in the form of a regulation, an EU-wide health programme for the period 2021–2027 called "EU4Health programme".[9] This act makes it clear that one of the objectives of the European Union's health policy is to contribute to the achievement by the Member States of the Sustainable Development Goals set out in the UN Agenda 2030.[10] Under Objective 3 can be found, *inter alia*, the provision of access to so-called sexual and reproductive health services.[11] Alongside access to abortion or contraception, this vague term also includes elements such as gender transitioning or permissive, vulgar sexual education for children and adolescents, which the UN and the EU are promoting as required elements of health policy aimed at contributing to building universal health and the peculiarly understood "well-being" of modern societies. The EU's assumption of decision-making powers in health policy will result in the coercive implementation of the damaging concept of "sexual and reproductive health and rights" so that it becomes an everyday reality in Polish society as well.

A dangerous EU approach to bioethical problems

Accepting the extension of the Union's powers to the field of bioethics may result in an obligation to implement uniform legal solutions which will be adopted at Union level, covering such issues as, in particular, euthanasia or the rules on the use of substances of human origin.

In the name of the introduction of "common indicators for health systems" and in the use of the new authority in the scope of "public health, in particular the protection and improvement of human health", it is to be expected that the EU institutions will be influenced by lobbyists favouring the implementation throughout the Union of the availability and reimbursement of such practices. This is particularly true of shortening the lives of terminally ill patients or assisted suicide, which have been used for years in some Member States and are currently under serious consideration in others. Recognising them as part of the EU's "standard of care" will lead to their widespread availability in all Member States.

In addition, in the area of bioethics serious concerns are already being raised about the proposed EU solutions within the framework of the draft regulation on standards of quality and safety of substances of human origin intended for human use ("SoHo regulation").[12] The draft adopted by the European Commission has been criticized for introducing unlimited possibilities for research on cells, tissues, or blood without taking ethical issues into account, while at the same time providing far-reaching facilities for pharmaceutical companies to achieve their business goals. Significantly, this is to take the form of an EU-wide regulation; i.e. legislation that is binding on all Member States, and which replaces the existing directives. Concerns about the procedure of such proposals in the EU are only a foretaste of the risks involved in the adoption of these public health Treaty amendments.

9 Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No. 282/2014, OJ. EU L 107/01.

10 Ibid, paragraph 19 of the preamble.

11 See paragraph 3.7 in *Goal 3: Ensure healthy lives and promote well-being for all at all ages*, Resolution adopted by the General Assembly on 25 September 2015, https://www.unic.un.org.pl/files/164/Agenda%202030_pl_2016_ostateczna.pdf, accessed 19 January 2024.

12 Draft Regulation of the European Parliament and of the Council on standards of quality and safety for substances of human origin intended for human application and repealing Directives 2002/98/EC and 2004/23/EC, 2022/0216(COD).

The end of sovereign health policy in a pandemic situation

The authors of the amendments to the Treaties advocate taking away the sovereignty of the Member States to shape their own health policy, including in the area of measures taken in a potential epidemic or pandemic. Experience to date shows that meeting the challenges of organising the provision of health services or the reimbursement of medicinal products requires leaving this area within the national decision-making process, however. The creation of uniform conditions for the use of health services across all the countries of the Union is an extremely profound change, which moreover has not been preceded by the necessary research and estimation of the effects the proposed changes will have in terms of their impact on the quality and accessibility of health care services from the perspective of the recipients' needs.

The ineffectiveness of attempts at pan-European management of health issues and the superiority of a dispersed search for solutions became clearly evident during the Covid-19 pandemic. The effects of these actions can still be seen today, and the prospect of their resolution does not appear to be imminent. A case in point is the legal proceedings initiated by the pharmaceutical company Pfizer against Poland concerning a contract negotiated by the President of the European Commission involving the purchase of vaccines, in which Poland has to defend itself before a Belgian court on the basis of Belgian rather than Polish law.

The new EU regulations that were adopted in response to the pandemic crisis as well as health policy, with particular reference to the Recovery and Resilience Facility, the associated EU debt, or the even now stalled disbursements under the National Recovery Plans, demonstrate the ineffectiveness of central management in health policy.

The effectiveness of sovereignty in health policy is illustrated by a story from 2009, when Health Minister Ewa Kopacz opposed the Polish government's purchase of costly vaccines against the so-called swine flu, which, as in 2020, had been recognised by the World Health Organisation as a pandemic, with safety concerns being raised at the time about theses vaccines.[13]

Contrary to experience, the proposed assumption of health policy powers by the EU is moving towards the global governance of health policy that is also being advocated by the World Health Organisation (WHO).

Summary

The adoption of the proposed Treaty amendments may result in a loss of sovereignty and decision-making power in matters of both bioethics and state health policy. In these areas, the Member States have so far taken sovereign decisions, which in practice means the national government being able to implement its own standard of healthcare in Poland: in particular, taking into account aspects of procreative health and disregarding the ideological concept of "reproductive and sexual health and

13 The possible serious health consequences of receiving the 'swine flu' vaccine have been reported, for example, by researchers studying its health effects in the French population who published the results in the journal Brain, as provided by the Oxford Academic service - Y. Dauvilliers et al, *Increased risk of narcolepsy in children and adults after pandemic H1N1 vaccination in France*, https://academic.oup.com/brain/article/136/8/2486/431857, accessed 7 December 2023.

rights", as well as adopting a positive model of palliative care instead of the utilitarian taking of the lives of seriously ill patients.

Past experience also shows how ineffective attempts at a top-down management of health crises can be. It is reasonable to anticipate that in the event of another pandemic being declared, following the adoption of the Treaty amendments under discussion, all action would be centrally controlled, and the initiative would be delegated to the central body responsible for health policy during the period of threat – through EU regulations which deeply interfere with fundamental civil liberties. The initiative of declaring lockdowns; closing schools, churches, city parks, and forests; restricting freedom of movement, etc. would be entrusted to an EU body – beyond the control of national authorities. It is imperative that issues related to the organising and financing of the provision of health services in a country be left to the Member States as part of the national decision-making process.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 3: CROSS-BORDER INFRASTRUCTURE

Member States may be deprived of a decisive voice in the area of roads, airports, railways, seaports of international importance. In the context of Poland, the adoption of amendments may lead to the ceding to the EU of decisions on investments such as the Central Communication Port, the development of the port of Gdańsk, the construction and development of the LNG terminal or the construction of Via Carpatia.

Jędrzej Jabłoński

3. Cross-border infrastructure

Main theses

- Amendment 71 seeks to extend the scope of legislative powers shared between the European Union and the Member States by including cross-border infrastructure in the field of transport.
- All modes of transport will be affected: road, rail, sea, air, and inland waterways.
- The adoption of the amendment could mean that the Member States will be deprived of their sovereign decision-making powers regarding, among other things, roads of international importance, interstate rail links, international airports, or seaports.
- In the case of Poland, the amendment would affect the sovereign authority in the planning and implementation of investments such as the Central Communication Port, the development of the Port of Gdańsk, the construction and development of LNG terminals (liquid natural gas ports), or the planning and construction of Via Carpatia.
- The change could also pose a threat due to the European Union's plans to reduce road and air transport using fossil fuels.

Cross-border infrastructure under current EU law

Amendment 71 seeks to modify Article 4(2)(g) of the Treaty on the Functioning of the European Union. This provision currently states that transport is a shared power between the European Union and the Member States. By contrast, the text of the amendment proposes that this power be defined as "transport, including cross-border infrastructure".

The authors of the amendments do not provide a definition of "cross-border infrastructure". Among the recitals of the resolution, at the end of recital 15 the authors only indicate that the European

Parliament "proposes to further develop Union shared competences in the areas of energy, foreign affairs, external security and defence, external border policy in the area of freedom, security and justice, and cross-border infrastructure".

Under current European Union law, the term "cross-border infrastructure" appears most often in the context of railways. For example, Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast) (OJ 2016 L 138, p. 102 as amended)[1] provides Article 9(5)(2),[2] Article 12(5),[3] Article 17(7),[4] for certain safety requirements for cross-border infrastructure – which, however, it does not define. On the other hand, the Commission Notice Guidance on Recovery and Resilience Plans in the context of REPowerEU (2023/C 80/01), OJ C 2023, No. 80, p. 1[5], albeit in a slightly different context (energy), indicates that "[C]ross-border infrastructure and multi-country projects are important for achieving the REPowerEU objectives in the medium term and are encouraged under REPowerEU. Measures are considered to have a cross-border or multi-country dimension or effect if they either contribute to securing energy supply in the Union as a whole or if they reduce dependency on fossil fuels and/or energy demand."

Implications of adopting this amendment

The main question that arises from this rather laconic amendment is what legislative effect it has. *At first glance*, there is the impression that its adoption will not lead to an actual extension of the scope of the EU's powers, since a literal reading of the proposed provision appears to refer to cross-border infrastructure as a subject already included in the current shared competences, i.e. transport; the phrase "including" would support this. On the other hand, adopting such an interpretation would mean that the amendment would be rendered superfluous without any normative content. However, given the legislator's rationality, one might fear that the actual intention of this amendment's drafters is to extend the EU's authority in transport to include cross-border infrastructure.

The European Parliament's resolution does not provide for changes to Title VII of Part III of the Treaty on the Functioning of the European Union (Articles 90-100) concerning the common transport policy. The consequences of Amendment 79 should therefore be read in the light of the provisions of this Title. As regards the scope of the common policy, according to Article 100(1) of the Treaty, it covers in principle transport by rail, road, and inland waterways. But the second paragraph of this provision provides that the European Parliament and the Council of the European Union may lay down appropriate provisions for sea and air transport. Such rules have been established – for example, Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC (Official

1 Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast), OJ L 138/102, as amended.

2 Safety management systems shall be constantly developed to coordinate the infrastructure manager's emergency procedures with all railway undertakings operating on the infrastructure concerned and with the emergency services, in order to facilitate a rapid response by the emergency services, and with other parties who might be involved in the event of an emergency. In the case of cross-border infrastructure, cooperation between relevant infrastructure managers facilitates the necessary coordination and preparedness of the relevant emergency services on both sides of the border.

3 In the case of cross-border infrastructure, the competent national safety authorities shall cooperate in issuing safety authorisations.

4 The national safety authority supervises and ensures that the Control-Command and Signalling Track-side, Energy, and Infrastructure subsystems comply with the essential requirements. In the case of cross-border infrastructure, it will perform the supervision activities in cooperation with the other competent national safety authorities. If a national safety authority considers that an infrastructure manager no longer satisfies the conditions for a safety authorisation, it shall restrict or revoke the authorisation, giving reasons for its decision.

5 Commission Notice Guidance on Recovery and Resilience Plans in the context of REPowerEU (2023/C 80/01), OJ C 2023, No. 80, p. 1.

Journal EU L of 2023 No. 234, p. 48), or Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation) (OJ EU . of 2023 p. 2405).

The actual consequences of this extension of the Union's powers will be that, pursuant to Article 91(1) of the Treaty, the European Parliament and the Council of the EU, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, will be able to lay down any appropriate provisions in this area. In accordance with the general provisions on shared competences, if the European Union adopts such provisions, the Member States will not be able to exercise authority in this area.

In view of the above, it appears that, once the amendment has been adopted, the European Union will be able, after the European Parliament and the Council have legislated, to take full charge of regulating infrastructure such as:

- international railways,
- international roads,
- international airports,
- and seaports.

At the same time, account should be taken of the fact that the currently undefined cross-border condition could be interpreted so broadly as to also include facilities physically located entirely within one country, but which serve transport connecting – directly, indirectly, or even potentially – other countries.

The assumption of powers by the European Union in these areas may have a direct impact on a number of investments and infrastructure projects that have already been implemented by Poland. Above all, the possibility of creating trans-European transport corridors through agreements between individual states will be called into question.

A flagship example of such a corridor already underway is the Via Carpatia (primarily the S19 expressway in Poland), which is to connect Lithuania, Poland, Slovakia, Hungary, Romania, Bulgaria, and Greece. As part of the joint work on this road, a number of international agreements between the individual countries were concluded, such as: the Lancut Declaration on the Extension of the Trans-European Transport Network through the Establishment of the Shortest Road Route, Connecting Lithuania, Poland, Slovakia, and Hungary, on a North-South Axis, of 27 October 2006, Lancut Declaration – II, signed in Warsaw on 3 March 2016 by the Ministers of Transport of Hungary, Lithuania, Poland, Romania, Slovakia, Turkey, and Ukraine concerning the strengthening of cooperation in the field of transport in the Carpathian region and the continuation of the development of Via Carpatia; or the most recent Agreement between the Government of the Republic of Poland and the Government of the Slovak Republic on the location of the connection of the S19 expressway with the R4 expressway in the vicinity of Barwinek and Vyšný Komárnik, which was signed in Barwinek on 16 July

2018. (M.P. of 2019, item 182). In the event of the European Union assuming authority in this area, such projects could only be implemented at the discretion of the Union, or possibly with its consent.[6]

The case of another corridor, which is actually an extension of Via Carpatia referred to as Via Baltic and that links Poland with the Baltic countries, also provides a telling conclusion. Following doubts about the impact of the road on the Augustow area (commonly remembered as the Rospuda Valley dispute), an observation mission by representatives of the European Parliament visited Poland and subsequently published a report on its activities.[7] It stated: "Of course the European Union does not have and does not seek absolute power to dictate its views to Member states in this or any other field of activity. The Union exercises its authority in a way which respects member states' competence on the basis of the subsidiarity principle. [...] In other words, member state authorities may decide independently that they need to develop new road or rail links in order to develop their communications, facilitate travel and commerce or improve transport safety and security. The European Union may provide funding to assist member states with such projects when requested from the so-called cohesion funds. But with or without funding, such projects must fully respect EU law and not undermine the integrity of areas which - on the basis of a proposal from the member state - are set aside, by a common accord between the EU and the member state concerned, in order to protect more fragile ecosystems from destruction."

What is perhaps clearest from the above passage is what the potential consequences of the amendment's adoption would be – namely, that Member States could be deprived of the ability to make such sovereign decisions. There would be an inversion of the relationship: instead of Member States being free to build their own road networks with a narrow range of restrictions based primarily on environmental standards ("what is not prohibited is allowed"), they would only have authority within a narrow framework as outlined by the European Union ("only what is explicitly permitted is allowed").

Similar concerns can be expressed with regard to airports, especially the planned air transport hub project called Central Communication Port, or CPK in Polish. If the European Union were to take over authority in the area covered by the amendment, decisions concerning such infrastructure would probably not be taken in Poland either, or at the very least they would require the consent of the Union. These same concerns apply to seaports and other key infrastructure investments, such as the LNG terminals (gas ports) or the expansion of the Port of Gdansk, which is competing in certain areas with the cargo port of Hamburg.

Even with regard to areas that would appear to be purely internal and non-boundary issues, concerns can also be raised as to whether they would fall within the scope of the amendment. For example, the question arises as to whether, if the re-establishment of inland waterway transport in Poland is considered to have the potential to affect transport flows in other countries as well, the construction of infrastructure in this area would not be considered to fall within the European Union's powers.

6 In this regard, it should be kept in mind that a recent European Central Bank report on cross-border infrastructure pointed out that the fact that such projects are implemented by two or more countries is a major obstacle to their implementation, *implicitly* suggesting that this issue should be more strongly subjected to European Union decisions; see Eib.org, *Cross-border infrastructure projects: The European Investment Bank's role in cross-border infrastructure projects*, https://www.eib.org/attachments/lucalli/20230107_cross_border_infrastructure_projects_en.pdf, accessed 8 December 2023.

7 Report on the fact-finding mission to Poland "Via Baltica" (Warsaw – Bialystok – Augustow), 11-14 June 2007, Committee on Petitions, Rapporteurs: Thijs Berman, David Hammerstein, Martin Callanan, https://www.europarl.europa.eu/meetdocs/2014_2019/documents/peti/dt/677/677664/677664pl.pdf, accessed 8 December 2023.

This must be of particular concern in the context of road and air transport. On the one hand, Poland is still lagging behind Western Europe in terms of the necessary infrastructure, while on the other the European Union, under the pretext of concern for the climate and environment, is taking steps to restrict these two forms of transport.[8] The loss of sovereignty in these areas might mean that Poland will never be allowed to catch up with other countries.

At the same time, the hope that the EU's assumption of additional powers in this area would contribute to the elimination of backwardness in the Polish railway infrastructure may also prove to be ill-founded. For example, in the project adopted by the European Commission at the beginning of this year for ten pilot cross-border rail links supported by the European Union, not a single link involving Poland was included.[9] Relying on the good will of the EU authorities in this area as well is therefore cause for far-reaching concern.

All of the above problems and doubts arise from objective circumstances that seem to have escaped the amendment's authors or else are deliberately kept quiet by them – namely, the issue of differences in the economic situation between the various Member States and the resulting competition between them.

In the event that further powers are transferred to the Union in matters of key importance for economic growth – which is undoubtedly the case for transport infrastructure – the largest EU states with the strongest economic and political position, both formally (through voting power in the EU Council and Parliament) and informally (i.e. primarily Germany and France), will have the greatest influence on decision-making.

This in turn leads to the conclusion that these countries will certainly take measures to prevent others from assuming control over the current transport channels. In a situation of free competition, the conditions offered by the countries of the "new Union" – such as, for example, lower costs – could be more attractive to operators. But if transport infrastructure issues are decided from the top by EU bodies, smaller states with a weaker political position in the EU's bodies will be deprived of the opportunity to pursue an effective policy in this area. This may end up with them being forced to use the infrastructure of richer countries, so that they may never catch up with them.

8 For example, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions *Sustainable and Smart Mobility Strategy – putting European transport on track for the future*, https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52020DC0789, accessed 8 December 2023, points out that: "Greening mobility must be the new licence for the transport sector to grow. Mobility in Europe should be based on an efficient and interconnected multimodal transport system, for both passengers and freight, enhanced by an affordable high-speed rail network, by abundant recharging and refuelling infrastructure for zero-emission vehicles and supply of renewable and low-carbon fuels, by cleaner and more active mobility in greener cities that contribute to the good health and wellbeing of their citizens." The text goes on to point out that zero-emission air transport technologies do not currently exist, and to announce the continuation of the policy of imposing additional charges for emission-producing forms of road transport.

9 Transport.ec.europa.eu, *Connecting Europe by train: 10 EU pilot services to boost cross-border rail*, 31 January 2023, https://transport.ec.europa.eu/news-events/news/connecting-europe-train-10-eu-pilot-services-boost-cross-border-rail-2023-01-31_en, accessed 6 December 2023.

Summary

Amendment 71 as proposed should not be accepted. It does not in any way clarify the legislators' intentions, so it is impossible to know what to expect in practical terms. An honest discussion would require that at least specific amendments to Title VII of Part III of the Treaty on the Functioning of the European Union are proposed, which would clarify what is to be understood as cross-border infrastructure and to what extent the Union can legislate on it. Above all, however, infrastructure is such an important attribute of a sovereign state that it should be considered that the European Union could at most – in line with the subsidiarity principle being duly applied – support states in their construction and maintenance under the terms of Article 6 of the Treaty, and not replace them in taking decisions in this area.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 4: NATIONAL BORDERS

The proposed amendments put control over migrant flows in the hands of the EU, including forced relocation without looking at the veto of member states. In addition, the EU can take sole control of the security measures used to stop migration by banning walls and ordering the opening of migration routes along the lines of the US southern border.

Jerzy Kwaśniewski

4. National borders

Main theses

- Proposed Amendment 98 contains the most far-reaching change to immigration policy, allowing the European Union to intervene directly in the powers of the Member States with regard to the protection of external borders, including the powers and manner in which national border and immigration services carry out their duties.

- The European Union can already regulate border monitoring measures within the current legal framework under the power to "put in place an integrated external border management system". The addition of "external border policy" to the catalogue of shared competences may seem redundant in view of the current provisions of the Treaties.

- However, considering the long-standing constitutional practice of the EU institutions, which is characterised by a systematic tendency to extend their powers beyond the boundaries set by the Treaty provisions, and especially given the nature of the shared competences, which implies their gradual takeover by the EU, one should expect an expansive interpretation of the added powers in the field of "external border policy".

- The framework of "securing" the external borders will allow the EU to determine both authorised and recommended border security measures, such as border posts or physical barriers. The fate of the wall along the Polish-Belarusian border may therefore potentially depend on decisions taken by the EU institutions.

- The proposed amendments increase the Union's leeway in the supervision of a common immigration policy, allowing it to regulate the flow of immigrants depending on the needs of domestic national employers.

Introduction

Here we will consider Amendment 72, which provides for the extension of the European Union's shared competences to include "external border policy" (in the new version of Article 4(2)(j) TEU). First of all, it should be emphasised that already in its current legal state, the European Union has quite broad legislative powers in the field of external border protection and other immigration-related aspects (Articles 67 and 77 TFEU). Thus, it can be said that the protection of external borders is in fact already a shared power between the EU and the Member States within the regulation of the "area of freedom, security, and justice" (the current wording of Article 4(2)(j) TEU), which includes "policies on border control, asylum, and immigration" (Articles 77-80 TEU). This does not mean that Amendment 72 – should it enter into force – would have no legal effect.

The systemic context of Amendment 72

Amendment 72 must be read in the context of the overall changes being proposed by the European Parliament to the regulation of immigration. The amendment under consideration sets out the general principle in terms of the division of powers between the EU and the Member States, whereas it is only the Treaties' specific provisions that confer specific legislative powers on the Union.

The general idea behind all the amendments is to "that the Union's common immigration policy be strengthened by taking appropriate and necessary measures to ensure the efficient monitoring, securing and effective control of the Union's external borders and for the Union's migration policy to take into account the economic and social stability of Member States, the ability to meet labour demands of the single market, as well as the efficient management of migration, taking into account the fair treatment of third country nationals".[1]

Particular attention should be paid to Amendment 98, which extends the power of the European Parliament and the Council to include the power to adopt "any measure necessary and proportionate to ensure the efficient monitoring, securing and effective control of the Union's external borders, as well as the effective return of those who do not have the right to remain on the territory of the Union" (Article 77(2)(da) TFEU). This is by far the most far-reaching change in immigration policy, allowing the EU to directly interfere in the powers of Member States with regard to the surveillance of external borders, including the powers and the way in which national border and immigration services fulfil their duties. As the law stands, the EU can already regulate "the checks to which persons crossing external borders are subject" (Article 77(2)(b) TFEU), whereas the novelty will be the specification that this control is to be "efficient", as well as the possibility to regulate the "monitoring" and "securing" of the EU's external borders. The formula for "monitoring" and "securing" borders is rather vague, making it difficult to predict what legislative measures the Union will be able to adopt under it. Certainly, within the framework of the regulation of "monitoring" of external borders, it will be possible to establish reporting mechanisms and impose an obligation on states to inform the Union institutions of the situation at their borders. Also, the possibility of the EU establishing additional surveillance measures for border crossings cannot be ruled out.

1 Paragraph 36 of the resolution.

It is worth noting, however, that already in its current legal state the Union can regulate border monitoring measures under its power for the "introduction of an integrated management system for external borders" (Article 77(1)(c) TFEU).[2] From this point of view, Amendment 98, at least in its wording, only slightly expands the EU's legislative powers on external border surveillance. However, in view of the long-standing constitutional practice of the EU institutions (the Commission, Council, Parliament and CJEU), characterised by a systematic tendency to extend their powers beyond what follows from the text of the Treaty provisions (the doctrine of *implied powers*, interpretation of which takes into account the principle of *effet utile*), it cannot be ruled out that the new drafting – letter d in Article 77(2) TEU – will be interpreted in an expansive manner as well. In addition, Article 4(2)(j) TFEU itself may be subject to an expansive interpretation.

In turn, as part of the "security" of external borders, it will be possible to establish authorised and recommended border security measures such as border posts or physical barriers (such as the famous wall along the Polish-Belarusian border). It should be stressed, however, that the provision proposed in Amendment 98 will not mandate the abolition of national border and immigration services and their replacement by European services. Nevertheless, the concept of "security" seems too broad.

The other amendments relating to border protection are more of a technical-editorial nature, namely:

- Amendment No 3: The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with ***common external border policies*** **and** with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. common policy on external borders and with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Article 3(2) TEU);

- Amendment No 96: The Union shall ensure the absence of internal border controls for persons and shall frame a common policy on ***borders,*** asylum, **and** immigration (formerly: asylum, immigration, **and external border control**), based on solidarity between Member States, which is fair towards third-country nationals. For the purposes of this title, stateless persons shall be treated as third-country nationals (Article 67(2) TFEU);

- Amendment No. 101: The Union shall develop a common immigration policy ***that takes into account the economic and social stability of Member States and is*** aimed at ensuring, at all stages, the ***ability to meet labour demands of the single market in support of the economic situation in the Member States, as well as*** efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings (Article 79(1) TFEU).

Given that the EU already has fairly significant authority to conduct a common immigration policy, the changes proposed in amendments 3 and 96 can hardly be considered relevant. In contrast, Amendment 101 is important for two reasons. Firstly, it clarifies the criteria for the conduct of the common immigration policy by obliging the Union to take into account the economic and social situation of the Member States. Secondly, it introduces a completely new criterion in the form of meeting labour

2 D. Thym, [in:] *Treaty on the Functioning of the European Union - A Commentary*, eds. H.-F. Blanke, S. Mangiameli, Vol. I, Cham 2021, p. 1453.

needs, which relates to the problem many European countries have with labour shortages that are being caused by the worsening demographic crisis. This last amendment thus increases the Union's room for manoeuvre in pursuing a common immigration policy, allowing it to regulate the influx of immigrants according to the needs of national employers for new workers that they cannot find among native-born EU citizens.

Current state of the law on external border policy

In their current state, the Treaties do not explicitly use the term "external border policy", but in fact regulate various aspects of it, using terms such as "common policy on asylum, immigration and external border control", "common policy on asylum, subsidiary protection and temporary protection", or regulation of the "management system for external borders". Even in the former Treaty establishing the European Community, the European Union had authority over immigration policy, although it was not yet referred to as a "common"' policy at that time.[3] In this context, Amendment 72 will not be revolutionary, but will clarify the EU's existing powers in this area.

The European Union already has the power to:

- "frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals" (Article 67(2) TFEU);
- develop policies to "carry out checks on persons and efficient monitoring of the crossing of external borders" (Article 77(1)(b) TFEU) and for "the gradual introduction of an integrated management system for external borders"(Article 77(1)(c) TFEU);
- create secondary legislation (i.e. directives, regulations, and decisions) on "the checks to which persons crossing external borders are subject" (Article 77(2)(b) TFEU) and "any measure necessary for the gradual establishment of an integrated management system for external borders" (Article 77(2)(d) TFEU). As already mentioned, Amendment 98 provides for the addition of "monitoring" and "securing" of borders to the scope of EU regulations.

It follows from the above that the European Union is already able to influence the immigration policy of its Member States to a fairly large extent, determining the rules for controlling the movement of persons at external borders, security measures, procedures for processing asylum applications, etc. However, as rightly emphasised in the doctrine, there is no legal basis for the creation of quasi-federal EU agencies that could completely take over the states' responsibilities in the processing of asylum applications or border protection.[4] The "creation of any supranational body equipped with the power to protect borders or refuse entry" is firmly ruled out.[5]

Amendment 72 is unlikely to change this because, as already mentioned, it only clarifies the general division of powers between the EU and the Member States, but does not establish any specific new

3 Cf. I. Wróbel, *Status prawny obywatela państwa trzeciego w Unii Europejskiej*, Warsaw 2007, p. 31.

4 See D. Thym, [in:] *Treaty on the Functioning of…*

5 K. Strąk, note 77.5.3. to Art. 77, [in:] *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom I (Art. 1-89)*, eds. D. Miąsik, N. Półtorak, A. Wróbel, LEX 2012. Cf. S. Peers, N. Rogers, *EU Immigration and Asylum Law. Text and Commentary*, Leiden-Boston 2006, p. 18.

powers. The European Parliament's proposed amendments do not touch at all on Article 72 TFEU, which is a strong guarantee of state sovereignty in this regard, as it states that "[T]his Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

In this respect, Amendment 98 may be of greater concern as, although linguistically it only slightly extends the EU's legislative powers, the general wording used therein may in practice be broadly interpreted by the EU institutions, recurring to already repeatedly used argumentative techniques such as the doctrine of implied powers,[6] the spillover effect,[7] or the principle of *effet utile*.[8]

Summary

Amendment 72, providing for the extension of the EU's shared competences ranging from the regulation of the "area of freedom, security and justice" (the current wording of Article 4(2)(j) TFEU) to the regulation of the "area of freedom, security and justice, and the external border policy" is not a revolutionary change. The new version of Article 4(2)(j) TFEU will not be able to constitute a source of EU legislative power in its own right, as this provision is only a framework, whereas specific legislative powers can only be derived from provisions such as Article 77 TFEU.

In this context, Amendment 98, linked to Amendment 72, which grants the European Parliament and the Council of the EU the power to regulate the "securing" and "monitoring" of external borders, may be of some concern. The impact of this amendment is difficult to predict due to the vagueness of the terms used. Given the past constitutional practice of the EU institutions, however, it is likely that the new provisions will be interpreted broadly, allowing for deeper interference in the functioning of national border and immigration services, as well as in the way external borders are protected (e.g. with regard to the use of physical barriers, such as the wall on the Polish-Belarusian border). Even if the proposed changes come into force, they will nevertheless not form the basis for a complete replacement of national services by EU agencies. As it is now, it would still be unacceptable under the proposed legislation to create an EU institution that would completely replace national services in border protection.

6 The concept of an expansive interpretation of powers, according to which the organs of an international organisation have not only those powers expressly enshrined in a treaty, but also powers implicitly derived from them as a logical consequence.

7 The concept of an expansive interpretation of the law-making power of the EU bodies, according to which it may not only concern matters explicitly mentioned in the Treaty, but may also "spill over" into related areas.

8 The principle of effectiveness, according to which EU law must be interpreted in such a way as to give it maximum effect.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 5: FOREIGN POLICY

Poland's entire foreign policy is brought under the overarching role of the EU. It will become acceptable for the diplomatic missions of the member states to be replaced by the European External Action Service under the leadership of the new EU Secretary for Foreign Affairs and Security Policy. This is the end of Polish international sovereignty and Polish embassies in world capitals.

Jerzy Kwaśniewski
Patryk Ignaszczak

5. Foreign policy

Main theses

- The European Parliament's amendments to the EU treaties would introduce fundamental changes to the Common Foreign and Security Policy (CFSP).
- The European Parliament proposes to make "foreign affairs" an area of shared power (Amendment 73).
- Additionally, the proposed Treaty amendments authorise the EU to undertake such CFSP actions which, although not expressly provided for in the Treaties, are a prerequisite for or affect the achievement of the Treaty's objectives (Amendment 239).
- As a consequence of accepting the EP's proposals, the Member States, including the Republic of Poland, would lose their authority to take action in these areas of foreign policy, which would become regulated by the EU. The European Union would gain exclusive legislative authority in these areas and the appropriate decisions would be taken by qualified majority, even in the face of opposition from a significant number of Member States.
- It is plausible that the European Union might decide to homogenise diplomatic relations, trade, investment, or human rights relations with third countries. It would then be acceptable to bind the Member States' foreign policy towards third countries by instructions from EU bodies. Such a turn of events would *de iure* and *de facto* deprive Poland of the ability to conduct a sovereign foreign policy.
- The above may lead to the replacement of the Member States' diplomatic missions by a European External Action Service under the direction of the High Representative of the Union for Foreign and Security Policy, to be transformed into a Union Secretary for Foreign Affairs and Security Policy under the amendments. The same could apply to consular missions.

Foreign policy as a competence of the European Union today

The idea of integrating the mechanisms for shaping foreign policy into the framework of European integration emerged at the very beginning of this process, in the 1950s.[1] Subsequent attempts in this area failed until 1986, when the Single European Act, which was adopted at the time (under the clear influence of Altiero Spinelli), included a provision that the implementation of a common foreign policy would be one of the tasks of the European Economic Community (EEC).[2] Also of significance was the Maastricht Treaty, signed in 1992, in which, for the first time, the Member States legally committed themselves to a *Common Foreign and Security Policy* (CFSP), recognising it as one of the three pillars of the European Union.[3]

The breakthrough, however, came with the Lisbon Treaty (2007), which strengthened the European Union as an international organisation and formally endowed it with a legal personality, thus enabling it to broaden its scope of action in the area of foreign policy. Consequently, a number of significant and far-reaching changes were introduced in this area in institutional terms as well: among others, the European External Action Service (EEAS) was established, i.e. a type of EU diplomatic service. It is the Lisbon Treaty provisions which define the CFSP's current shape and functioning.1[4]

Unanimity as a principle in the development of the Common Foreign and Security Policy

The Common Foreign and Security Policy is implemented on the basis of the principles enumerated in Articles 3(5) TEU and 21(1) TEU, as well as the objectives contained in Article 21(2) TEU. In this context, it should be noted that the CFSP is the only one of the Union's policies to be included in the TEU. The CFSP's unique nature is also evidenced by Article 24(1) TEU, according to which it is subject to specific rules and procedures.

Foreign policy is a key area for the Member States of the European Union, strongly linked to the attribute of sovereignty, which is why decisions taken in this sphere by the European Council and the Council of the European Union must in principle be unanimous, as indicated by Article 24 TEU. In accordance with this provision, the CFSP is implemented by both the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter: High Representative) and the Member States in accordance with the Treaties.

As regards the CFSP's institutional structure, the European Council and the Council of the European Union play a special role in this area. On the basis of Article 26(1) TEU, the European Council defines the Union's strategic interests, sets the objectives, and outlines the general guidelines of the Common Foreign and Security Policy. Its powers also include the election of the President of the European Council, who, *inter alia*, represents the Union externally and convenes meetings of the European Council when the international situation requires the definition of lines of action for the Union.[5]

1 M. Boniecka, *Cele, zasady i struktura wspólnej polityki zagranicznej i bezpieczeństwa Unii Europejskiej - próba oceny po zmianach w Traktacie Lizbońskim*, 'Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM,' No. 5 (2015), pp. 42-43.

2 M. Boniecka, op. cit. p. 43.

3 D. Byrska, K. Gawkowski, D. Liszkowska, *Unia europejska. Geneza. Funkcjonowanie. Wyzwania*, Warsaw 2017, pp. 24-25.

4 M. Chruściel, *Wspólna Polityka Zagraniczna i Bezpieczeństwa*, [in:] *Wybrane polityki publiczne Unii Europejskiej; stan i perspektywy*, eds. M. Świstak, J.W. Tkaczyński, Krakow 2015, p. 207.

5 M. Boniecka, op. cit. p. 48.

In contrast, the Council of the European Union, on the basis of Article 26(2) TEU, develops a common foreign and security policy and takes the decisions necessary to define and implement that policy on the basis of the general guidelines and strategic orientations laid down by the European Council. The Council of the European Union itself consists of representatives of the EU Member States at the rank of foreign ministers. It meets regularly in two formats, which – depending on the subject matter – are called the Foreign Affairs Council and General Affairs Council.

It is worth noting at this point that one of the Lisbon Treaty's most important institutional reforms with regard to the CFSP was the establishment of the office of High Representative of the Union for Foreign and Security Policy.[6] In accordance with Article 18(2) TEU, he is responsible for conducting the Union's common foreign and security policy. His responsibilities also include, *inter alia*, the development of that policy, its implementation as mandated by the Council (Article 18(2) TEU), and the chairing of the Foreign Affairs Council (Article 18(3) TEU). In addition, he ensures the consistency of the Union's external action (Article 18(4) TEU). The High Representative represents the Union in matters relating to the common foreign and security policy (Article 27(2) TEU). The office of the High Representative can thus be considered a surrogate for a foreign affairs ministry of the EU.[7]

Another reform introduced by the Treaty of Lisbon was the creation of the European External Action Service (EEAS). The legal basis in the Treaty for the creation of the EEAS is the provision of Article 27(4) TEU, according to which its task is to assist the High Representative in fulfilling his mandate. It is therefore a diplomatic body of a subsidiary nature, which reports to the High Representative.[8]

Anticipated effects of the amendments

The amendments tabled by the European Parliament address several important issues in the area of foreign policymaking.

The legal analysis of the proposed amendments should start with a look at the wording of Amendment 73 itself, which relates in particular to the terminology used. It uses the singular noun "policy" for the Common Security and Defence Policy (CSDP) and the different plural noun "affairs" for the amendments proposed to Article 4(2)(k) TFEU. It is also worth remembering that since the Lisbon Treaty, the European Union has had the aforementioned Office of the High Representative of the Union for Foreign Affairs and Security Policy, which is responsible for conducting matters in this area, and whose position contains the word "affairs".

It is therefore worth looking at the meaning of the two terms: foreign policy and foreign affairs. "Foreign policy as a concept of 21st century practice, for example, is associated with institutions such as foreign ministries and embassies, and ideas such as national interests, rational utility maximisation, and bureaucratic politics".[9] In the Cambridge dictionary, "foreign affairs" is defined simply as "matters

6 A. Staszczyk, *Rola Parlamentu Europejskiego w procesie kształtowania Wspólnej Polityki Zagranicznej i Bezpieczeństwa UE po zawarciu Traktatu z Lizbony*, 'Rocznik Integracji Europejskiej,' No. 7 (2019), p. 254.

7 A. Staszczyk, op. cit. p. 254.

8 A. Nitszke, *Europejska Służba Działań Zewnętrznych - nowa jakość dyplomacji unijnej?*, 'Politeja,' No. 3 (2018), p. 262.

9 H. Leira, *The Emergence of Foreign Policy*, 'International Studies Quarterly,' Vol. 61, Issue 1 (2019), p. 1.

that are connected with other countries".[10] Thus, the terms foreign affairs and foreign policy seem to be more or less synonymous, denoting virtually the same referents.

The EP amendments under discussion also proposed that the High Representative of the Union for Foreign Affairs and Security Policy should operate under the new name "Union Secretary for Foreign Affairs and Security Policy" (Amendments 24, 40, 41, 45, 53, 193).

In the context of Amendment 73, it should be noted that the proposal under discussion involves placing the provision under discussion in Article 4(2)(k) TFEU. Article 4(2) TFEU regulates the matter of competences shared between the European Union and the Member States. As explained in the introduction to this report, the Member States lose the option of regulating sovereignly the area corresponding to the shared competences when the EU provisions concerning them enter into force.[11]

As a consequence of the adoption of Amendment 73 in its present form, the Member States, including the Republic of Poland, would lose their authority to take action in these areas of foreign policy, which would become the subject of regulation under European Union law. At the same time, the European Union would gain legislative authority in these areas. Decisions on such matters would be taken by a simple majority.

Of key importance is the fact that the European Parliament's proposal likewise implies far-reaching changes in the way decisions are taken in the area of the CFSP. Thus, according to Amendment 45 to Article 24(1) TEU, decisions in this sphere should be taken by the European Council and the EU Council of Ministers by qualified majority (QMV) with the consent of the European Parliament, which is an extremely significant change, especially if we consider that decisions are currently taken unanimously by all Member States.

Thus, these proposals should also be assessed negatively, as their adoption in their present form could lead to the shaping of CFSP priorities in a manner that would not take sufficient account of the individual Member States' most important interests, and which would also apply to Poland. In other words, the Republic of Poland would lose the ability to genuinely and effectively protect its national interests in the area in question.

Attention should also be drawn to Article 352 TFEU. The essence of this provision is to establish the necessary authorisations for the Union to take such actions which, although not expressly provided for in the Treaties, are a prerequisite for or affect the achievement of the Treaty's objectives.[12] It is thus a kind of gateway, which in certain cases allows the EU to act in matters where no power has been conferred on it. Amendment 239 calls for the removal of Article 352(4) TFEU, according to which "[T]his Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union." The elimination of Article 352(4) from the TFEU would result in the applicability of the provision in question in the area of the Common Foreign and Security Policy.

10 Cambridge Dictionary, entry: *foreign affairs*, https://dictionary.cambridge.org/dictionary/english/foreign-affairs, accessed 6 December 2023.

11 *System Prawa Unii Europejskiej*, ed. S. Biernat, Vol. 1, Warsaw 2020, p. 399.

12 A. Wróbel, Commentary on Article 352 [in:] *Traktat o Funkcjonowaniu Unii Europejskiej. Komentarz. Tom III (art. 223-358)*, eds. D. Kornobis-Romanowska, J. Łacny, A. Wróbel, LEX 2012.

This is an important development, as we must bear in mind the numerous criticisms of Article 352 TFEU, which has been accused of lacking precision, and translates into its abuse by Union bodies. "It has also been alleged that the provision in question blurs the division of powers between the Union and the Member States or shifts it in favour of the Union to the detriment of the Member States".[13] The proposal to delete Article 352(4) is a logical consequence of the transfer of the matter of "foreign affairs" to the area of shared competences.

In practice, in view of the shift of "foreign affairs" to the area of shared competences and the removal of the requirement for unanimity in the CFSP's decisions, a scenario in which the European Union decides to homogenise diplomatic, trade, investment, or human rights relations (also covering "reproductive and sexual rights") with third countries becomes likely. In matters of this kind, the hitherto excluded principle of implicit power (Article 352 TFEU) will apply. As a result, the European Council and the Council of the EU, acting by qualified majority and with the consent of the European Parliament, can take over national powers in foreign affairs, including in areas such as the running of diplomatic and consular missions in third countries. To illustrate the scale of the limitation of sovereignty: it would become permissible to establish a list of "strategic partners" towards which all Member States would be exclusively represented by a European Union ambassador, in an EU-flagged outpost manned by the European External Action Service and under the direction of the Union Secretary for Foreign Affairs and Security Policy (formerly the High Representative of the Union for Foreign and Security Policy).

Such a turn of events will *de jure* and *de facto* deprive the Member States, and therefore Poland as well, of the possibility of conducting a sovereign foreign policy, as powers in this area will be ceded to the European Union. Thus, in the event that the amendments to the Treaties proposed by the EU are adopted, Poland will lose the option to fight for its national interests, in such cases where these run contrary to the interests of the dominant faction among the Member States. Given that the qualified majority proposed for CFSP decision-making consists of 55% of the countries involved (15 given the current number of 27 Member States), representing at least 65% of the EU's total population, it can be assumed that a group of states centred on the duo of Germany and France, or Germany and another big country of the EU, will be able to impose on the other countries any solution – even those which are most unfavourable to their national interests – in the field of foreign policy. In analysing the short history of the European Union, one can find many examples where its main players made use of EU mechanisms to push through business and political projects that were in fundamental contradiction to the Polish *raison d'État*, of which the best (or, better said, the worst) example is the German-Russian partnership in the construction of Nord Stream 2.

13 Ibidem.

Summary

Given the above considerations, it can be concluded that the adoption of the amendment would considerably broaden the European Union's powers in foreign policy matters, at the expense of the Member States' sovereignty. This would be a revolutionary change, one completely different from the current legal state of affairs, where the European Union has the authority to conduct the Common Foreign and Security Policy, but the Member States are provided with adequate instruments for protecting their own interests. The best guarantee for the protection of these interests is the principle whereby decisions in this area require unanimity and the Member States have a right of veto.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 6: DEFENCE

The emerging Defence Union can take command of the armed forces of the member states, including the power to send Polish soldiers on missions despite the veto of the Polish government. Armaments procurement is centralised and brought under EU control. The EU also takes over competences in the area of the arms industry, which altogether means the abandonment of its own arms policy. The rapporteurs of the draft openly point out that the EU wants in this way to "make itself independent from NATO".

Michał Nowak

6. Defence

Main theses

- The resolution of the European Parliament refers at the outset to the Communist Ventotene Manifesto of 1941, whose authors assumed that the Union "would be a stable federal state with a European army in place of national armies".

- The European Parliament's motion for a resolution to amend the EU Treaty includes transferring the area of "external security and defence" to the Union's shared competences (Amendment 75).

- The preamble to the European Parliament's resolution calls "for the establishment of a defence union including military units, a permanent rapid deployment capacity, under the operational command of the Union", and furthermore "proposes that joint procurement and the development of armaments be financed by the Union through a dedicated budget under parliamentary co-decision and scrutiny".

- Amendment 52 stipulates that the established Defence Union would include military units under the direct command of the EU. According to the same amendment, the European Defence Agency would be given the right to "procure armaments on behalf of the Union and its Member States".

- Amendment 53 stipulates that "[d]ecisions relating to the common security and defence policy shall be adopted by the Council acting by a qualified majority", which implies the rejection of the current principle of unanimity.

- Amendment 54 stipulates that military missions will be launched on the basis of a decision taken by qualified majority.

- The above changes mean that ultimately, command over the entirety of the Polish armed forces may be taken over by the EU. The amendments' first effect will be to hand over decisions on armaments and procurement to the EU, however. The Polish government's opposition to missions involving the armed forces will not be able to prevent potential use of Polish soldiers by EU command structures.

- The establishment of the Defence Union should be read as a challenge to NATO structures and, in the longer term, as an attempt by Europe to abandon military cooperation with the United States

altogether. It would represent an intermediate stage in the realisation of the German Eurasian concept with the participation of the Russian Federation. According to the co-rapporteur of the resolution, Helmut Scholz (not to be confused with Chancellor Olaf Scholz), the transformation of the EU Member States' armed forces into an EU army should lead to "de-coupling from NATO" in order to avoid duplicating armed forces and their expenditures.

- The implementation of the concepts of centralised and joint arms procurement and development, combined with the separately discussed issue of extending EU powers into the industrial area, leads to a threat to national sovereignty over decisions regarding the armaments developed and produced by the arms industry. It also poses a threat to the interoperability of national armed forces with non-European NATO allies.

Although national defence is still the sole responsibility of the EU Member States, the idea of transferring this prerogative to the EU has been under development for some time, culminating in this attempt at realizing it via a proposed amendment to the Treaties.

The long road to an EU army

The proposed security Treaty changes represent a return to ideas that have previously emerged in the European integration process in recent decades. This has resulted in the establishment of a number of essentially superficial institutions, which nevertheless provided the nucleus for the implementation of the overall objectives. The European Union Battlegroups are a case in point. The proposed Treaty changes that have been voted on by the European Parliament are the biggest step yet towards realising the idea of a common EU defence, and at the same time a European army.

Although the Lisbon Treaty enshrines a common defence policy for the European Union (Article 42(2) TEU), its provisions point to the overarching role of national defence policies. In recent years, the theme of extending the Union's security powers has recurred repeatedly in statements by European leaders. In 2018, this was hinted at by both the French President and the German Chancellor. Emmanuel Macron put forward the concept of a "real European army", the creation of which he justified in relation to the threat from Russia and its aggressive policies.[1] Angela Merkel stated that "we should work on the vision of one day creating a real European army".[2] The strengthening of EU powers in the field of common defence was raised both when Jean-Claude Juncker and his successor, Ursula von der Leyen, presided over the European Commission. Bogusław Liberadzki, from the then still-extant Democratic Left Alliance and at the same time Vice-President of the European Parliament, also stated that "in four years there will be a European army", which was to be preceded by the creation of an EU arms market.[3] The idea of a common army is explicitly referred to by the European Commission

1 Rp.pl, *Emmanuel Macron: For a European Renaissance*, https://www.rp.pl/Unia-Europejska/303049912-Emmanuel-Macron-Na-rzeczeuropejskiego-Odrodzenia.html, accessed 5 December 2023.

2 Rp.pl, *Merkel calls for a 'real European army'. Applause and booing in the hall*, https://www.rp.pl/Unia-Europejska/181119768-Merkel-wzywa-do-utworzenia-prawdziwej-europejskiej-armii-Aplauz-i-buczenie-na-sali.html, accessed 5 December 2023.

3 Rp.pl, *Boguslaw Liberadzki - In 4 years there will be a European army*, https://www.rp.pl/RZECZoPOLITYCE/190409989-Boguslaw-Liberadzki---Za-4-lata-powstanie-europejska-armia.html, accessed 5 December 2023.

in its "White Paper", a proposal for a reform of the European Union. It mentions the establishment of a "European Defence Union".[4]

Recent years have seen the gradual creation of more EU institutions with responsibility for security in various areas. In June 2017 the European Defence Fund was created, with which the co-financing of defence activities from the Union budget began. At the same time, the Military Planning and Conduct Capability (MPCC) was established. A few months later, in December, the Permanent Structured Cooperation on Defence (PESCO) emerged, with areas such as mutual assistance for cyber security and rapid response teams, the Union's Joint Intelligence School, and the maritime surveillance system falling under its remit.

Following the Russian invasion of Ukraine in February 2022, there was an expansion of community defence activities. Under the so-called Ammunition Support Act (ASA), funding was approved for strengthening the industry's munitions capabilities. In September 2023, the European Defence Industry Reinforcement through common Procurement Act (EDIRPA) was voted on in the European Parliament.

Treaty changes as a means of achieving objectives

From the point of view of this report, however, the key point is the proposed Treaty changes that were voted on in November 2023. The preamble to the European Parliament's resolution on the amendment of the Treaties included the following passage: "The European Parliament calls for the establishment of a defence union including military units, a permanent rapid deployment capacity, under the operational command of the Union; proposes that joint procurement and the development of armaments be financed by the Union through a dedicated budget under parliamentary co-decision and scrutiny and proposes that the competences of the European Defence Agency be adjusted accordingly; notes that clauses with regard to national traditions of neutrality and North Atlantic Treaty Organisation (NATO) membership would not be affected by these changes".[5]

The resolution already refers at the outset to the Ventotene Manifesto, whose authors assumed that the Union would "constitute a steady federal state, that [would] have at its disposal a European armed service instead of national armies".[6] Among the numerous proposed changes to the Treaties, a few of the most important from a security and defence perspective shall be highlighted.

Amendment 50 would delete paragraph 4 of Article 31 of the Treaty on European Union, which would the sovereignty of states in decision-making on military and politico-defence matters.

In Article 42 it is proposed to introduce the following provision (Amendment 51): "The common security and defence policy, including the procurement and development of armaments, shall be financed by the Union through a dedicated budget in respect of which the European Parliament is a co-legislator and exercises scrutiny" while replacing the current unanimity-based decision-making

4 European Commission, *White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025*, https://commission.europa.eu/document/download/b2e60d06-37c6-4943-820f-d82ec197d966_en?filename=white_paper_on_the_future_of_europe_en.pdf, accessed in May 2024).

5 Report on the European Parliament's proposals to amend the Treaties, 7.11.2023 - (2022/2051(INL)), op. cit.

6 Ibid.

process on the Union's common defence policy with qualified-majority voting.[7] It is also proposed to introduce a provision for the establishment of "a Defence Union with civilian and military capabilities for the implementation of the common security and defence policy. That Defence Union shall include military units, including a permanent rapid deployment capacity, under the operational command of the Union. Member States may provide additional capabilities."[8]

Special attention should also be paid to the position of the co-rapporteur Helmut Scholz on foreign, security, and defence policy. He stresses the Union's responsibility for "contributing to international peace", and "fostering active engagement for disarmament". At the same time, he points out that the transformation of the armed forces of the Union's Member States into an EU army should "be based on the principle of structural non-aggression capabilities", and that Treaty changes should be accompanied by measures for "independence from NATO" in order to avoid duplicating armed forces and their expenditures.

Making Poland (and other Member States) powerless

Transferring defence and security powers to a common EU policy will in practice mean depriving nation-states of their own defence capabilities and forcing them to become totally dependent on decisions taken in Brussels. From the point of view of individual EU Member States, and especially of those countries on the EU's eastern flank, the looming prospect of a Defence Union as pursued by the EU poses a threat to NATO's continued functioning.

This is firstly through the EU's declared (as indicated earlier) desire for de-coupling from NATO. Secondly, by strengthening Germany's role as a key member of the North Atlantic Alliance in Europe. And thirdly, by hindering the development of the Three Seas Initiative as a concept of military cooperation within NATO, but with some degree of independence from the Western European members of the alliance. Those states that are members of both the Union and the Alliance may become incomplete members of NATO due to the EU taking over decision-making powers in the area of defence and armaments.

Nor does the European Union have the traditions and experience of a military alliance. All attempts to date to create a Community framework on security issues have been smashed due to bureaucratic barriers or by a lack of a coherent vision. The Union does not have the structures, the experience, or even the procedures that could be the foundation for building a military defence alliance. This observation turns out to be all the more relevant if one considers the Russian Federation's current aggressive policy, which not only threatens the states of Eastern and East-Central Europe, but also seeks to overturn the European security order. Countries that would be a part of the planned EU military alliance could thus become a target of the Russian Federation's influence. This includes Poland.

As quoted above, one of the assumptions made in this proposal is the replacement on European soil of NATO structures by a new EU military alliance, which has been described as "de-coupling from NATO". In essence, this slogan means making defence capabilities and capacities independent of the

7 Ibid.

8 Ibid.

USA as well as abandoning the American protective umbrella, including its nuclear leg. Restricting the ties of EU states with the Alliance's structures may even lead to its collapse, whereas from Poland's point of view, NATO membership is the basic guarantor of its security.

Surrendering to non-state structures full control of such fundamental issues not only for a nation's self-determination, but even its survival, as defence will lead to total dependence on decisions taken outside the state's borders.

The well-known sluggishness of EU structures – which are particularly evident in their actions in support of Ukraine, which were merely a backdrop to the actions of nation-states – will mean that the actual security of the Member States in the new alliance will decrease rather than increase. It will lead to the paralysis of the defence capabilities of the individual countries, which, in the event of hostile acts, will have to wait for officials hundreds of kilometres away from the hostilities to make decisions. The decisions made in recent times clearly demonstrate the cynical attitude of Berlin and some of the other capitals of the Western half of the Union, and have forced us to wonder whether, in a situation where there is actual aggression by the Russian Federation against Poland or the Baltic States, this new alliance will take appropriate action quickly enough to counter and stop it.

The actual state of the armed forces of the individual EU Member States – which disarmed themselves after the end of the Cold War, thus seriously weakening their own military potential – is also not without significance. A clear confirmation of their lack of adequate capability is the situation of the German brigade that is supposed to be stationed in Lithuania in order to serve as a deterrent against Russia's possible aggressive intentions. In 2023, it was announced that a commander for this unit would be appointed by 2025 and that the brigade would be fully operational by 2028 at the latest. Five years after the announcement of this initiative, Germany will be able to deploy a unit with a strength of 4,800 soldiers and 200 civilians in Lithuania.[9] During this same period, the Russian president, by decree, has increased the number of troops in the Russian army by 170,000 to a total of 1,320,000 soldiers.[10] The overwhelming majority of EU Member States do not have armed forces of any real significance.

The practical effect of centralisation in the context of defence and security would be to increase Germany's chances of maintaining its dominance over the other EU countries. This would also be accomplished through joint arms purchases. The proposed changes envisage a significant strengthening of the European Defence Agency's powers such that it would handle the purchasing needs of both the planned EU army as well as the armies of the Member States. This is not only a huge intrusion into the sovereignty of individual states and their security, but also a vision that cannot succeed. Many types of armaments are simply not produced in Europe, and the capacity of European industry is so limited that they cannot be produced and supplied quickly in the event of a looming threat. The proposed solution will primarily reward the armaments industries of Germany, France, and even the Czech Republic, but not that of Poland, whose armaments industry is currently lagging behind in many areas. In addition, by strongly tying purchases fulfilling the armaments needs of the EU countries' armies, the relationship between Poland and the United States, which has been built up in recent

9 P. Miedzinski, *Niemieckie trudności z brygadą na Litwie. Minister Niemiec zabiera głos*, https://portalobronny.se.pl/polityka-obronna/niemieckie-trudnosci-z-brygada-na-litwie-minister-niemiec-zabiera-glos-aa-nZN6-q8Jm-qdBa.html, accessed 5 December 2023.

10 Businessinsider.com.pl, *Putin wydał dekret. Liczebność armii wzrośnie o 170 tys.*, https://businessinsider.com.pl/wiadomosci/putin-wydal-dekret-liczebnosc-armii-wzrosnie-o-170-tys/w9vx5wt, accessed 5 December 2023.

years, will be weakened. Interoperability with the US military, with which Poland has tied its security future, will also be weakened. Surrendering powers in this area to the Union means that there will be no national control over a country's military potential. This could mean forcing Member States to purchase armaments from German or French concerns. This is all the more dangerous for Poland as it has recently linked the development of its armed forces to arms purchases from the United States and South Korea.

Russia's full-scale invasion of Ukraine vividly demonstrated the lack of readiness of Germany, one of the EU's most important countries, to pursue an active and swift policy of support for Kyiv. On the contrary, Berlin's cautious attitude rather indicates a readiness to continue economic ties with Moscow. German sluggishness limited Ukraine's opportunities to obtain more favourable results on the battlefield. One should therefore not dismiss the possibility of a scenario where, if the Russian threat to the EU's eastern flank were to actually materialise, Berlin will pursue an equally restrained attitude, and voices in favour of "not dying for Warsaw" will be heard not only at pacifist demonstrations, but also from the mouths of decision-makers.

The risk of loosing the power to make decisions

From Poland's point of view, one of the more dangerous proposed Treaty provisions, apart from the common arms procurement policy, is the centralisation of the command process. Transferring powers in this area to the EU level will in practice mean a gradual departure from national armies, which will be replaced by a single EU army. Such an army would not have to take appropriate action in defence of specific member states, as the armies of those states would do. This objective is moreover found in the Ventotene Manifesto, which underpins the proposed solutions. Surrendering the command of one's own armed forces to a foreign command cannot guarantee their proper use. In a situation of armed conflict, a joint command will at best make decisions that are beneficial for the alliance as a whole rather than to a specific country. By depriving ourselves of the capacity for decision-making, and possibly of the control over our own armed forces, we will be deprived of our capacity to resist on our own in the absence of favourable decisions made at the EU level.

The comment by Helmut Scholz, which is quoted above and is included in the European Parliament's Report on proposals for the amendment of the Treaties, is also particularly noteworthy. Basing the concept of security on the principle of majority voting in the Council, under the full control of the EP, will lead to the EU's defence becoming the province of an unreal institution that is dependent on the conflicting interests of specific groups of states, or even individual decision-makers.

One practical dimension of maintaining a deterrent capability is the possession of nuclear weapons. However, basing the assumptions of our common defence on full nuclear disarmament will not ensure that those states which could conduct aggressive actions against selected states of the Union will reciprocate. The Russian Federation has an extensive arsenal of nuclear weapons. If it were to take aggressive actions against Poland or other EU states, it would not even need to use them. It would be enough if it threatened to use them if the EU army were to intervene. If the EU were to lack the means to respond adequately, Moscow would not have to fear the threat of escalation.

It is also dangerous that the new EU army would be built as a "non-aggression force". War and armed forces are a system that requires each of its components to function efficiently. Almost any weapon

can be used for both defence and attack. Defensive warfare also requires offensive capabilities that can potentially liberate lost territory or carry out counter-insurgency operations. Depriving oneself of a capability "aimed at aggression" at the outset means that a country under attack will be weakened in a clash with an aggressor which has not deprived itself of its own offensive capabilities.

Summary

The new EU concept of defence and a common army will in fact mean the disarmament of the Member States, paralysing their defence capabilities and making their defence dependent on the attitude of the most important EU states. It will also leave them without control over the defence of their own territories as well as over their own armies and, in the long term, make even their liquidation possible. It will also mean their resignation from NATO membership or the disintegration of the Alliance, which is the foundation of the security of most Central and Eastern European states.

Moving away from the concept of national armies to an EU army may also result in a low actual capability to conduct operations. Soldiers from the various countries that make up the units of an EU army, depending on the situation, will likewise have different motivations for fighting. The willingness to make the utmost sacrifice in a situation of fighting on or near one's own territory may be different from that of fighting at the other end of the continent.

Finally, there are also big question marks over the EU army's ability to wage war in the event of a full-scale armed conflict lasting more than a few weeks. What structure will be responsible for the forced mobilisation of soldiers? Who will decide on the continuation of resistance as opposed to the surrender of part of the territory which is at stake to the aggressor? What institution will decide which front is most relevant? There are plenty of questions that can be raised, although the proposed solutions do not answer most of them, and in fact create the illusion of increased security, when in fact already at the outset they undermine the existing foundations of security.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 7: INDUSTRY

Regulatory power in the area of each industry can be transferred to the EU even in the face of the veto of a significant number of member states. This is the way to consolidate the advantage of the German economy over European competition. As a result, it may be up to the EU to decide on strategic industries: mining, energy, armaments.

Konrad Bonisławski

7. Industry

Main theses

- The draft EU Treaty amendments contained in the European Parliament's resolutions provide for the area of "industry" to fall under the shared legislative powers (Amendment 75).
- Deepened integration in the field of industry and the transfer of powers in this area to the European Commission will accelerate the processes of EU industrial integration while limiting Poland's influence on the shape of industrial policy, which is crucial for economic development.
- The Member States have struggled for many years with the development of a common industrial strategy. This demonstrates that the technological diversity of countries and the differences in their competitive advantages make it impossible to define a uniform developmental direction for the entire Union.
- An even greater concentration of powers and resources in the field of research and development in the European Commission will exacerbate developmental disparities between countries which are at different levels of economic development.
- The proposed Treaty changes also affect such strategic areas as the mining industry, energy, and the arms industry. This could easily lead to the European Commission gaining the power to set a timetable for the phasing out of the mining industry, despite the objections of countries such as Poland.
- The proposed amendments will allow the EC to intervene more in the economies of the Member States. Among other things, it may choose to impose solutions that are components of a policy aimed at reducing the impact of industry on the climate and the environment.
- The projected expansion of the EU's direct powers will also lead to a reduction of Poland's sovereignty in antitrust policy. The loosening of restrictions on state aid to businesses is likely to primarily benefit the largest states.

The transfer of the area of industry from the sole jurisdiction of the Member States to that of shared competences poses a number of risks that have already been reported in recent years in relation to the successive iterations of the EU's common industrial policy, but also in relation to decisions that have affected industry within the purview of the European Commission's activities. Once the presumption of legislative power over industry has been transferred to the EU level, it will be much more difficult to prevent the negative impact of a common policy in this respect.

Industry in the EU Treaties

Industry is mentioned in Article 173 of the Treaty on the Functioning of the European Union (TFEU), according to which "[t]he Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist". Interestingly, the literal wording of this provision already implies that it is the industry of the Union, and not of the individual Member States, that is to be competitive. This gives the green light to a perception of the EU's role in the development of industrial policy which would allow the Union's economy to be treated as a single entity, and in practice would favour large, supranational (albeit intra-Union) companies at the expense of relatively smaller national firms. Further, Article 173 TFEU specifies that measures for developing industry shall aim to speed up the adjustment of industry to structural changes; encourage an environment favourable to initiative and the development of undertakings throughout the Union, particularly small and medium-sized undertakings; encourage an environment favourable to cooperation between undertakings; and foster better exploitation of the industrial potential of policies in relation to innovation, research, and technological development.

Despite the fact that, until the 1990s, the focus was on creating a common market within the European Union, since 2005 steps have been taken to strengthen cooperation aimed at a common industrial policy. For example, in 2008 the European Commission initiated processes to level the playing field in terms of access to raw materials from third countries and to reduce the consumption of certain raw materials in Europe. These activities accelerated after the entry into force of the Lisbon Treaty. For example, in 2016 a Communication on Digitising European Industry was issued, focusing, among other things, on the need to create a digital single market, as well as to take action at the EU level to help coordinate national and regional initiatives for digitising industry, emphasising the need for the interdependence of the Member States in advancing digital technologies.[1]

A new industrial strategy

In March 2020, the Commission presented the communication "Making Europe's businesses future-ready: A new Industrial Strategy for a globally competitive, green and digital Europe", which is designed to help European industry achieve a twofold transformation towards climate neutrality and digital leadership, and to strengthen Europe's competitiveness and strategic autonomy.

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. Digitising European Industry Reaping the full benefits of a Digital Single Market, 19 April 2016, COM (2016).

In May 2021, due to its experience with the coronavirus pandemic, the Commission updated the European industrial strategy, focusing on the resilience of the EU single market, EU dependencies in key strategic areas, and support for small- and medium-sized enterprises (SMEs) and start-ups, as well as on accelerating green and digital transformation. A central axis of this strategy is precisely the so-called "dual transformation": green and digital. The strategy is therefore also coupled with the European Green Deal, which has set the EU's goal of achieving climate neutrality by 2050. According to the strategy, "industry has a leading role to play in this process".

The transfer of industry to areas of shared competences will give the European Commission further opportunities to steer the economies of the Member States towards reducing their impact on the climate and the environment. Environmental considerations could increasingly be used to change the ratio of costs incurred in industrial production between Member States. This concerns both the way in which the energy required for industrial processes is generated, and the carbon intensity of the processes themselves. The further transition to renewable energy sources, as well as the implementation of clean – i.e. emission-free – industrial technologies and the development of a closed-loop economy are therefore to be supported. Following the adoption of the proposed Treaty changes, it is easy to imagine the European Commission gaining the power – on the basis of a regulation adopted by a simple majority and in spite of the Polish veto – to set a timetable for the phasing out of extractive industries, as well as the phasing out of fossil fuel-based energy production.

In the context of a more centralised EU, this may mean that investment in industry, financed by Euro-taxes or common debt, will be subjected to tightening environmental criteria or else submitted to other regulations and limits, thus becoming a hidden constraint on development imposed on Poland for the benefit of the more developed EU economies.

An example of the potential for Member State industries to be affected is the Emissions Trading System, which imposes additional costs on energy production that emits greenhouse gases. The effect of this system has been a drastic increase in energy prices.

The adoption of the proposed Treaty changes opens the way for the imposition of similar – and even more far-reaching – regulations by a simple majority, and therefore without taking into account the interests of a large proportion of the Member States.

We must also bear in mind that, due to Poland's energy mix and relatively low labour costs compared to other EU countries, regulatory measures targeting non-EU countries with low labour costs and a high-carbon energy mix will also ricochet into our country.

A significant part of the EU's industrial strategy concerns the regulation of the common market. This area is already a shared power, and by its very nature its rules, which must apply equally in all Member States, are set centrally. The inclusion of the whole issue of "industry" in the area of shared competences will result in an unprecedented deepening of the EU's regulatory authority.

The "New Industrial Strategy for Europe" announces the "development of new technical standards and regulations", which, given the priority status of "environmental and climate policy", will in all likelihood mean tightening requirements for European and imported products or imposing additional levies on products deemed to be non-environmental (vide: "carbon duty" – the Carbon Border Adjustment

Mechanism). Requiring specific properties for industrial products is one of the few ideas introduced by EU politicians to ensure the EU's competitiveness, which cannot compete in terms of costs with countries such as India or China, nor can it withstand technological competition with China or the USA. Once again, it should be stressed that depriving Poland of a decisive influence on the shape and scale of these restrictions may result in the adoption of measures that are grossly unfavourable to the entire domestic manufacturing industry. It will also result in a growing dependence of the domestic economy on the economies of the more developed countries within the EU, primarily Germany.

A common industrial strategy and a single, EU-wide industrial policy is the next stage in the creation of a single entity (superstate) from the European Union, which is to pursue an active economic policy on an equal footing with the US and China through a wide range of tools: subsidies, taxes, and regulation. Under the proposed Treaty changes, however, this policy will be able to ignore the needs and national interests of a significant number of Member States, giving the deciding vote to Germany or France. Poland, once deprived of global brands, will most likely be disregarded.

Another response – which is desired by the German and French lobbies – to the protectionist practices of China and the US as well as the strategy of state support for global companies in Japan and South Korea (*keiretsu* and *cheboli* respectively) will be to try to loosen antitrust policy in such a way that supranational consortia from within the EU – which have been formed by the merger of, for example, large companies from Germany, Italy, or France – can become global players. At the same time, attempts to create national heavy-weight companies inside the smaller Member States will continue to face opposition from the European Commission – as in the case of PKN Orlen's recent merger with Lotos, when it made its approval of their merger conditional on the sale of some production facilities and petrol stations to third parties.

Antitrust policy

The proposed changes to the Treaty and the transfer of the most wide-ranging powers in the area of industry to the European Union herald radical centralisation steps which, based on past experience, can be judged to be grossly unfavourable to the dynamically developing and aspiring economies of the new Member States. Even deprived of these extraordinary powers, the EU has taken numerous steps in the past few years to concentrate special regulatory powers in the EC and its special agencies, as well as to implement special policies which usually primarily benefit the developed economies of the older EU Member States. The proposed change in the scope of powers would mean accelerating these trends and freeing the German and French lobbies from the political constraints imposed by the veto right of each new Member State. Indeed, even in areas which are already covered by majority voting, the threat of a veto in other fields allowed the younger EU members to negotiate on a more equal footing with their older counterparts.

Already in 2019, Poland commented on the draft strategy for industrial policy in the EU for the period up to 2030, among other things on the project to build European-scale champions as part of the reform of EU competition policy.[2] In articulating its concerns, Poland – unsurprisingly – cited allegedly

2 Poland's Ministry of Entrepreneurship and Technology, *New industrial policy of the European Union*, available on the website of the Ministry of Development and Technology at https://www.gov.pl/web/rozwoj-technologia/stanowisko-polski-do-prac-nad-strategia-polityki-przemyslowej-w-ue-do-2030-roku, accessed 20 January 2024.

negative examples of protectionist measures enacted during Donald Trump's presidency in relation to the US and Chinese policy. However, it was rightly pointed out that economic partners from countries at a lower level of development could be even more discriminated against.[3]

Building a common industrial strategy for the whole of the European Union is questionable, as the technological diversity among Member States and the differences in their comparative advantages make it impossible in practice to define uniform directions of development for the whole Union. Creating a strategy for the entire Union in such a constructivist manner must in practice lead to the primacy of the strongest states' interests.

The Polish government's opinion on the joint strategy also emphasised that "Industry 4.0 benefits the largest companies the most, and 90% of young companies end up in the investment portfolio of mature companies".

Attention was also drawn to the need to revise the state aid policy. According to the Polish government, investment aid is particularly important in the least favoured areas of the EU, where there are insufficient market incentives to encourage economic activity (underdeveloped scientific base, transport infrastructure, significant distance from large urban centres, lack of qualified employees), hence state aid offered by these countries, especially in less developed areas, should be treated more leniently. Already in the past, state aid law frequently blocked Polish industrial policy and strategic sectors. The changes we are now facing, however, go in a slightly different direction in practice.

An example of a breakthrough in peremptory state aid law is currently the IPCEI projects ("important projects of common European interest"), which are bundles of investment projects that Member States notify the European Commission about in order to obtain approval for funding. Under normal circumstances, Member States would not be able to provide state aid to selected companies at this level, as this would violate the principles of equal competition in the EU common market. In the case of IPCEI projects, countries get approval when they prove that such aid enables private capital to invest in the production of new technologies that could not have been launched without said support. The facility covers only selected technologies - those that the EU identifies as strategic – and their value chains. It is not difficult to see that such a de facto bending of competition law in this case will also mainly serve the richer countries, even, in this instance, widening the gap between Member States.[4]

Another case related to state aid to enterprises is the "Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia". It allows for emergency state aid in connection with the negative economic consequences – particularly on the energy and raw material markets – of the war in Ukraine. Despite the fact that, after the first few months in force, Germany was found to account for 53% of all aid provided and France for a further 24%, the emergency rules have already been extended twice. Both cases – the IPCEI and the

3 It is worth mentioning that even under the current anti-trust legislation, Polish companies such as the window manufacturer Fakro have complained about unfair market practices which have been accepted by the European Commission. The case brought by Fakro was put before the European Commission between 2006 and 2022, and did not end in the Polish company's favour.

4 The largest of these, IPCEI "Microelectronics and Communication Technologies", is taken as an example. Although we find as many as 14 countries of origin among the 56 companies, their proportions are very uneven. We can find as many as 23 companies that have been submitted by Germany, including jointly with other countries, while 12 were submitted by France (one of them jointly with Germany). Poland participates in four of the seven IPCEI projects, with one company reported in each.

"Temporary Framework" – illustrate the return of protectionism even within the EU's internal market, allowing the largest countries to subsidise their companies in a way that poorer countries cannot.

Another threat to Poland's economic sovereignty was – after being supported by the Polish government in 2019 – the creation of a single EU-wide antitrust authority. On the one hand, it is legitimately noted that such a body could more easily proceed in the cases of digital giants than can the EC. On the other, extending direct powers at the expense of national authorities (in Poland, the President of the Office of Competition and Consumer Protection) clearly limits sovereignty in the area of economic regulation.

Research and technological development

One of the Treaty objectives that is necessary for the development of industry is to work towards a better use of research and technological development. According to Article 179 TFEU, "The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely". In 2014, the majority of EU research funding was grouped around Horizon 2020. In practice, 95% of the programme's budget was allocated to the technological development of the 15 countries of the so-called "old Union", with a dominant role for Germany, the UK (until Brexit), and France. Research teams from the remaining 13 Member States received less than 5% of the total budget. In assessing such a glaring disproportion in the allocation of funds, attention was drawn, among other things, to the need to... increase the share of national R&D funding.[5]

As the issue of R&D is systemically linked to the development of the economy and industry, it is not difficult to imagine that the proposed Treaty amendments will lead to a progressive accumulation of powers and resources in the field of R&D by the European Commission, exacerbating the development disparities between the more and less developed countries. National funding from rich Western countries, but also their large corporations (e.g. from Germany and France), will attract almost all of the centralised R&D funding in the EU, exacerbating backwardness in terms of development in companies from other EU countries.

Summary

The inclusion of the industrial area in the shared competences of the European Union serves the interests of the largest EU economies, whose global aspirations and development strategy remain at odds with the interests of the dynamically developing economies of the new EU countries, including Poland.

The hitherto necessary blending of positions, allowing compromise solutions to be worked out, will be able to be replaced by the dictates of a coalition consisting of Germany, France, and those countries which are closely linked to them economically. A consequence of this alliance will be changes to antitrust law, favouring supranational groups originating from the old EU countries at the expense

5 *Horizon 2020: Geographical balance of beneficiaries*, https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/662597/IPOL_BRI(2020)662597_EN.pdf, accessed 24 January 2024.

of large groups from the new EU countries, such as Poland's PKN Orlen group, which was created through mergers and takeovers.

The proposed amendments will also result in a further deepening of the imbalance in the disbursement of resources earmarked for research and development, 95% of which already goes to the countries of the old Union. Ultimately, the amendments will make it possible to force Poland and other growing economies to maintain an unfavourable rate of energy transition and to implement an economic strategy that is subordinate to limiting emissions, including a timetable for closing mines that does not take account of the Polish position. Rising energy costs will make the production of further industrial goods in Poland unprofitable, which will translate into the bankruptcy of companies and the disappearance of entire branches of Polish industry.

The limitations on sovereignty that result from the proposed change will therefore hit the competitiveness and development dynamics of the Polish economy, forcing it to become further subordinated to the EU's main economic centres, in particular the German economy. This will relegate Polish industry to the role of a labour-intensive contractor within value chains which are managed by Western European companies.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 8: EDUCATION

The proposed amendments open the way for the EU to take full control of education in the member states, including the organisation of the school system and the content of education. The consequence could be the introduction of a common baccalaureate and a common curriculum of baccalaureate subjects, including a common history and literature curriculum. This could lead to the introduction of a permissive model of sex education.

Marek Puzio
Jerzy Kwaśniewski

8. Education

Main theses

- The proposed changes to the EU Treaties include a shift in education from an area of the European Union's complementary power to an area of shared competences.
- This implies a far-reaching restriction on the Member States' autonomy in determining the content of teaching as well as the organisation of educational institutions.
- After the changes, the introduction of a single European baccalaureate and a reduction in the teaching of mother tongues, history, or geography cannot be ruled out.
- It will likewise enable a top-down introduction of a uniform, mandatory, and permissive type of sex education for all.
- The implementation of so-called inclusive education may entail an obligation to abolish special schools such that, in the name of the dogma of equality and non-discrimination, all students will attend the same classes, including those in line with developmental norms as well as those with severe intellectual disabilities.
- The EU Commissioner for Education will be able to take over the powers of the ministers who are responsible for education.
- It is no coincidence that the authors of these changes use the term "regions" when referring to nation-states. This is intended, among other things, to cut the individual nations off from their centuries-old traditions and uproot their attachment and love for their homelands.
- The assumption of powers in the field of education and childrearing appears to be a necessary step towards the realisation of Altiero Spinelli's vision of the eventual abolition of sovereign nation-states and the creation of a common European state, where a communal European identity will be instilled in the appropriately-formed next generation – in place of a sense of national identity.

Proposed changes to the Treaties in the field of education

The proposed changes would be to delete the reference to education from Article 6(e) of the TFEU, which contains the list of complementary powers (Amendment 78), and to extend the list of competences shared between the European Union and the Member States in Article 4(2) of the TFEU to this field.

The amendment to Article 4(2) of the TFEU would add a further drafting unit in the form of 'kc', with the result that **"education, especially when it concerns transnational issues such as the mutual recognition of degrees, grades, skills and qualifications"** would be among those shared competences (Amendment 76). It is worth noting the wording "in particular", which indicates that the "recognition of degrees, grades, skills and qualifications" mentioned in the provision is only an illustrative rather than an exhaustive list. This means that any issue relating to education could be treated as potentially regulated by the EU legislator.

In tandem with the above-mentioned changes, the authors of the resolution propose to amend Article 165(2) TFEU, by extending it to include further areas of specific Union measures in the field of education. As things stand as of now, the areas of EU actions in this area boil down to activities consisting of **promoting** cooperation between educational institutions, **encouraging** academic recognition of diplomas and periods of study, **fostering** student mobility and youth exchanges, or **supporting** distance learning and the dissemination of EU languages. Meanwhile, new areas would include Union measures to "**common objectives and standards of an education that promotes democratic values and the rule of law as well as digital and economic literacy**" (amendment 143, introducing a separate *indent*[1] into Article 165(2) and rendering it an opening quotation), as well as a broadening of the scope of activity. This currently consists of "promoting cooperation between educational establishments". In the new version, it would include "promoting cooperation ***and coherence*** between ***educational systems, while guaranteeing cultural traditions and regional diversity"*** (amendment 144).

Significance of the proposed changes

The most far-reaching change is undoubtedly the transfer of education from the area of complementary powers to the area of shared competences. Giving the European Union primacy in lawmaking in a given area means a far-reaching reduction in the Member States' autonomy in said area.

While it is true that there is no change to the literal contents of Article 165(1) TFEU, the first paragraph of which states, among other things, that the Union shall respect the responsibility of the Member States for the content of teaching and the organisation of educational institutions, the change indicated above may nevertheless be of considerable significance for this provision's interpretation.

The responsibility of the Member States for the content of teaching and the organisation of educational institutions has so far meant independence in regulating them, since education, as already mentioned, is now exclusively one of the EU's complementary powers. As amended, Article 165(1) TFEU can be interpreted to mean that the responsibility of states will include the **obligation to** give the

1 *An indent* is a drafting unit of a legal text marked by a horizontal dash (hyphen).

educational institutions such a form and to include in the curriculum such content as the EU legislator deems necessary and decides to implement, e.g. by means of a regulation. Only in those areas which fall outside the scope that is covered by Community regulations will a Member State be free to act.

The planned amendments (Nos. 143 and 144) to Article 165(2) TFEU, which use such broad concepts as the development of "common objectives and standards" or "coherence between educational establishments systems", are in line with this approach and give the European institutions *de facto* unlimited scope for action. Para 27 of the European Parliament's resolution of 23 November 2023 serves as evidence for such an interpretation, calling on the Union to "develop common objectives and standards for an education that promotes democratic values and the rule of law, as well as digital and economic literacy; calls further for the Union to promote cooperation and coherence between educational establishments systems while guaranteeing the cultural traditions and regional diversity".

Practical implications

What might this mean in practice? A common European baccalaureate, with a list of new compulsory subjects, could be a way of implementing coherence between the educational systems as mentioned in Amendment 144 and the mutual recognition of degrees (see Amendment 76). Leading European publishers could then issue uniform textbooks that would provide the best preparation for passing the "EU baccalaureate". This would result in the universalisation of curricula (which would also be justified on the grounds of ensuring equal opportunities and mobility in employment), including the setting of a common curriculum for European literature and history by the EU institutions.

In the pursuit of further, deeper integration, the EU legislator could then consider implementing the teaching of a common European history, covering such topics as "Europeans in times of conflicts between nation-states" or "the history of European integration" as mandatory components. In doing so, it would not be out of the question to centrally determine the number of hours to be devoted to the "universal curriculum". This would leave less time for teaching other subjects or discussing other topics, such as the history of one's own country, especially in view of the "right to rest", which has been particularly emphasised recently. An analogy could be made to the teaching of foreign languages, which would be at the expense of the mother tongue; the teaching of European literature, in which there would be no place for national authors; or the teaching of geography, during which the geography of other European "regions" would have to be taken into account to an appropriate extent.

Attention should be drawn to the new wording of the provision covered by Amendment 144, where there is no mention of a guarantee to preserve national diversity, but rather "regional diversity". In Polish terms, this could mean, for example, that the history of Silesia or Kashubia should be taught as "cultural and geographical regions", in isolation from their Polishness. After all, both regions administratively belonged to various states during different periods – which, from the perspective of a progressive European integration, would be of secondary importance, anyway. It can be expected that such an approach would indirectly encourage separatist movements such as we are currently experiencing, for example, in Catalonia.

One of the first decisions made after the entry into force of these Treaty changes would probably be to introduce a standardised **sex education**, which shall be compulsory from the students' earliest

years, based, among other things, on the "Standards for Sexuality Education in Europe" that was developed in 2010 by the World Health Organisation Regional Office for Europe and the German Federal Centre for Health Education (BZgA). In this model, human sexuality is presented primarily as a source of pleasure, and the prospect of conceiving a child is shown as a threat which is "protected" by contraception, the early abortion pill, and ultimately, the "procedure" of abortion itself as an integral part of so-called reproductive rights. In turn, as part of a "comprehensive" view of human sexuality, children are taught about the existence of different "sexual orientations", each of which is supposedly as natural as the difference in hair colour is natural in humans. It just needs to be individually discovered, just as one discovers one's own gender identity. In "sex education" classes, children will therefore be taught about the differences between biological sex and gender identity, about the multiplicity of "genders", and about the possibility of freely defining one's own "gender" with which one identifies, regardless of one's biological sex. A subject of indoctrination will also be "sexual reproductive rights" (a concept hitherto non-existent in human rights doctrine, but which is being vociferously introduced into the language of international law documents by the EU and the WHO), meaning in particular an alleged right to abortion (or to so-called "safe abortion") without any restrictions.

It should be expected that these changes will also include the compulsory implementation of the principles of the so-called inclusive **education**, which in practice would mean, among other things, that all students, both able-bodied and disabled (including those with severe and possibly even profound intellectual disabilities), would be taught in one group. In the longer (or nearer) term, this would probably involve the gradual phasing out and eventually the abolition of special schools.

This is confirmed by the provision found in the "Partnership Agreement for the Implementation of the Cohesion Policy 2021–2027 in Poland" of 30 June 2022, which was concluded between the Republic of Poland and the European Union. The document states: "Special schools and other institutions that lead to or maintain the segregation of any disadvantaged group and/or at risk of social exclusion will not be supported in terms of infrastructure and equipment."[2]

It can be anticipated that the implementation of the assumptions of inclusive education would lead to a significant reduction in the level of learning if school activities were to be standardised and adapted to pupils with completely different aptitudes and needs. Pupils in line with the developmental norm, including those who are particularly gifted, would not be provided by their educational system with a curriculum adapted to their abilities, nor with appropriate learning conditions. On the other hand, pupils with disabilities, in a group of mostly non-disabled peers, whose achievements they would probably never match (due to their dysfunctions), would be all the more at risk of exclusion and alienation and, especially in the younger grades, of various forms of psychological violence such as ridicule, humiliation, bullying, and name-calling.

Along with the grouping together of all pupils, regardless of their developmental limitations, we can expect a move away from the classic grading system and towards descriptive grades.[3] The teacher would then be deprived of the possibility of making the student answerable to any consequences,

2 Ministry of Development Funds and Regional Policy, *Umowa Partnerstwa dla realizacji polityki spójności 2021-2027 w Polsce*, Warsaw 2022, https://www.funduszeeuropejskie.gov.pl/media/109763/Umowa_Partnerstwa_na_lata_2021_2027.pdf, accessed 22 January 2024, p. 53.

3 See European Agency for Special Needs and Inclusive Education, *Organising support for inclusive education. Synthesis Report*, https://www.europe-an-agency.org/sites/default/files/OoPSummaryReport_PL.pdf, accessed 24 January 2024.

even in the form of a negative grade, while the parents (but also the student himself) would be deprived of the possibility of receiving objective and clear verification of the effects and progress of his child's learning. The element of a certain type of competition and reward, which serves to motivate students to achieve better results in learning, would thus be eliminated.

There is a certain overlap here with critical theory as rooted in Marxism, which denies the prevailing order, questions the existence of empirically knowable objective truth, and strives for change in order to "liberate the individual from a system of oppression and domination". This concept, which emphasises the rights of the student and marginalises or ignores his or her responsibilities, likewise opposes the "student-master" relationship inherent in the classical education model. Indeed, any relationship based on hierarchy and subordination is unacceptable in such a critical approach.

Efforts to promote the implementation of the inclusive education model in the EU Member States (for the time being of a purely supportive nature) are currently being undertaken by, among others, the European Agency for Special Needs and Inclusive Education, which is a formally independent organisation but is nevertheless financially supported by the European Commission. The EU institutions themselves are also taking an unequivocal stance on this issue. On 22 May 2018, the Council of the EU, at the request of the European Commission, issued a Recommendation "on the promotion of common values, inclusive education and the European dimension of education" (2018/C 195/01). It stated: "as to enhance the cohesion of societies, it is essential to ensure genuinely equal access to quality inclusive education for all learners, including those with a migrant background, those with a disadvantaged socio-economic background, those with special needs and those with disabilities – in line with the Convention on the Rights of Persons with Disabilities. In pursuing this objective, Member States may make use of existing EU instruments, in particular the Erasmus+ programme, the European Structural and Investment Funds [...] as well as the guidance and expertise of the European Agency for Special Needs and Inclusive Education".[4]

Although the steps taken by such international institutions to implement this model of inclusive education are not, as yet, binding, the implementation of some of the assumptions behind this inclusion approach have been observed in Poland for years. The result is, among other things, a reduction in the number of special schools. Data from the Supreme Audit Office (Poland's court of auditors, NIK)[5] shows that between the school year 2016/17 and 2019/20, the number of such schools decreased by more than 500 – from 2,434 to 1,909, respectively, which is nearly a 22% decrease.[6]

The change in the EU Treaties to include education in the competences shared between the European Union and the Member States may therefore result in Poland being deprived of the possibility to realise certain assumptions concerning inclusive education according to its own concept, and being obliged to implement whatever model the European legislator deems appropriate.

4 It is also important to note the particular measures taken by the UNICEF Fund, which was established by the UN General Assembly, towards promoting inclusive education.

5 Supreme Audit Office (*Najwyższa Izba Kontroli*, NIK), *Kształcenie w szkołach specjalnych*, Warsaw 2020, https://www.nik.gov.pl/plik/id,23409,vp,26129.pdf, accessed 22 January 2024.

6 Ibid, p. 35.

Summary

One of the aims of education, besides imparting knowledge, is the upbringing of children. This means that in the process of pre-school and school education at all levels, the young generation is taught not only knowledge about the world around us, but also a specific system of ethical, aesthetic, and social values – in order to shape desirable attitudes such as patriotism, honour, altruism, and a sense of responsibility for oneself and others. One way of depriving successive generations of their sense of national identity, love, and attachment to their homeland, as well as cutting individual nations off from their centuries-old traditions, is by making changes to the educational system, involving, among other things, a reduction in the number of hours one is taught the history of one's own country, mother tongue, and literature, as well as the introduction of new subjects, including compulsory sex education of a type which promotes a hedonistic vision of human sexuality treating sexuality as the essence of humanity. Thus, the right of parents to ensure their children's moral and religious upbringing and teaching in accordance with their beliefs and values would be taken away in yet another field as well. Moreover, the ethic of duty, which has been the basis of all European culture since Greco-Roman times, could easily be replaced by the hedonistic ethic, which is now dominant in the West within the so-called mainstream. This ethic holds that personal pleasure is the highest value and the ultimate criterion of what is good.

As things stand today, the citizens of individual countries, via elections to their national parliaments, decide who will govern their country, including in the individual ministries. It can be envisaged that, following the introduction of the proposed changes to the Treaties, the core curriculum would no longer be determined by the Polish minister responsible for education and childrearing, but by the European Commissioner for Education.

The extension of the European Union's power to take authoritative steps in the field of education therefore appears to be a necessary step towards realising the vision of a common, federal European state, without sovereign nations, which would then be reduced at best to "cultural regions of Europe", where national patriotism would be replaced by "European patriotism". This vision was outlined in 1941 by Altiero Spinelli and Ernesto Rossi in the Ventotene Manifesto, to which, not coincidentally, the authors of the European Parliament's resolution of 22 November 2023 refer in its very first sentences.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 9: CURRENCY

The proposed changes introduce a pressing commitment to implement the Euro. The beneficiaries of the single currency are primarily Germany, to some extent the Netherlands. The other countries lost out on being in the Eurozone. The lack of monetary sovereignty opens up new fields of political and economic blackmail against the member states.

Piotr Głowacki
Jacek Trych

9. Currency

Main theses

- The draft Treaty amendments adopted by the European Parliament envisage replacing the Treaty-based recognition within the EU of an economic and monetary union with the euro as its currency with a simple statement that "[t]he currency of the Union is the euro".
- This change shall be read as an urgent commitment to implement the single currency in all Member States and a relinquishment of monetary sovereignty.
- The main beneficiary of the single currency is Germany, followed closely by the Netherlands. All other Member States, notably Italy and France, have suffered disadvantages from being in the Eurozone.
- The lack of monetary sovereignty and the handing over of a number of central bank powers to the European Central Bank (ECB) increases the possibilities for EU institutions to pressure and blackmail the Polish state.
- The adoption of a single currency will deprive the countries still having their own national currency of the benefit of the natural shock absorber mechanism (or stabiliser).
- The legal details of the European single currency were enshrined in the Maastricht Treaty, however, and no route to withdrawal from the Eurozone was included in this or any other document.

The Treaty on European Union, in the current wording of Article 3(4), states that "The Union shall establish an economic and monetary union whose currency is the euro". This provision, according to the proposed amendments, is to be replaced by the simple sentence: "The currency of the Union is the euro".[1]

The current wording emphasises the existence of two separate entities: the monetary union and the European Union. These entities, as we know, overlap but remain distinct, as there are full EU Member States who remain outside the monetary union. This laconic and authoritative statement which is being proposed by the European Parliament appears to abolish this separateness. Is this, then, to imply a compulsion for Member States to join the Eurozone? Let us recall that in the Accession Treaty, Poland theoretically accepted this obligation, but in practice its vagueness significantly weakened the prospect. How does the proposed new Treaty provision relate to this? This remains unclear. Undoubtedly, however, the amendment will provide a pretext to intensify pressure on those EU Member States that still enjoy monetary sovereignty to join the Eurozone. It is therefore worth considering what our own currency gives us.

The euro – basic facts

The idea of a common European currency began to be realised in 1979, when, as part of the introduction of the European Monetary System, the European Currency Unit (ECU) began to be used for operations and settlements between governments. At the beginning of 1999, the euro was inaugurated in non-cash transactions, and three years later also in cash form, thus phasing out national currencies. The euro as a currency was initially adopted by 12 countries, but over the past 21 years a further eight have joined, bringing the total to 20 Eurozone countries. Let us add that these are all countries with different economic situations, national interests, and degrees of development.[2]

Currency unions are not a new phenomenon. Moreover, usually the most important motives for their establishment have not been economic, but political – including the desire to expand and strengthen political influence.[3] This also applies to the Eurozone. Contrary to popular belief, the most ardent supporters of monetary union were the French, who saw it as an opportunity to prevent the German mark from dominating the European market. The Germans agreed to the creation of the Eurozone in exchange for Paris' support for German reunification.[4] Nevertheless, the Deutsche Mark was used as the basis for the euro exchange rate at the parity of €1 = DM 1.955. In addition, the euro's issuer, the European Central Bank, made its headquarters in Germany, specifically in Frankfurt. After the collapse of the Soviet Union, the project of a common European currency was raised all the more eagerly, as it was hoped that it would serve to counter the US dollar's dominant position in the world. The Eurozone economy is comparable to that of the USA, and the euro has the second largest share of global reserves at 20%. Despite this, contrary to the ambitions of its creators, the euro has failed to threaten the dollar's global dominance and remains a regional currency, mainly in the Old Continent.[5]

1 Draft European Parliament resolution on the European Parliament's proposals for the amendment of the Treaties, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/AFCO/PR/2023/10-25/1276737PL.pdf, accessed 24 January 2024.

2 M. Gwóźdź-Lasoń, S. Miklaszewicz, K. Pujer, *Unia Europejska i strefa euro: Doświadczenia i wyzwania ekonomiczne, techniczne, inżynieryjne*, Wrocław 2017, p. 7.

3 Z. Szpringer, *Dylematy i przesłanki związane z przyjęciem euro przez Polskę*, 'Studia BAS,' Warsaw 2019, p. 187.

4 P. Bagus, *The tragedy of the euro*, transl. J. Wozinski, Warsaw 2011.

5 P. Kowalewski, *Euro nie zagrozi dominującej pozycji dolara USA*, https://www.obserwatorfinansowy.pl/tematyka/rynki-finansowe/waluty/euro-jeszcze-dlugo-nie-zagrozi-dominujacej-pozycji-dolara-usa, accessed 24 January 2024.

The euro in light of theory and research

The theoretical basis behind the Eurozone's creation was provided, as is sometimes believed, by the Optimum Currency Area Theory. Its precursors were R. Mundell, R. McKinnon, and P. Kinen. The problem is that the Eurozone does not in fact meet this theory's basic criterion, namely that of real convergence – i.e. of economies becoming more similar. Although Frankel and Rose expected the single currency to provide the impetus for real convergence to occur, nothing of the sort has happened. To put it another way, the Eurozone countries were and remain too different in terms of economic development, and their economies have different characteristics.

The impact of the Eurozone on economic growth has been the subject of numerous empirical studies. Typically, they point to mixed and negative effects. According to one study, Germany was the main beneficiary of the euro in 2019, followed closely by the Netherlands. At the same time, all other countries, notably Italy and France, were losing out by being in the Eurozone relative to what they could have potentially gained by continuing to use their own currencies.[6] The 2022 study offered similar results, the only difference being that, according to it, only Germany benefited from being in a monetary union, and even then only since 2010.[7]

Sovereign monetary policy

What is the reason for this? Let us consider the various consequences of the change from the Polish złoty to the euro. We should start by recalling a basic fact: entry into the Eurozone would deprive Poland of the possibility of conducting a sovereign monetary policy, whose most important objective is to maintain price stability. The main tool of monetary policy is interest rates and, in recent years, asset purchase programmes (primarily domestic bonds). The selection of appropriate parameters (the level of rates, the size of asset purchases), as well as the appropriate moment to change them, are key decisions which are taken by the monetary authorities – in Poland's case, primarily the Monetary Policy Council and the Management Board of the National Bank of Poland, which is headed by its President. These decisions are made on the basis of analyses of various economic indicators. While the international environment is an important variable, the parameters of the Polish economy are key. Moving decision-making to the level of the ECB will render Poland's economic situation just one of many parameters to be taken into account. And, as we know from how the EU institutions operate in practice, this would not be the most important parameter, euphemistically speaking. Formally, the President of the National Bank of Poland would be one of the members of the Governing Council, the ECB's most important decision-making body (today with 26 members, that is, six members of the Executive Board, plus the governors of the national central banks of the euro area countries).

Pursuing a common monetary policy would make sense if the Polish economy behaved similarly to other EU economies, above all the German, French, and Italian ones. Meanwhile, the characteristics of the core EU countries' economic processes, which are economically well-integrated, such as those of Germany or the Benelux countries, are different from those of the countries of the South (e.g. Italy, Greece, and Spain), as well as those of the so-called "new EU", of which Poland is a part.

6 A. Gasparotti, M. Kullas, *20 Years of the Euro: Winners and Losers. An empirical study*, Centre for European Policy, 2019.

7 P. Dreuw, *Structural time series models and synthetic controls-assessing the impact of the euro adoption*, 'Empirical Economics,' Vol. 64 (2023), pp. 681-725.

The current inflation crisis may blur the picture somewhat, as it is global in nature, and affects – albeit to varying degrees – the whole of Europe. But it is easy to imagine a situation where Poland will need a loose monetary policy (e.g. low rates) to stimulate economic growth, while in Germany or France there would be a need to tighten it because of inflation. In such a situation, the ECB's monetary policy would be mismatched to either country. It is not difficult to guess that it will be the country with less political influence which will suffer.

Currency interventions, whereby the central bank buys or sells foreign currencies, are also one of the tools for conducting monetary policy. This power is also transferred to the ECB upon a country's entry into the Eurozone. A Member State is obligated to transfer part of its foreign exchange reserves to the ECB, losing influence over their use at the strategic level. The decision to intervene in foreign exchange is made at the discretion of the ECB authorities. The management of the reserves remaining at the national central bank is also subject to restrictions; operations above a certain threshold must be authorised by the ECB.[8]

The euro as a source of political pressure

The lack of monetary sovereignty and the handing over of a number of central bank powers to the ECB widens the scope for EU institutions to pressure and blackmail the Polish state. There is a long history of monetary institutions being used to achieve specific economic and political goals. The International Monetary Fund, under the dominant influence of the US, is often accused of abusing the conditionality mechanism. For its part, the US Fed, in theory an independent central bank, refused in 2020 to open a so-called swap line with Turkey, citing a lack of mutual trust between the two countries.[9] This was a time of heightened political tensions between Washington and Ankara, and the decision may have contributed to the deepening of Turkey's currency crisis.

The ECB likewise does not remain free of accusations of similar practices. These are described, among others, by Manolis Kalaitzake, a researcher on the influence of financial institutions on the political sphere. He cites, among others, the example of the actions of Jean-Claude Trichet, then President of the ECB during the financial crisis in Ireland. He made the provision of liquidity support by the ECB conditional on concessions to Ireland's creditors.[10] While liquidity support is usually seen as a neutral technical tool for providing short-term assistance to banks in difficult situations, in this case it was used as a means of putting pressure on the Irish authorities. While retaining monetary sovereignty, a country can, without asking external decision-making centres for approval, take action which it deems appropriate to the situation.

The Frankfurt bank's is also well-known for even more controversial actions. In 2011, the ECB halted its Italian bond-buying programme, which contributed to serious unrest in the Italian capital market, the collapse of Silvio Berlusconi's government, and the appointment of Mario Monti as Prime Minister, who was considered to be supported by financial circles.[11] In the case where it has its own currency,

8 Banco de España, *Holding and managing foreign currency*, https://www.bde.es/wbe/en/sobre-banco/mision/funciones/gestionar_las_r_fc6b52429f11281.html, accessed 24 January 2024.

9 Reuters.com, *Fed has swap lines with countries of 'mutual trust', policymaker says*, https://www.reuters.com/article/us-turkey-economy-reserves-fed/fed-has-swap-lines-with-countries-of-mutual-trust-policymaker-says-idUSKBN22I2D4/, accessed 24 January 2024.

10 M. Kalaitzake, *Central banking and financial political power: An investigation into the European Central Bank*, 'Competition & Change,' Vol. 23, Issue 3 (2018), p. 15.

11 Ibid, p. 16.

the decision to buy bonds by a country's central bank remains its sovereign decision. The field for foul play and pressure from external players is then much narrower. Yanis Varoufakis, Greece's former Finance Minister, has described similar ways of influencing key aspects of economic policy, including by making personnel decisions regarding the state's key positions during the debt crisis of the 21st century's second decade.[12]

The Złoty as a natural shock absorber in the event of crises

The benefit of having sovereignty over currency also entails the ability to resort to a mechanism known as a natural shock absorber or stabiliser. The exchange rate, unless it is artificially stiffened, is subject to natural, continuous fluctuations. They reflect the economic processes that take place in a given national economy, or more precisely: in its relations with the global economy. An inflow of foreign capital to Poland – resulting, for example, from investments or increased exports – leads to a greater demand for the Polish zloty, which in turn strengthens our currency. A stronger currency, however, makes exports less profitable, causing imports to be favoured instead, which leads to a natural balancing of these forces. This facilitates the stabilisation of the country's balance of payments.

The Eurozone suspends these rules in trade between its members. This is because they all share the same currency, so the exchange rate does not play the role of a natural stabiliser of the trade balance. This suspension of natural exchange rate mechanisms has allowed Germany to develop its exports on a large scale, while at the same time it has become one of the causes of economic woes for countries such as Greece.

It is the history of this country in the second decade of the 21st century that has shown that the lack of a national currency is particularly troublesome in times of crisis. Beyond the economic dispute is the fact that the crisis would have been much easier to overcome if the Drachma had continued to be in use. A deep recession such as the one experienced by Greece would inevitably have caused a significant weakening of the national currency. This would have improved the competitiveness of its exports and tourism industry and attracted foreign investment, as Greece would then have become a country with cheap labour and low production costs. As a result, economic recovery would have come much faster. But the opposite happened: Greece experienced a deep economic decline, and being part of the Eurozone was the main reason for this.

Extraordinary currency issue

Monetary sovereignty offers another privilege: the possibility of extraordinary money issuance. Economists generally agree that it is not a good thing to finance budgetary needs by, as we used to say colloquially, printing money. After all, high inflation, which frequently results from this, is devastating for both economic and social life. But this does not change the fact that there are circumstances in which elevated inflation may be the lesser evil: for example, wars or major disasters may require a rapid response and completely unexpected expenditures. A country with a sovereign currency can,

12 Y. Varoufakis, *Porozmawiajmy jak dorośli. Jak walczyłem z europejskimi elitami*, transl. P. Juśkowiak et al, Krytyka Polityczna Publishing House, Warsaw 2018.

in extraordinary situations, finance such things by issuing more money. The Eurozone countries have deprived themselves of such a privilege.

In an analogous way, it is possible, in exceptional circumstances, to respond to a debt crisis. If a country borrows money in its own currency (in the case of Poland, this is largely true) and has the ability to issue it, it is in principle always able to avoid bankruptcy.

The euro and rising prices

It is also worth mentioning that, by looking at the experience of other countries after they have entered the Eurozone, Poles can expect an increase in prices it their country adopts the euro. It is the so-called cappuccino effect. It consists in adjusting the prices of products and services after conversion from the national currency. When converting their prices to the new currency, retailers tend to round them up. The popular name for describing this effect refers to the time when Italy adopted the euro. Cafés on the Italian peninsula used to price their flagship product at around 1,500 lira (equivalent to €0.77), and then at €1 after the new currency was adopted, resulting in a significant price increase of up to 30%.

What about exiting the Eurozone?

The legal details of the European single currency are enshrined in the Maastricht Treaty, but no exit route from the Eurozone is included in this or any other document. The exit procedure would therefore have to be the subject of a separate agreement. The UK's experience of leaving the EU demonstrates how arduous this process can be, especially when the EU side treats the process as a way of warning those other countries which might be considering exiting the European institutions, and the UK had its own currency. Exiting the Eurozone would be even more difficult for yet another reason: the Eurozone countries' debt is, for natural reasons, denominated in a common currency. A return to a national currency means that overnight, all of a country's liabilities become *de facto* foreign debt. This translates into the economy and budget becoming highly sensitive to exchange rate fluctuations. All this makes an exit from the Eurozone an extremely difficult operation – *de facto* on the verge of impossibility.

Summary

In the political and economic debate, the euro is increasingly rarely mentioned as a factor for economic success. Unsurprisingly, the benefits of adopting the euro are questionable, while the risks are increasingly evident. The euro has thus become an almost exclusively political project. The common currency makes a possible exit from the EU even more difficult. It seems that it is mainly for this purpose, i.e. cementing the EU, that additional pressure is being put on the Member States to get rid of their own currencies – without exception. We can see, however, that giving up monetary sovereignty will give rise to serious consequences for Poland's economy and political autonomy.

10 AREAS WHERE WE WOULD LOSE SOVEREIGNTY

BASED ON THE EUROPEAN PARLIAMENT RESOLUTION OF 22 NOVEMBER 2023 ON PROPOSALS OF THE EUROPEAN PARLIAMENT FOR THE AMENDMENT OF THE TREATIES (2022/2051(INL))

AREA 10: FAMILY ISSUES

A Polish veto, even if supported by the states of our region. will no longer block the possibility of family law being shaped by a group of progressive Member States. The adoption of the amendments could lead to the normalisation of surrogacy and force Member States to recognise the effects of marriage and adoption by same-sex couples.

Nikodem Bernaciak

10. Family issues

Main theses

- Amendments Nos. 103 and 104 remove from the Treaty on the Functioning of the European Union (TFEU) the requirement for unanimity in the EU Council in the field of family law (i.e., the right of veto) and replace it with an ordinary legislative procedure, making it possible to adopt by qualified majority solutions contrary to the cultural, constitutional, and moral identities of a significant number of the Member States.

- Poland declared its sovereignty over family law at the beginning of its membership in the European Union – in two official declarations regarding the EU Treaties, in 2003 and 2007.

- The proposed amendments continue the long-standing efforts of the European Parliament and the European Commission to date to impose an obligation on all EU Member States to recognise the legal effects of registering and privileging same-sex couples.

- Adopting the amendments would also make it possible to impose an obligation on the Member States to comply in the future with the decisions of foreign courts and administrative authorities which unjustifiably order the separation of children from their parents.

- The adoption of the amendments could also lead to the normalisation of surrogacy, i.e. the "purchase" of a child conceived from one's own or alien genetic material, but born to a "surrogate mother".

Amendments 103 and 104 take away the Member States' sovereignty over family law

The proposed amendments contained in the European Parliament's resolution of 22 November 2023 include amendments number 103 and 104, concerning "measures concerning family law with cross-border implications" and "aspects of family law with cross-border implications". These amendments relate respectively to the first subparagraph of Article 81(3) and the second subparagraph of Article 81(3) of the Treaty on the Functioning of the European Union[1] (hereinafter: TFEU). In their current wording, these provisions – when it comes to the establishment of the aforementioned measures and the adoption of a decision defining these aspects – presuppose that the Council of the European Union, after consulting the European Parliament, shall always act unanimously on these matters. Meanwhile, the amendments remove this exception, stipulating that henceforth the European Parliament and the Council of the EU, after receiving a proposal from the Commission, would have to act in accordance with the ordinary legislative procedure, which would make it possible for some countries to outvote others.

The essence of the current wording of Article 81(3) TFEU is to exclude the regulation of family law at the EU level from the regime of the ordinary legislative procedure and to make it subject to the unanimity of the Council – which in everyday language is equivalent to a kind of veto right belonging to each Member State. This exception is directly linked to Article 9 of the Charter of Fundamental Rights of the European Union annexed to the TFEU[2] (CFREU), according to which "**[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights**". The proposed changes amount to replacing the unanimity rule with the ordinary legislative procedure. This means, as in many areas that are discussed in this report, subjecting family law matters at the EU-wide level to a qualified majority decision, i.e. the support of 55% of the Member States with a combined population of at least 65% of EU citizens.

If such an amendment to an international agreement such as the TFEU were to be introduced, Poland would face a real risk that other Member States with an appropriate qualified majority in a given vote could pass a regulation imposing various family law solutions on all the Member States, despite their apparent contradiction with the fundamental principles of their respective legal orders. For example, it could be a regulation on the recognition of same-sex unions that puts them on an equal footing with marriage; or a regulation on the discretionary separation of children from their parents for, say, the purpose of their being brought up in a particular value system or for refusing to fulfil their educational obligations outside the family home; or else a regulation normalising surrogacy.

1 Consolidated version: Official Journal of the EU C 326, 26.10.2012, pp. 1-390.

2 Charter of Fundamental Rights of the European Union, OJ. EU C 326/391.

A persistent contradiction of positions on the sovereignty of the Republic of Poland in the area of family law – issues of moral importance and matters of human life

Declaration No 39 to the Accession Treaty

The sovereignty of the Polish State in the field of family law was unilaterally declared in Declaration No. 39 to the Accession Treaty, which was adopted by Poland as early as January 2003. According to this declaration, "nothing in the provisions of the Treaty on European Union, of the Treaties establishing the European Communities and the provisions of treaties amending or supplementing those treaties prevents the Polish State in regulating questions of moral significance, as well as those related to the protection of human life"[3] and Declaration No. 61 to the Lisbon Treaty of 2007, according to which "the Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity."

In response to this declaration, in February 2003,[4] the "15" countries – i.e. the EU Member States at that time – , annexed their "counter-declaration" (a general joint declaration No. 21) to the Treaty. According to it, "[t]he present Member States underline that the Declarations attached to this Final Act cannot be interpreted or applied in a way contrary to the obligations of the Member States arising from the Treaty and Act of Accession. The present Member States note that the Commission subscribes fully to the above."

Resolution of the Sejm of the Republic of Poland of 11 April 2003 on the sovereignty of Polish legislation in the sphere of morals and culture

In view of this bipartisanship and ambiguity, it was decided to declare the sovereignty of the Polish state in the area of public morality and family law on the basis of the resolutions promulgated by the Polish Sejm as well. Although not legally binding, they are nevertheless of significant importance as a moral obligation and an important indication in decoding the actual intentions of the legislature that was delegating part of its powers to the European Union's institutions.

On 29 November 2002, a group of MPs represented by Artur Zawisza submitted a draft resolution "on the inviolability of the sovereign powers of the state in the field of morality and culture".[5] The project was of a cross-party nature: its proposers included the then leaders of both the party belonging to the government coalition, the agrarian Polish People's Party PSL (Zbigniew Kuźmiuk), as well as the two opposition parties, the Civic Platform (Maciej Płażyński) and Law and Justice (Jarosław Kaczyński). The proposers pointed out that a year earlier, on 9 May 2002, the Minister of Foreign Affairs, Włodzimierz Cimoszewicz, in response to an interpellation of 15 April, had stated that "issues concerning the protection of fundamental human rights, including in ethical and cultural terms,

3 Declaration of the Government of the Republic of Poland on Public Morality, OJ. UE L 236, 23.09.2003, p. 983.

4 Wiadomosci.wp.pl, *Unia Europejska a polska moralność*, 5 February 2003, https://wiadomosci.wp.pl/unia-europejska-a-polska-moralnosc-6036482652488321a, accessed 6 December 2023.

5 Draft resolution on the inviolability of the state's sovereign powers in the field of morality and culture, 4th Sejm print 1172, 29.11.2002, https://orka.sejm.gov.pl/SQL.nsf/poskomprocla?OpenAgent&4&1172&KSP, accessed 6 December 2023.

remain entirely within the powers of the Member States and their national legislation. They are not governed by European law. There is no tendency at present to change this state of affairs, and it is difficult to imagine such an evolution of European law in the foreseeable future. Moreover, it would require changes of a constitutional nature in the European Union, **and such changes are possible only with the approval of all Member States, including Poland after its accession to this organisation**.".[6]

On 12 March 2003, the Minister of Foreign Affairs, Włodzimierz Cimoszewicz, in response to a parliamentary enquiry on 7 February concerning this government declaration, confirmed that it should be understood in such a way that "[c]ommunity law does not, in principle, encroach on issues of morality and protection of life, so one cannot conclude that Poland's accession to the European Union will be associated with the necessity to conform to an imposed 'code of ethics' [...]. After accession to the European Union, Poland will continue to be guided by its own legal regulations in matters of morality and protection of life."[7]

Finally, five days before the signing of the Treaty and two months before the accession referendum, on 11 April 2003, the Sejm of the Republic of Poland, by an overwhelming majority of 374 votes[8], adopted a resolution on the sovereignty of Polish legislation in the field of morality and culture (M.P. pos. 290) which reads: "Moving towards integration with other European countries within the framework of the European Union, and in view of the upcoming referendum on Poland's accession to the European Union, the Sejm of the Republic of Poland states that Polish legislation in the field of the moral order of social life; the dignity of the family, marriage, and childrearing; and the protection of life is not subject to any restrictions by way of international regulations."

While they were still working on the resolution, it became apparent that representatives of the European Commission were presenting a diametrically opposed position to that of the representatives of the Polish government and parliament. On 2 April 2003, the Commissioner for Enlargement of the European Union, Günter Verheugen, in response to a question on the Polish declaration of 14 February, stated that "[t]he declaration as such does not imply that Poland was granted an exemption from its duties and obligations under the EC Treaties. On the contrary, the present Member States have issued a general joint declaration underlining that the declarations added to the Accession Treaty cannot be interpreted or applied in a way contrary to the obligations of the Member States arising from the Treaty and the Act of Accession. The Commission has fully subscribed to this declaration".[9] The Commissioner gave an identical response on 10 July to a question dated 21 May, adding that it had been made clear to the Polish Government that the declaration on 'public morality' could not be interpreted as releasing the Polish Government from any obligations under directives 2000/43/EC and 2000/78/EC".[10]

6 Intervocation No. 1113 on the possibility of signing the so-called Additional Protocol guaranteeing the inviolability of national legislation protecting human life in case of accession of the Republic of Poland to the European Union, 15.04.2002.

7 Enquiry No. 1441 on the declaration on morality in the context of Poland's accession to the European Union, 7.02.2003, https://orka2.sejm.gov.pl/IZ4.nsf/3001bd878392962bc12573b500459bdb/b290f4a01d653ef1c125748900496d3a?OpenDocument, accessed 6 December 2023.

8 Vote 168 - Meeting 45, 11.04.2003, https://orka.sejm.gov.pl/SQL.nsf/glosowania?OpenAgent&4&45&168, accessed 6 December 2023.

9 Answer given by Mr Verheugen on behalf of the Commission, Parliamentary question - E-0533/2003(ASW), 02.04.2003, https://www.europarl.europa.eu/doceo/document/E-5-2003-0533-ASW_EN.html, accessed 6 December 2023.

10 Answer given by Mr Verheugen on behalf of the Commission, Parliamentary question – E-1844/2003(ASW), 10.07.2003, https://www.europarl.europa.eu/doceo/document/E-5-2003-1844-ASW_EN.html, accessed 6 December 2023.

Treaty of Lisbon. Declaration by the Republic of Poland No 61 to the TFEU. Polish-British Protocol

The Republic of Poland has consistently stood by the validity of the declaration submitted. The TFEU contains another declaration made by the Republic of Poland, No. 61, according to which "[t]he Charter (of Fundamental Rights of the EU – author's note) does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity."

This position was subsequently reiterated in the resolution of the Sejm of the Republic of Poland of 1 April 2008 concerning consent to the ratification of the Treaty of Lisbon (M.P. pos. 270), according to which "the Treaty of Lisbon does not give rise to an interpretation which would allow any action to be taken within the institutions of the European Union which would deplete the sovereignty of the Member States, harm their national identity, or damage their legitimate national interests. [...] The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity, as confirmed in the Declaration of the Republic of Poland to the Treaty of Lisbon." This resolution was adopted by an overwhelming majority of 353 votes.[11]

Likewise an integral part of the TFEU is the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, the "Polish-British Protocol", which introduces an opt-out clause into the application of the Charter in Poland, stating that it "does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. (...) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." It is worth noting that Title IV contains Articles 27 to 38, dealing mainly with workers' rights, but in Article 33 also with the protection of the family. Protocol 30 goes on to state that "[t]o the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom."

Resolution of the Sejm of 27 May 2011 declaring the draft Council regulation to be incompatible with the principle of subsidiarity

On 11 May 2011, in response to the draft Council of the European Union regulation on registered partnerships presented by the European Commission (see section 3.2.), government representatives recommended that MPs in the Parliamentary Committee for European Union Affairs adopt a draft resolution expressing opposition to the proposed regulation on registered partnerships. MP Nelli Rokita-Arnold, who was appointed as rapporteur for the draft, stated: "It seems to me that there is a risk of recognising same-sex marriages in Poland. We will be forced to recognise such a union as a marriage". In response, the Undersecretary of State at the Ministry of Justice, Zbigniew Wrona,

11 Vote 3 - Meeting 12, 01.04.2008, https://orka.sejm.gov.pl/SQL.nsf/glosowania?OpenAgent&6&12&3, accessed 6 December 2023.

confirmed that "through such a norm, recognition of partnerships by Polish courts would be forced, if they had the jurisdiction to rule. This is one of the reasons why the government is opposed to the work on the proposed regulation".[12] On 20 May, at a subsequent meeting,[13] the Committee, without further discussion, adopted a resolution initiative expressing the MPs' opposition to the draft regulation.[14]

In the debate, Jarosław Pięta, representing the Civic Platform (PO) party, referred to a legal opinion by Piotr Mostowik of 29 April 2011. He indicated that, should the regulation come into force, "the main result in practice may be the redefinition of the institution of marriage from being between a man and a woman, or the introduction of a 'limited marriage,' or the registration of predominantly homosexual couples (the latter aim is emphasised as the main objective of introducing this legal institution in practice)".[15]

27 May 2011. The Sejm of the Republic of Poland, by an overwhelming majority of 379 votes,[16] adopted a resolution declaring the draft Council regulation incompatible with the principle of subsidiarity (M.P. pos. 522), together with a reasoned opinion in which it stated that "the aim of the Treaty is not to transfer substantive family law regulations concerning civil partnerships from the EU Member States, which in recent years have introduced such regulations in their internal legislation, to those states which do not provide for similar legal constructions (e.g. to Poland, where the protection of marriage defined as the union of a man and a woman is a principle expressed in Article 18 of the Constitution). The Sejm is of the opinion that the European Union does not have the authority to adopt provisions on substantive family law, in particular provisions resulting in the introduction of civil partnerships as regulated by the law of the state of registration in other states which do not provide for such a legal institution".

Guaranteed nature of existing Treaty provisions

Irrespective of the dispute which has been clearly defined since the beginning of Poland's membership in the European Union, the regulations of Article 81(3) TFEU, establishing the principle of unanimity, stood guard over Polish sovereignty in the area of family law. The removal of this guarantee is precisely what the amendments commented here concern.

12 Meeting of the Parliamentary Committee for European Union Affairs, 11.05.2011, https://orka.sejm.gov.pl/Biuletyn.nsf/wgskrnr6/SUE-247, accessed 6 December 2023.

13 Meeting of the Parliamentary Committee for European Union Affairs, 20.05.2011, https://orka.sejm.gov.pl/Biuletyn.nsf/wgskrnr6/SUE-250, accessed 6 December 2023.

14 Commission draft resolution on declaring the draft Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011) 127 final) incompatible with the principle of subsidiarity - Sixth Chamber Parliamentary Paper 4203, 20.05.2011, https://orka.sejm.gov.pl/proc6.nsf/opisy/4203.htm, accessed 6 December 2023.

15 P. Mostowik, *Opinia prawna w sprawie projektów rozporządzeń Rady […] w szczególności w zakresie zgodności z zasadą pomocniczości oraz skutków dla prawa polskiego*, 29.04.2011, http://orka.sejm.gov.pl/SUEVIkad.nsf/7bfa211dcbf982c7c12578630035da9e/40adec4e1f525477c1257887004ab82c/$FILE/833-11_Mostowik.rtf, accessed 6 December 2023.

16 Vote 49 - Meeting 93, 27.05.2011, https://orka.sejm.gov.pl/SQL.nsf/glosowania?OpenAgent&6&93&49, accessed 6 December 2023.

Amendments 103 and 104 as increasing the risk of imposing a legal obligation on Member States to recognise same-sex unions and put them on an equal footing with marriage

The proposed amendments continue the European Parliament's previous routine calls for the European Commission to impose an obligation on all EU Member States to recognise same-sex relationships in (non-legally binding) resolutions:

- of 18 January 2006. "on homophobia in Europe" (points 11 and 13),
- of 24 May 2012. "on the fight against homophobia in Europe" (points 4 and 9),
- of 4 February 2014. "on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity" (point 4(H)),
- of 14 February 2019. "on the future of the LGBTI List of Actions (2019-2024)" (item 10),
- of 14 September 2021. "on LGBTIQ rights in the EU" (points 4 and 5).

On 16 March 2011, the European Commission also presented a draft regulation "on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships".[17] This regulation would have imposed on the administrative and judicial authorities of all Member States the obligation to recognise in certain cases the institution of registered partnerships in other Member States (recitals 21 and 23, Article 18(2), Article 24). However, the draft was never enacted due to opposition from, among others, Poland and Hungary.

On 7 December 2022, the European Commission presented a draft regulation analogous to that of 2011, but with a different title: "on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood".[18] As before, this regulation would have imposed an obligation on Member States to recognise in certain cases the institution of partnerships registered in other Member States (recitals 14 and 21, Article 24(1) and (2)).

Amendments 103 and 104 are an attempt to "bypass" the complicated procedure of passing successive regulations and take away the Member States' autonomy in this regard once and for all.

17 Proposal for a COUNCIL REGULATION on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships – COM (2011) 127 final, 16.03.2011, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52011PC0127, accessed 6 December 2023.

18 Proposal - Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood - COM (2022) 695 final, 07.12.2022, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX-:52022PC0695, accessed 6 December 2023.

Amendments 103 and 104 increasing the risk of unjustified separation of children from their parents

On 14 July 2023, the European Commission launched an initiative to "support the development and strengthening of integrated child protection systems in the EU",[19] which would result in an EC recommendation (that is not legally binding). According to the announcement, it would "support an integrated systems approach involving all relevant actors in the Member States working together to protect children, including public authorities [...] and civil society, including in cross-border cases". The Commission justifies the necessity of the Recommendation via Article 24(1) of the EU Charter of Fundamental Rights: "Children shall have the right to such protection and care as is necessary for their well-being".

The stated motivation of the initiative itself does not raise significant objections. But the lack of clarification of the new initiative's assumptions regarding the protection of the integrity of the family (which is implicitly guaranteed also by Article 33(1) of the CFREU, according to which "the family shall enjoy legal, economic and social protection") leads to the risk that the European Union may in the future seek to impose on the Member States, including Poland, the model of solutions that have been adopted in countries such as Norway (a non-EU member) and Germany, or even the possible creation of an EU-wide "children's office" that would disproportionately interfere with the integrity of Polish families. Observing how institutions such as the Norwegian Barnevernet, which was established in 1992, or the German *Jugendamt* have operated over a long period of time shows the dysfunctionality of such solutions and the destructive effects they have on families.[20]

Up to now, the position of the European Union's bodies on the phenomenon of authorities unjustifiably separating children from their parents has been rather critical. The European Parliament in 2018 adopted a resolution condemning the German state's discrimination against parents from other countries and criticising the unjustified separation of children from their parents.[21] The adoption of amendments 103 and 104 would, however, create the possibility of it introducing such anti-family measures in the future – for example, by passing a relevant regulation despite the opposition of several Member States.

Amendments 103 and 104 increasing the risk of the normalisation of surrogacy

Surrogacy is a contract in which a woman agrees to become pregnant through in vitro fertilisation, give birth to a child, and then transfer the parental rights to a client. If remuneration to the mother is part of the contract, it is referred to as commercial surrogacy, and if it is done for free, it is referred to as "altruistic" surrogacy, although in the latter case the remuneration may be camouflaged as reimbursement for the cost of the pregnancy.[22]

19 Ec.europa.eu, *Ochrona dzieci – integracja systemów. Zalecenie w sprawie zintegrowanych systemów ochrony dzieci*, Ref. Ares(2023)4901705, 14.07.2023, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13884-Ochrona-dzieci-integracja-systemow_pl, accessed 6 December 2023.

20 Ordoiuris.pl, *Zagrożenie dla autonomii rodzin. KE pracuje nad zintegrowanymi systemami ochrony dzieci*, 28.09.2023, https://ordoiuris.pl/rodzina-i-malzenstwo/zagrozenie-dla-autonomii-rodzin-ke-pracuje-nad-zintegrowanymi-systemami, accessed 6 December 2023.

21 European Parliament resolution of 29 November 2018 on the role of the German Youth Welfare Office (*Jugendamt*) in cross-border family disputes (2018/2856(RSP)), OJ. UE C.2020.363.16.

22 Ordoiuris.pl, *Opinia prawna na temat obowiązku legalizacji surogacji i ektogenezy z punktu widzenia prawa Unii Europejskiej*, 10.02.2023, https://ordoiuris.pl/sites/default/files/inline-files/Analiza_surogacja_ektogeneza.pdf, accessed 6 December 2023.

The European Parliament has condemned "surrogacy" as a form of exploitation of women in two resolutions, in 2011 and 2015. All EU Member States currently prohibit commercial surrogacy. Most also prohibit "altruistic" surrogacy (e.g. Germany, France, Italy, and Spain), but others allow it by law (e.g. Belgium, the Netherlands). Surrogacy is a popular practice in Ukraine, which aspires to EU membership.[23] There is therefore a risk that in the future, should the circle of surrogacy's supporters broaden, the instrument introduced by amendments 103 and 104 will be used to normalise surrogacy across the European Union – through the possibility of voting in favour of a regulation universalising surrogacy, regardless of opposition from even a few countries.

Summary

Given the unique and inimitable status of the family – the basic social cell and educational community, the transmitter of national and religious traditions, and the shaper of ethical attitudes – the renunciation by the Member States of any part of the European Union's authority in the area of family law should be approached with great caution.

In the meantime, the proposed Treaty changes do not merely entrust the EU with a mediocre fraction of these powers but constitute a blanket mandate to have some Member States outvoted by others in this area. This opens up the possibility for the EU institutions to arbitrarily shape family relations throughout the EU, to the point of completely undermining the family's natural identity, despite its having been protected by millennia of European legal tradition. If the proposed changes are adopted, it would only take one EU regulation being enacted at the initiative of individual governments (which may be dominated by, for example, ideological LGBT+ currents or movements that believe the state can raise children better than parents) to impose an obligation on the other Member States to legally recognise homosexual unions and equate them with marriage or an obligation to recognise and support surrogacy (i.e. the "trade" in children), or to compel them to provide for the needs of homosexual couples, or even to take children away from their parents, following the example of Norway.

The history of the Republic of Poland's past relations with the European Union in the field of family law, as cited in subsection 2, clearly shows that from the very beginning of Poland's membership in the EU, the sovereignty of our state in this field was questioned. It is understandable that within the EU as an international organisation which has developed out of earlier entities that were formally established for economic motives, different positions may clash in the areas of the protection of human life, family law, or public morality. Acceptance of the renunciation by our country of its authority in even one of these areas will mean giving up the foundations of the cultural, constitutional, and moral identity not only of Poland, but also of a significant part of the remaining Member States, which see Poland as a barrier against the imposition of such solutions at the EU-wide level.

Three examples of such regulation are described in subsections 3, 4, and 5. The first one has already been announced; the second is moderately far in the future, as it is mainly practised in Norway, which is outside the EU, although to a lesser extent also in Germany; while the third seems to be the most distant, as it is for now being openly condemned by the European Parliament and is only practised

23 Ordoiuris.pl, *Prawo UE nie wymaga legalizacji surogacji i „hodowli" ludzi w laboratoriach – analiza Ordo Iuris*, 10.02.2023, https://ordoiuris.pl/rodzina-i-malzenstwo/prawo-ue-nie-wymaga-legalizacji-surogacji-i-hodowli-ludzi-w-laboratoriach-0, accessed 6 December 2023.

in Ukraine, which is only aspiring to EU membership. The essence of the proposed amendments 103 and 104, however, is that each of these regulations could be imposed on some Member States by the others, should the proposed changes come into force – if not today, then perhaps decades from now. Abandoning the principle of unanimity in such a sensitive area would result in a constant, permanent concern on the part of the Member States to seek ad hoc majorities in order to reject those regulations which run contrary to the fundamental principles of their legal orders.

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