

TEN YEARS OF SLOVENIAN EXPERIENCE WITH THE EU INTERNAL MARKET

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ABSTRACT

On 1 May 2014 Slovenia and nine other Member States are experiencing the first decade in the EU. This also means a decade of adjustments to the internal market principles. Judging from the case law of the EU Court of Justice Slovenia is not among the most serious offenders of the internal market rules as it was found to be in breach of these rules only once. Nevertheless, Slovenian citizens, companies and authorities have gained considerable experiences, positive and negative, in terms of Slovenian membership in the internal market. The article is presenting some of legal aspects of these adjustments.

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1. INTRODUCTION

For Slovenia and nine other Member States 1 May 2014 marks the tenth anniversary of EU membership. This also means that these states have a decade of experience with adjusting to the internal market principles. Considering that Slovenian companies export over three thirds of their products to the other EU Member States (predominantly to Croatia, Germany, Italy and Austria) internal market is of paramount importance for Slovenia and with new accessions in the region its importance will further increase.

In order to adjust to the EU internal market principles before and after the accession Slovenia adopted a series of laws. Considering case law of the EU Court of Justice Slovenia is not among the most severe offenders of the internal market rules. In this respect it has only been found to breach EU internal market rules once. Nevertheless, Slovenian participation in the internal market has offered its citizens, companies and authorities considerable experience, both positive and negative. This article discusses certain legal aspects of this adjustment process. Since the Treaty on Functioning of the EU defines the internal market as *»an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured»* (Article 26(2) TFEU) the article approaches the topic by the individual fundamental freedoms.

2. FREE MOVEMENT OF GOODS

2.1. TOBACCO DUMPING

The first case before the EU Court of Justice in the field of the internal market that related to Slovenia has happened very soon after the accession. It concerned the privileged transitional period in the field of tobacco excise duties for the new Member States. Passengers arriving from the new Member States to the old ones had to pay an excise duty in case they imported over 200 cigarettes. Austria, however, adopted legislation that provided the exemption from excise duty on tobacco products imported in the personal luggage of travellers who are normally resident in Austria to be limited, until 31 December 2007, to 25 cigarettes on entry from Slovenia. Coming from Slovenia, Ms Valeško, an Austrian national, returned in July 2004 to the Republic of Austria, where she resided. During a check carried out at the Austrian frontier post, she declared 200 cigarettes. Relying on the exemption limited to 25 cigarettes the Zollamt Klagenfurt levied tobacco tax on 175 of the 200 cigarettes imported by Ms Valeško, in the sum of 16.80 €. In her appeal against that decision Ms Valeško claimed that the exemption from excise duty limited to 25 cigarettes was con-

trary to Community law and the case was later referred to the EU Court of Justice for preliminary ruling.¹

The Court confirmed Austrian legislation by pointing out that the Austrian legislation, laying down the exemption limited to 25 cigarettes, was introduced in order to prevent Austrian residents from systematically evading payment of the overall minimum excise duty on cigarettes, by buying, often on repeated short journeys, cigarettes in third countries bordering the Republic of Austria where the tax level and therefore prices are considerably lower. The other legitimate reason for Austrian legislation approved by the Court was public health – the disputable Austrian provision only concerned Austrian residents for who Austria is responsible to guarantee public health. This judgment therefore prevented Slovenia to benefit from competitive advantage based on low excise duties on tobacco products that were guaranteed until the end of 2007 and thereby imposing public health cost on Austria related to health treatment of ill smokers.

2.2. POOR APPLICATION OF THE MUTUAL RECOGNITION PRINCIPLE

Case law of the EU Court of Justice is, however, not the best indicator of the Slovenian adjustment to the internal market. There are in fact many internal market cases in practice that never reached (Slovenian or European) courts. This is particularly true for mutual recognition principle, elaborated by the Court 35 years ago in *Cassis de Dijon*,² where the Court proclaimed free trade assumption, which has often not been properly understood in Slovenia.

Illustrative example of problems this principle is causing in Slovenia is that only buildings having a lightning conductor that is in line with the Slovenian standard on lightning conductors may get an operating permit. Therefore lightning conductors Prevector 2 of a French company Indelec s.a., which are in line with the relevant French standard and are legitimately put on the French Market, were refused by the Slovenian Chamber of Engineers with an explanation that the French standard is not relevant to them as the lightning conductors should have been in line with »the relevant Slovenian rules, SIST standards and EU norms«. This argumentation contravenes not only the before-mentioned *Cassis de Dijon* judgment, but also the Court's judgment in *Dundalk Water Supply*, where it was held that Irish requirement for the pipes to be in line with the relevant Irish standard 188: 1975 breached Article 34 TFEU as

¹ Case C-140/05, Amalia Valeško v Zollamt Klagenfurt, ECR 2006, p. I-10025.

² Case 120/78, Rewe v Bundesmonopolverwaltung für Branntwein, ECR 1979, p. 649.

the authorities did not take into consideration »other equivalent standard«. ³ It is not Slovenian legislation that poses a problem in this case but actual administrative practice. It can be submitted at this point that the crisis even increased disrespect for the mutual recognition principle as various lobbies formally or informally expect protectionist treatment that often goes against consumers' interest. Examples of this are widespread campaigns supported by state and quasi-state bodies promoting domestic products.

2.3. »BUY SLOVENIAN« CAMPAIGNS

For a considerable period of time, probably ever since the proclamation of independence and adoption of the new constitution (twenty years ago), we could not have witnessed such a unified and patriotic atmosphere in the Slovenian Parliament as in Spring 2011, when the Members of the Parliament adopted an Act on promotion of agricultural and food products. The Act is trying to increase consumer ethnocentrism, so that consumers would object to imported goods because they are harmful to the national economy and cause unemployment, and therefore consider the purchase of imported goods to be an unpatriotic act. ⁴ As such, the Act breaches free movement of goods rules. The authors of the Act namely introduced a vision of a rather one-hand "internal market", where other EU Member States should be open for Slovenian goods, however, where Slovenia may hinder free trade of goods from the other Member States.

Since 2008 also the Slovenian Chamber of Agricultural and Food Enterprises (Zbornica kmetijskih in živilskih podjetij (ZKŽP)) is conducting a campaign titled "I am buying Slovenian". The purpose of the campaign is to "remind the Slovenian consumers of the possibility to choose when standing before the supermarket shelves and of the importance of buying domestic, Slovenian products for growth and stability of the domestic economy." The Chamber emphasises that Slovenian consumers and companies must be aware of the fact that a successful and stable domestic economy is a *conditio sine qua non* for operations on the global market; among other things this requires preservation of jobs and purchase power: "a consumer must first earn to spend", they say. Additionally, the Chamber points out that encouragement to buy Slovenian food is also important for preservation of certain Slovenian values, customs and tradition, but foremost for preservation of the Slovenian national identi-

³ Case 45/87, Commission v Ireland, ECR 1988, p. 4929, para. 22.

⁴ Shimp, S. Consumer ethnocentrism: construction and validation of the CETSCALE, *Journal of Marketing Research*, Vol. 24, No. 3 (1987), p. 280 and Shimp, "Consumer ethnocentrism: the concept and a preliminary empirical test", in Kinnear (ed.), *Advances in Consumer Research*, Provo, UT, Association for Consumer Research, Vol. 11 (1984), p. 285.

ty. Similarly to this, in 2009 also the Slovenian Chamber of Agriculture and Forestry presented an initiative “*Buy domestic*”, with express purpose of promoting consumption of domestic yield and products of the Slovenian farmers.

Activities for the protection of the Slovenian agricultural and food sector reached the apex in March 2011, when the Slovenian Parliament adopted the before-mentioned Promotion of agricultural and food products Act, which had been in preparation over a decade. The Slovenian minister for agriculture and food has explained that the Act has four aims: “*a buyer, who buys Slovenian food gives work to our farmer and worker; this way the state budget is being filled; high food safety is being guaranteed and an important step towards climate change prevention is being done (the transport is the greatest pollutant)*”.⁵ The minister added that a new aim was recently highlighted – i.e. that in combating world hunger each country must grow as much food as possible. The enhanced promotion should lead to greater consumption of promoted categories of products – thereby indirectly positively affect the development of the domestic agriculture and food industry as well as eating habits of the population.⁶

The government’s decisiveness in this field is further evident from the recent announcement that traditional Slovenian breakfast for children in pre-school care and in schools will be introduced consisting exclusively of Slovenian food. These way children should learn about the importance of having a healthy breakfast, but also of the importance of domestic food.

2.4. »MISLEADING« YOGHURTS NA PLANINCAH

To some point similar to the campaigns that promote domestic products was a case concerning yoghurts »Na planincah«. French company Danone in spring 2012 started an advertising campaign to promote a new brand of yoghurts titled after a well-known Slovenian folk song »Na planincah« that describes pleasant life in the mountains. The campaign caused large media attention. The problem was that a French company produced yoghurts from Austrian milk for Slovenian market bearing a name after a Slovenian folk song which could lead the consumers to believe that they are actually buying a product from Slovenian milk (or milk from Slovenian mountains). Origin of the goods was not at stake as the producer marked it on the product, nevertheless, Slovenian Min-

⁵ Hojnik J., Vlahek A. (2011), Promocija slovenskih živilskih proizvodov in enotni trg EU, Pravna praksa, vol. 30, No. 10, pp. 12-14.

⁶ More on this Hojnik J., Der freie Verkehr der “irreführenden” slowenischen Joghurt aus österreichischer Milk, WiRO, 2012, vol. 21, issue 11, pp. 329-333.

ister for agriculture heavily criticised the advertising campaign as an attack upon Slovenian consumers and producers. Deriving from the EU Court's case law on inappropriate and misleading practices,⁷ particularly cases like *Rau*⁸ and *Estée Lauder*⁹ it is submitted that fallacy by which the French company (having a branch in Slovenia) wanted to get close to the Slovenian consumers in an improper way was not justifiable. If approaching consumers of other Member States would not be allowed, internal market does not make sense. False origin marking is not justifiable, of course, however "Na planincah" case was foremost a protectionist reaction of the Slovenian authorities. Yoghurts did not pose a public health or life threat to the Slovenian consumers. Those that were damaged by the booming campaign were in fact Slovenian producers of milk products having less successful marketing campaigns than Danone, particularly taking into consideration that Slovenian creameries import milk from other EU Member States for years already.

2.5. KARAWANKEN SAGA

Contrary to the campaigns that promote buying of Slovenian products, however, was the so-called Karawanken Saga, where Slovenian entities actually referred to the free movement of goods principles.

In tourist season of 2011 Austria decided to restrict truck traffic through the Karawanken tunnel on the border between Slovenia and Austria over weekends due to the increased traffic. Consequently, traffic of trucks exceeding 7.5 tons was prohibited under *Verordnung der Bundesministerin für Verkehr*.¹⁰ The prohibition upset Slovenian truck drivers that were informed about the prohibition only a day earlier. On Saturday, 30 July 2011 thus about 200 meters before the tunnel about 100 trucks were stuck, many of them transporting perishable goods as the Austrian authorities did not let them in Slovenia. Also parallel regional roads were closed by firemen. The anger of truck drivers almost lead to a physical conflict between the drivers and Austrian police. Additional problems were caused when also Slovenian Motorway Company on Austrian demand stopped the trucks driving from Slovenia towards the tunnel. Truck drivers that were stopped therefore asked domestic drivers for solidarity and to

⁷ Oliver P., *Free Movement of Goods*, Sweet&Maxwell, London, 2003, p. 301.

⁸ Case 261/81, *Walter Rau Lebensmittel v De Smedt PvbA*, ECR 1982, 3961.

⁹ Case C-315/92, *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC in Estée Lauder Cosmetics GmbH*, ECR 1994, p. I-317.

¹⁰ See 249. *Verordnung der Bundesministerin für Verkehr, Innovation und Technologie über ein Fahrverbot für bestimmte Fahrzeuge im Karawankentunnel (Fahrverbot Karawankentunnel)*, BGBl II 2011/249.

close the motorway altogether. In the following days even the political summit of both EU Member States was involved in the incident.

The conflict derived from that fact that Austrian motorways are central transit routes, entrance towards North and South Europe. Considering predominant mountain surface trucks driving in this area normally have stronger motors that have considerable consequences upon traffic and pollution of the Alpine region. Transporters, nevertheless, refer to free movement of goods in their aim to have as free routes for their business performance as possible. For this reason several cases concerning Austrian road restrictions reached the EU Court of Justice so far.¹¹ Although the case concerning the Karawanken tunnel was not among them it may be submitted that Austrian measures had not been in line with EU rules on free movement of goods in this case.

Since the tunnel was not safe due to the increased traffic in the tourist season it may have been considered appropriate to disburden the tunnel with less frequent traffic. This should, however, include traffic as such, regardless the type of transport (cars, buses, trucks etc.). One of such measures could be to close the tunnel temporarily for all kinds of vehicles and letting them into the tunnel in certain time intervals. *Schmidberger* case also demonstrates that road blockade can only be a proportionate measure in case it is announced well ahead, if it is possible to use alternative roads and providing it is transparently stated which roads may be used to avoid the closing. In this case, however, these proportionate measures were not applied by the Austrian authorities.¹²

2.6. DISCRIMINATORY TAX ON MOTOR VEHICLES

In the field of free movement of goods it must finally be brought up that the Slovenian Act on motor vehicles tax of 1999 that was in force until 2010 defined new vehicles as vehicles “*that are put in traffic for the first time or are registered for the first time in Republic of Slovenia*”. This meant that new vehicles included used vehicles that have not been registered in Slovenia before (predominantly vehicles from other EU Member States). For all “new” motor vehicles a progressive tax scale was prescribed with tax varying from 1 to 13% depending on the value of the vehicle. On the other hand, used motor vehicles were taxed by a flat rate of 5% of the purchasing price. In practice this meant

¹¹ Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Austria, ECR 2003, p. I-5659; case C-320/03, Commission v Austria, ECR 2005, p. I-9871; case C-28/09, Commission v Austria, ECR 2011, p. I-0000.

¹² Knez R., Hojnik J., Poletna saga na Karavanškem predoru v luči prava EU, Pravna praksa, 2011, vol. 30, Issue 35, pp. 6-8.

that if a Slovenian resident had bought a used motor vehicle for 25.000 €, he would have to pay 11% tax in Slovenia. On the other hand, however, if he had bought the same kind of vehicle in Slovenia, the tax would only amount to 5%. This regulation breached Article 110 TFEU that prohibits tax discrimination of goods from other Member States, despite the fact that purchasers of low price imported used vehicles would pay less tax than in the case of equivalent domestic purchase.¹³

3. FREE MOVEMENT OF WORKERS

Politically considerably more sensitive from free movement of goods is free movement of workers. One may even doubt whether free movement of workers would be put in the Treaties if they were drafted in the present time of huge wage differences between the Member States. Political sensitivity of this freedom was, however, not felt in Slovenia, considering that Slovenian workers are protected from the outer competition by the language. Knowledge of Slovenian language is normally required by the employers to the extent needed to work with clients and colleagues; this, however, is effectively deterring citizens from other Member States to candidate for vacancies. Consequently, Slovenia did not witness massive employment of workers from other EU Member States and related problems. Two groups of workers, that were trying to improve their economic situation by relying on EU rules, were therefore not classical »Community workers«, who move to another state in order to perform economic activity there, but frontier and agency workers.

3.1. FRONTIER WORKERS – ON THE BORDER OF DIFFERENT TAX SYSTEMS

In the field of labour market many open questions concern entitlement of Slovenian frontier workers, who work in Austria, to tax and social benefits in Slovenia. Frontier workers have been protesting for several times due to their disapproval of Slovenian social and tax regulation that, according to them, breaches free movement of workers principles. Since 2012 they may not ask for a reduced fee for kinder gardens and since 2013 they are not entitled to a general tax reduction on personal income. Their situation is to certain extend similar to the facts in *Hartmann*,¹⁴ where the EU Court of Justice ruled that Germany indirectly discriminated against a spouse of a worker that resided in

¹³ Case 127/75, *Bodie Getraenkevertreib v HZA Aachen-Nord*, ECR 1976, p. 1079.

¹⁴ Case C-212/05, *Gertraud Hartmann v Freistaat Bayern*, ECR 2007, p. I-06303.

Austria and worked in Germany by refusing to grant a child-raising allowance on the ground that he does not have his permanent or ordinary residence in Germany. The difference between this case and the case of Slovenian frontier workers, however, is that they are claiming benefits in the state of their residence. Additionally, this case may be distinguished from the case *d'Hoop*,¹⁵ in which a Belgian national asked Belgian authorities for tide-over allowance, but was refused on the sole ground that she completed her secondary education in another Member State.

Slovenian frontier workers working in Austria, do not, however, witness this kind of discrimination since they are not taxed twice as they claim. In Slovenia they merely pay a tax supplement, which results from lower average incomes in Slovenia in comparison to Austria that put these workers' wages under higher tax rates than in Austria. In the past Slovenia granted them general tax reduction, so that most of the frontier workers did not have to pay the tax supplement; economic crisis, however, forced the state to find all possible sources to fill empty state budget. Nevertheless, adopting such fiscal measures Slovenia does not breach EU law as it currently stands. This also derives from a recent Commission's announcement of a targeted initiative to ensure that Member States' tax provisions do not discriminate mobile EU citizens.¹⁶ The focus will be on both economically active individuals such as workers and self-employed, and those that are not, such as retired persons. The initiative complements a previous project which looked at the tax treatment of cross-border workers,¹⁷ however, in both initiatives the Commission only emphasised a need to remove tax discrimination, thereby not asking for any additional tax benefits for mobile EU citizens as are requested in the protests of the Slovenian frontier workers.

3.2. AGENCY WORKERS

Specific problems also arise in the field of agency employment that formally falls under free movement of services. In the beginning of 2014 media reported that Slovenian workers of a Slovenian company that work through a Slovakian agency have been offered to sign a contract that provided for 327 € of gross monthly salary (mandatory minimum wage in Slovenia being 790 €). Trade unions have publicly criticized the event, saying it is a beginning of

¹⁵ Case C-224/98, *D'Hoop*, ECR 2002, p. I-6191, para. 30-31.

¹⁶ Free movement of people: Commission to tackle tax discrimination against mobile EU citizens, Press release IP 14/31.

¹⁷ Commission to examine tax measures for cross-border workers, Press release, IP 12/340.

a dangerous practice and planned creation of modern slaves. In this respect Slovenia has faithfully implemented Directive 2008/104 on temporary agency work, which seeks to guarantee those working through employment agencies equal pay and conditions with employees in the same business, doing the same work, thereby preventing unfair competition among the Member States and the so-called race to the bottom (Article 5 of the Directive).¹⁸ Additionally, the Directive 96/71 on posted workers (96/71/EC) determines the state of work as the one determining the issue of minimum wage – under the condition that this minimum wage is determined by law or a generally applicable collective agreement. Salaries that do not meet the prescribed minimum wage in Slovenia therefore contradict Slovenian and European regulation.

4. FREE MOVEMENT OF SERVICES

4.1. HEALTH INSURANCE

More varied from free movement of workers was the field of free movement of services. Within this field also falls the only internal market case in which Slovenia was sued by the Commission and in which the EU Court of Justice confirmed a breach of EU internal market rules. The case concerned supplementary health insurance¹⁹ and it was found that Slovenia incorrectly and incompletely transposed into national law First and Third Directive on insurance other than life assurance thereby failing to fulfil its obligations not only from the directives but also principles of free movement of services and capital as guaranteed by the Treaties.

Most health care services that are of key importance for citizens of Slovenia are partly financed from supplementary health insurance. The latter has therefore been proclaimed as public interest insurance. This, however, led to high level of regulation that according to the Commission restricts competition and free movement of goods and services as well as prevents foreign insurance companies' entrance to the Slovenian market. The Commission particularly disapproved provisions of Slovenian Health Care and Health Insurance Act concerning mandatory notification of new or amended insurance terms and condition to the Insurance Supervision Agency, obligation for any premium increase to be approved by the insurance's actuary in written form as well as

¹⁸ See McGaughey, E., Should Agency Workers Be Treated Differently?, LSE Legal Studies Working Paper No. 7/2010 and Countouris N., The Temporary Agency Work Directive: Another Broken Promise?, *Industrial Law Journal*, vol. 38, No. 3, 2009, p. 329.

¹⁹ Case C-185/11, *Commission v Slovenia*, judgment of 26 January 2012, not yet reported in ECR

obligation for ex-ante approval of the general terms and conditions for supplementary health insurance by the health minister. Slovenia has not opposed to the Commission's criticisms and has promised to amend the Health Care and Health Insurance Act in accordance with the relevant EU legislation. End of 2013 the National Assembly adopted amendments to this act, provisions that have been identified as a breach of EU law have, however, not been abolished. The Court's judgment therefore remains overlooked and the Commission might sue Slovenia for penalty payment under Article 260 TFEU.

4.2. GAMES OF CHANCE

In contrast to health insurance legislation, where the Commission put Slovenia before the EU Court of Justice, this has not also happen in the field of gambling, although there are several doubts as regards consistency of Slovenian gambling regulation with the Court's case law in the field. Nevertheless, particularly the Court's judgments in *Winner Wetten*²⁰ and *Engelmann*²¹ encouraged Slovenia to remove obligation of a casino concessionaires to have their seat in Slovenia. On the other hand, however, Slovenian Gambling Act still provides that lotteries may only be organized by *public limited companies* having their *seat in Slovenia*. Such obligation is considered as a restriction to the freedom of establishment as guaranteed by Article 49 TFEU. According to the Court *»such an obligation may deter companies established in other Member States from applying, owing to the establishment and installation costs in (that Member State) that they would have to incur if their application were successful. Nor can that system avoid a company whose seat is located in another Member State being prevented from operating gaming establishments in (that Member State) through an agency, a branch or a subsidiary«* (Engelmann, para. 33). It is also important that the Court did not accept any legitimate justification for such obligations and pointed out that *»the categorical exclusion of operators whose seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime.«* (Para. 37-38).

In this respect it is interesting to note that the Slovenian Supreme Court (Criminal Division) in 2013 deliberated on a case²² that concerned financial penalty imposed on a foreign gambling provider that had advertised his online gambling services at a sporting event in Slovenia without having a license to

²⁰ Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, ECR 2010, p. I-8015.

²¹ Case C-64/08, *Criminal Proceeding against Ernst Engelmann*, ECR 2010, p. I-8219.

²² Case Ips 91/2012, judgment of 9 July 2013.

operate gambling in Slovenia. The Supreme Court found that Article 6 of the Gambling Act that prohibited advertising only to foreign gambling providers and not also to the domestic ones not having a license, presented discrimination in contravention with Article 56 TFEU that guarantees free movement of services. The Supreme Court thus dismissed the penalty imposed by the Gambling Supervision Office.

In addition to this judgment it is submitted that it would be needed to review Slovenian rules and practice on gambling advertising in general, as some games may legitimately be advertised while others may not. This may be an indicator of inconsistent and unsystematic approach of the Slovenian legislator. EU Court of Justice does not prohibit gambling advertising;²³ however, it must be moderate and limited to what is necessary to address consumers to legitimate forms of gambling. Record winnings of Slovenian Lottery that are advertised in Slovenian media might therefore not convince the EU Court of Justice that Slovenian legislation »consistently and systematically« restricts gambling in order to protect the consumers.

Despite Slovenian restrictions upon gambling opportunities offered to their citizens from other Member States Slovenia is actively trying to attract gamblers from other Member States. The Slovenian Government expressly supports export-oriented gambling strategies. The planners of the Slovenian gaming strategy established the goal of creating a development policy that would enable the gaming industry to generate the maximum economic benefits at minimal economic and social costs for the residents. This strategy was, however, to certain degree limited by a recent Court's judgment in case *HIT*,²⁴ where the Court ruled that a Member State (in that case Austria) may prohibit the advertising of casinos located in another Member State (in that case Slovenia) when the protection for gamblers is not equivalent there. The decision directly concerned Slovenia, considering that HIT is one of the carriers of the Slovenian economy. HIT applied to the Bundesminister für Finanzen for permits to carry out advertising in Austria for their casinos located in Slovenia. The ministry rejected their applications on the ground that they had not proved that the Slovenian legal provisions concerning games of chance ensured a level of protection for gamblers comparable to the level provided for in Austria. While Advocate General opinion supported HIT's submissions of disproportionate restrictions on free movement of services, the Court decided that such legislation is justified by the objective of protecting the population against the risks connected with games of chance. With this the Court certainly restricted

²³ See Case C-258/08, *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator*, ECR 2010, p. I-4757.

²⁴ Case C-176/11, *HIT*, ECR 2012, p. I-0000.

Slovenian export oriented gambling strategy, while at the same time encouraged Slovenia to raise standards for protection of gamblers. In this respect Slovenian minister for finances already announce amendments to the Gaming Act that will respond to the judgment in the case HIT and particularly better protect minors from gambling.

5. FREEDOM OF ESTABLISHMENT

Also in the field of freedom of establishment several issues of consistency with EU law have arisen.

5.1. SCOPE OF PUBLIC AUTHORITY DEROGATION

One group of problems was related to the definition of public authority derogation. Particularly problematic were professions of private security and notary public.

Private Security Act of 2003 provided in Article 20 that a person directly providing private security services must have Slovenian nationality. In order for this condition to be in line with EU law, private security would have to be considered as public authority as provided in Article 51 TFEU. The Court, however, has not recognized private security profession characteristics of public authority as this derogation is limited to activities that are *»directly and specifically connected with the exercise of official authority. That does not apply to the business of security firms, internal security services and security systems.«*²⁵ Although the Court found this already in 2000, the Slovenian National Assembly amended the Private Security Act only in 2007 and since then Slovenian nationality is no longer a condition to perform private security services.

Similar scenario to the one of private security has happened in the field of notaries public. In 2006 the Commission began its activities to dismiss nationality condition for notaries public that was in force in many Member States, including Slovenia. The Commission was of the opinion that this profession does not fall within the scope of public authority derogation. After the investigation the Commission brought several Member States before the Court, which decided that *»various activities performed by notaries do not involve a direct and specific connection with the exercise of official authority, despite the significant legal effects of their acts, in so far as either the wishes of the parties or the*

²⁵ Case C-355/98, Commission v Belgium, ECR 2000, p. I-1221, para. 26.

supervision or decision of the court are of particular importance«. ²⁶ Although Slovenia was not among the Member States that were put before the EU Court of Justice, judgments against those states were of direct importance for Slovenia, where Notary Act in its original version provided nationality condition for performance of this profession. For this reason Slovenia also intervened on behalf of four Member States (Germany, Austria, Greece and Portugal). Considering clarity of the Court's judgments Slovenia amended its Notary Act in autumn 2013 in order to remove the nationality condition. Slovenian notaries public may thus expect to get colleagues from other Member States.

At this point it is also worth noting that fear of liberalization of professions was often unnecessary. An example of this is the Attorneys Act that in accordance with EU law permits performance of the attorneys' profession to the citizens of other Member States already since the accession; nevertheless, in practice there are only 19 lawyers from Italy and Austria that are registered at the Slovenian Attorneys' Chamber. Another example is Land Survey Service Act (ZGeoD-1), that also does not restrict land survey profession to the Slovenian nationals although some other Member States do reserve certain land survey services to their own nationals. ²⁷ Despite Slovenian liberalized approach, however, Slovenian Chamber of Engineers reports that there are no foreign nationals in the directory of responsible land surveys. Only one EU citizen has sent his application to be entered into the directory in 2012, but did not hold sufficient education and practical experience and was therefore turned down.

5.2. CHOICE OF COMPANY'S ORGANIZATIONAL STRUCTURE

In 1993, the Slovenian Parliament adopted the Companies Act (*Zakon o gospodarskih družbah - ZGD*), which presents a codification of company law in Slovenia. The Act has paved the way for doing business in a market economy and is often referred to as the "economic constitution." The Companies Act has been modified often in order to bring it closer in compliance with EU law. When drafting the Companies Act, Slovenian legislators have been in a dilemma concerning which structural concept to adopt. When drafting the first text of the Act in 1993, the decision in this regard was rather easy, because legisla-

²⁶ Judgments in cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08, *Commission v Belgium*, *Commission v France*, *Commission v Luxembourg*, *Commission v Austria*, *Commission v Germany*, *Commission v Greece* and *Commission v Portugal*, ECR 2011, p. I-4105.

²⁷ More on this Hojnik, J., *Geodetska dejavnost in enotni trg EU - prijatelj ali sovražnik?*, *Cadastral surveying and EU single market - friends or foes?*, *Geodetski vestnik*, 2013, Vol. 57, No. 1, pp. 46-65.

tors simply adopted the German company law concept and the German dualistic system. Hence, in 1993 the Slovenian Companies Act adopted a two-tier structure with a management organ and a supervisory board. According to the Act, the company statute determines whether the company should have a supervisory board or not. However, until recently the supervisory board was obligatory in certain circumstances—which were defined in such a way that in practice there were only very small joint-stock companies, and a supervisory board was not obligatory—but, in these cases, it was also possible for the employer and employees to agree on a supervisory board. In the past ten years, the Slovenian dualistic system worked well, with only occasional pressures for changes and move towards the monistic system. The latter endeavours, however, intensified following the adoption of EU legislation on the European Company.

Since the adoption of the European Company Statute (ECS) Slovenian company law has been under extensive reform. In the process of ECS implementation, Slovenia was one of the Member States experiencing the most delays. The reason for these delays lies in the strong influence that the SE-Regulation had on Slovenian national law. In terms of EU company law, provisions of the SE-Regulation enabling alternative choice of monistic and dualistic management system present the most important novelty, enabling the founders of European companies to choose the most appropriate system for their company. Individual Member States, however, have been in a dilemma as to whether or not to allow the choice of monistic and dualistic management systems for domestic joint-stock companies. Slovenian legislator has adopted this choice and the renewed Slovenian Companies Act thus grants the right to choose between dualistic and monistic management systems for *national* joint-stock companies. This means that the Act regulates monistic management systems in addition to the existing dualistic systems. It is a genuine novelty, because under previously existing Slovenian law, there was no such choice. Hence, the European Company Statute had a wide impact on the Slovene national company legal system, as it fundamentally changed the national management structure.²⁸

5.3. OBLIGATION TO ESTABLISHMENT A BRANCH

In line with freedom of establishment Slovenian Companies Act regulates the position of foreign companies in Slovenia. There were some doubts, however,

²⁸ Bratina, B. (2006), *Enotirni sistem upravljanja d.d. – temeljne značilnosti in možnosti prehodov*, Gospodarski subjekti na trgu, Portorož; Hojnik J. (2009), *Indirect management and implications for industrial relations of the European company statute: the case of Slovenia*, in Gold, M. (ed.), Nikolopoulos, A. (ed.), *The European company statute: a new approach to corporate governance*, Bern, Peter Lang, pp. 201-226.

on consistency of Article 676 of this act that imposes obligation to establish a branch in Slovenia, with this freedom. The Act does not define a branch, nevertheless, it is generally accepted that a branch refers to a form of organized conduct of business in practice that presents a part of a foreign undertaking that is relatively permanent and has management that is separated from the management of the parent company. A branch is partially economically and organizationally independent, but not also legally.²⁹ The condition to establish a branch in Slovenia must be assessed in light of freedom of establishment as Article 49 TFEU requires from Slovenia to permit direct conduct of business from the state of the companies seat. This is expressly supported by recital 37 of the Services Directive, that provides that *»(a)n establishment does not need to take the form of a subsidiary, branch or agency, but may consist of an office managed by a provider's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency.»* It may thus be submitted that Article 676 of the Slovenian Companies Act contravenes freedom of establishment as guaranteed by the TFEU as it imposes on undertakings from other Member States that want to conduct business on a permanent basis to establish a branch in Slovenia.

6. FREE MOVEMENT OF CAPITAL

Finally, there have been some difficulties also in the field of free movement of capital.

6.1. OPEN REAL ESTATE MARKET

Foreigners may acquire real estate property in Slovenia on the basis of Article 68 of the Constitution. Upon the accession Slovenia adopted no derogations or transitional periods in respect of free movement of capital in the area of real estate, which means that since the accession EU citizens may acquire real estate in Slovenia under the same conditions as Slovenian citizens – particularly they no longer have to submit certificate of reciprocity. Additionally, in 2006 Act Governing conditions for the acquisition of title to property by natural persons and legal entities of European Union candidate countries started to apply that provides in Article 4 that natural and legal persons from a candidate country may acquire real estate property under the reciprocity condition.

²⁹ Knez, R., 2006-2007, Commentary on Article 676, in Kocbek M. (ed.), Veliki komentar Zakona o gospodarskih družbah (ZGD-1), GV založba, vol. 3, p. 944.

According to the Slovenian Tax Administration foreigners have bought over 4000 real estates in the first nine years after the enlargement. Most of them were British, who bought nearly one third of the before mentioned real estate. The number is in reality even higher, considering that the Tax Administration only counts purchasing of the existing real estate and not also new real estate. British have massively come to Slovenia, when the prices of real estate were low – subsequently, however, the prices started to grow rapidly and only after the global breakdown on the real estate market the prices started to fall again.

In 2011 also expired the period in which Slovenia could have asked the Commission under the Accession Treaty to grant a protective clause in the field of real estate purchasing. Two citizens' initiatives (Kras and Za Primorsko) had pressed the Government in spring 2011 to enforce the protective clause, claiming the need to consistently regulate the environmental planning, although the initiatives predominantly expressed fear from Italians. Slovenian Government never asked the Commission for protective clause and with the outbreak of the crisis that injured building sector and real estate market, the “protective clause” was put in practice without any formal Slovenian request or grant by the Commission.

6.2. PROHIBITION OF GOLDEN SHARES

With the start of massive privatization of state-owned companies that is needed in order to stabilize public finances Slovenia will also have to adjust to the fact that golden shares are not in line with free movement of capital, despite being non-discriminatory. Capital under Article 63(1) TFEU *inter alia* includes direct investments. In this respect the Court held that “(e)ven though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings”.³⁰ As the Court found in VW, golden shares limit “the possibility for other shareholders to participate in the company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control”.³¹ Slovenia will have to take this into consideration when enforcing the announced privatization of state-owned companies and not apply provi-

³⁰ Case C-367/98: Commission v. Portugal, case C-483/99: Commission v. France; C-503/99: Commission v. Belgium.

³¹ Case C-112/05, Commission v Germany, ECR 2007, p. I-8995, para. 52.; see Zumbansen P., Saam D. (2007), The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism, German Law Journal, Vol. 8, No. 11, p. 1032.

sions, such as Article 8 of Telekom Slovenija d.d. articles of association that expressly mentions golden shares rights in the form of veto power over key decisions in respect of organization and business activities of the undertaking.

7. CONCLUSION

EU internal market presents the foundation stone upon which most of other EU politics are based. One can even say that should the EU fall apart for other reasons, this architecture would not be totally demolished, as the internal market would remain. This, however, does not mean that it is functioning perfectly. There are still many barriers that justifiably or unjustifiably discriminate goods, workers, services and capital from other Member States in order to grant protection to the domestic economy. As far as Slovenia is concern, one can conclude that there are not many formally identified breaches of internal market principles, nevertheless, there are many more to be found in practice. Consumers, companies and state authorities are often poorly informed about internal market rules, which create barriers nobody complains about. Such cases can be found in all fields of the internal market, both on the side of Slovenian companies and authorities that are still not fully aware of the internal market, as well as on the side of authorities of other Member States that do not treat Slovenia as a full EU Member State and therefore impose restrictions that contravene EU law.

Apart from the cases mentioned above, there are other challenges related with the internal market ahead of Slovenia, e.g. problems with beggars from other Member States, where it is not fully clear what measures against them are in accordance with EU law, as well as general challenges related with economic and social diversity of the Member States that affect both standard of living of Slovenian citizens as well as performing business of their legal persons.

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