RETURN MIGRATION:
THEORY AND PRACTICE

edited by Tomasz Sieniow

MIGRATION LAW AND POLICY STUDIES ·IV·

RETURN MIGRATION:
THEORY AND PRACTICE

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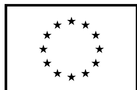
JOHN PAUL II CATHOLIC UNIVERSITY OF LUBLIN
LUBLIN 2015

The monograph has been published in the framework of the Project „Return migration: theory and practice", implemented by the John Paul II Catholic University of Lublin. Project is co-financed by the European Return Fund.



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Editor: Tomasz Sieniow
Reviewers: Prof. dr hab. Wiesław Czyżowicz (SGH)
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Translation and linguistic consultation:
Yulian Hofman, Agata Pidenko, Delaine R. Swenson

Publisher:
Petit SK
commissioned by the John Paul II Catholic University of Lublin
ISBN 978-83-6144-95-3

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INTRODUCTION

Return policy is one of the instruments for migration management in the European Union. The need for a common approach to illegal migration and foreigners whose stay on the territory of Member States is unregulated became obvious with the liberalization of the rules on controls at the internal borders of the Schengen area. The creation of the Area of Freedom, Security and Justice (by the Amsterdam Treaty) was to ensure that *"the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime"*[1].

According to the Communication from the Commission to the Council and the European Parliament on EU Return Policy[2], this policy is an important tool for facing the challenge of irregular migration, while fully ensuring respect for the fundamental rights and dignity of the individuals concerned, in line with the EU Charter of Fundamental Rights, the European Convention on Human Rights and all other relevant international human rights conventions. The use of a "return" (replacing in some ways the more straightforward terms "deportation", "expulsion") applies to third-country nationals without legal grounds to stay in the EU or a need to be granted international protection. In this way, the Return Policy, according to the European Commission, *"is essential to the credibility of EU legal migration and asylum policy"*[3].

The main piece of legislation governing the return of third-country nationals is Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals (ie. The Return Directive)[4].

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[1] Cf. art. 3 para. 2 of the Treaty on European Union.

[2] Communication from the Commission to the Council and the European Parliament on EU Return Policy, Brussels, 28.3.2014, COM(2014) 199 final.

[3] Ibidem, p. 2.

[4] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country national, OJ L 348/98 of 24.12.2008. Cf. much criticism regarding its adoption [in:] D. Acosta Arcarazo, *The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly?* (The adoption of Directive 2008/115: the Returns, Directive), [in:] E. Guild & P. Minderhoud (Ed.), T*he First Decade of EU Migration and Asylum Law*, Leiden-Boston 2012, p. 179-205.

Return policy is integrated with EU actions on readmission and reintegration. They are an integral part of the *Global Approach to Migration and Mobility - GAMM*[5], which defines the overarching framework of external migration and asylum policy. The Preamble to the Return directive emphasizes the need for Community and bilateral readmission agreements with third countries to facilitate the return process. Readmission agreements are often a condition of signing Association Agreements with the European Union. Such a readmission agreement was signed with Ukraine.

This publication has been produced as a part of the project "Return migration – theory and practice". The project which has been financed by the European Return Fund was implemented in the years 2013-2015 by the Department of European Union Law at the John Paul II Catholic University of Lublin. The project was realized in cooperation with Nadbużański Border Guard Regional Division, whose officers raised their qualifications during postgraduate studies in European migration law and policy. The results of the scientific component of the project are research on selected problems of EU law and return policy, having relevance to the movement of persons on the Polish-Ukrainian border, which is at the same time the external border of the Schengen Area. These studies combined theoretical and practical elements, referring to the prospect of an association of Ukraine with the European Union. The subject of this research was chosen in 2013 and the individual texts were prepared the following year. Therefore, the authors based their studies on the legal status before the entry into force of the new Law on Foreigners and did not consider the migration impact of the conflict in the East and South of Ukraine. Both the new Act on Foreigners, which entered into force on 1 May 2014 and the ongoing *exodus* of Ukrainian citizens to the EU Member States require separate monographs.

The joint publication contains nine topics. The first five concern directly the relationship with Ukraine as a country bordering with Poland and the European Union. Volodymyr Motyl and Violetta Żakowiecka-Górnik are presenting the state of implementation of readmission agreement be-

[5] Cf. Communication from the Commission on The Global Approach to Migration and Mobility - COM(2011) 743.

tween Ukraine and the European Union from the point of view of international relations and the practices of the Nadbużański BG Regional Division. Stanisław Dubaj attempts to explain how the European Union's visa policy affects migration flows from Ukraine to Poland. Anna Szachoń-Pszenny devotes her chapter to the *Schengen acquis* legal instruments used on the border between the EU and Ukraine. Agnieszka Parol examines the phenomenon of local border traffic, which can be presented as an argument that the border can sometimes connect rather than divide.

The following four topics are showing the substantial impact of EU law (including ECJ judgments) on national regulations on migration. Justyna Gileta presents three special cases in the construction of the Area of Freedom, Security and Justice – the case of Ireland, United Kingdom and Denmark. In turn, Anna Kosińska while presenting restrictions to the possibility of expulsion of foreigners, introduces the concept of the Safe European Country and its impact on the protection of fundamental rights of third-country nationals. Artur Kuś presents some problems concerning the expulsion of foreigners in the judgments of the EU and Polish courts. Finally, Edyta Krzysztofik analyzes the judgments of the Court of Justice of the European Union on third-country nationals who are family members of a EU citizen, trying to define the nature of their residence rights.

Issues related to the regulation of migration and treatment of foreigners still are, and probably will be, a primary concern of the so-called countries of the *Wealthy North*, which (whether we like it or not) includes Poland – a Member State of the European Union and the Schengen Area. The use of Return Policy instruments (including readmission) by Poland, which is an EU border state and is considered by migrants as a transit country will be crucial for a common EU immigration policy. Therefore, we hope that this publication will help in understanding the complex mosaic of EU legal regulations, case law and practices having relevance to the return of these foreigners whose presence in the territory of the Union is undesirable.

TOMASZ SIENIOW
Project coordinator
„Return migration – theory and practice"

CURRENT ASPECTS OF THE IMPLEMENTATION OF THE READMISSION AGREEMENT BETWEEN UKRAINE AND THE EUROPEAN UNION

VOLODYMYR MOTYL

One of the key problems on the agenda of relations between Ukraine and EU is implementation of the Readmission Agreement (hereafter RA or Agreement).

In international law readmission means a transfer and acceptance of own citizens, foreign nationals and stateless persons, who illegally entered the territory of one state, directly from the territory of another state. In the majority of readmission agreements, including the Readmission Agreement between Ukraine and EU, there is no definition of the notion of readmission,. However such definition is included in the Readmission Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation of 23 September 2008, where readmission is interpreted as "transfer by competent state authorities of one Party and acceptance by competent state authorities of another Party in the order, on conditions and with the purpose, foreseen under this Agreement, of persons, who have entered or stay in the territory of the Parties' states, violating legislation on the matters of entrance, leaving and staying of foreign citizens and stateless persons"[1].

The process of development and conclusion of the RA between Ukraine and EU consisted of several stages. On 27 October 2006 in Helsinki was initialed[2] a draft Agreement on simplification of drawing up visas and re-

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[1] The Agreement was filed for ratification by Resolution of CM N 1014 of 08.08.2007 http://zakon1.rada.gov.ua.

[2] Initialing means concordance of the text.

admission of persons[3] between Ukraine and EU. On 18 June 2007 in Luxembourg the Agreement on readmission of persons[4] between Ukraine and EU was signed. On 1 January 2008 the RA had come into force after ratification by Ukrainian parliament, but the provision on acceptance-transfer of citizens of third parties was implemented only in 2 years, i.e. on 1 January 2010[5].

Soon after coming into effect for execution of Art. 15 RA the Joint Readmission Committee was established on 2 April 2008.

Under the Agreement Ukraine assumed obligations to accept in its territory all persons, who are citizens of Ukraine, citizens of third countries or stateless persons, who illegally stay in the territory of the EU. Condition of fulfillment of this obligation is an illegal entry of such persons to the territory of EU from the territory of Ukraine or availability of Ukrainian visa as of the entry to EU or permit to stay in Ukraine.

The main tasks of the agreement are an effective fight with illegal immigration and such countering action should be effected by introduction of fast and efficient readmission procedures based upon the principle of reciprocity.

Under the Agreement two readmission procedures are foreseen:

– Accelerated readmission procedure – readmission of a person, who was apprehended in a border district of Ukraine or a EU member state for 48 hours since the moment of crossing the state border by

[3] On the part of Ukraine the Agreement was initialed by Minister of Foreign Affairs Borys Tarasiuk, on the part of the European Commission – by Foreign Affairs Commissioner Benita Ferrero-Waldner.

[4] This process is delayed due to the need of translation into all 23 official EU languages.

[5] On the part of the EU these agreements are not to be ratified by parliaments of all 25 EU member states, because these issues are within the competence of the Union. However for their coming into effect consent of the European Parliament and decision of the EU Council are required. Formal procedures have been completed after finishing of this process. The Readmission Agreement anticipates a two-year delay of validation of provisions, related to reception and transfer of citizens of third countries and stateless persons. During this 2-year period the agreement shall be applied only to stateless persons and citizens of the third countries, which Ukraine has concluded agreements on readmission. So, the government actually prepared only two years for a transient period for this process.

such person.[6] Should in the border district of Poland a person be revealed, who illegally crossed Polish-Ukrainian border and 48 hours have not elapsed yet, such person shall be transferred to the State Border Guard Service of Ukraine. In other cases or if more time has elapsed, the standard readmission procedure shall be applied, in which the Ministry of Internal Affairs (MIA) shall be the authorized body on the part of Ukraine:

– Standard readmission procedure - readmission of persons, to whom the accelerated readmission procedure cannot be implemented and who do not observe current conditions on entry to the territory of a EU member state or Ukraine, staying within its territory or termination of observation of such conditions and about what competent authorities of this state have got to know not more than a year ago.

The Agreement shall also regulate the issue of financing arrangements related to implementation of the readmission. According to art. 12 RA all transportation expenses, arising as a result of readmission and transit passage under this Agreement to the border of the destination state, shall be carried by the Requesting State, but expenses related to transportation of such persons from Ukrainian border and their support shall be carried by Ukraine.

It was a remarkable attainment for Ukraine that declaration on rendering technical and financial assistance to Ukraine for realization of readmission and determination of this direction as one with the highest priority in cooperation with Ukraine was included in the text of the Readmission Agreement. Proceeding from this provision within the framework of the European Neighborhood and Partnership Instrument 35 million euros were allocated for Ukraine for infrastructure improvement and introduction of procedures, related to proper accommodation and treatment of irregular migrants[7].

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[6] It is referred to the competence of State Border Guard Service.

[7] EU supports Ukraine in fulfillment of the readmission agreement // http://eeas.europa.eu/delegations/ukraine/documents/eucooperationnews/46_eucooperationnews_uk.pdf Readmission of citizens under the standard procedure is limited by making inquiries by MIA on readmission of Ukrainian citizens to the territory of our state from Czech Republic, the Netherlands, Poland, Austria and Germany.

The Agreement is important not only for the reason of providing a normative consolidation of financing of the cost of it's implementation, but the Parties have also decided to give this Agreement a special status. So, art. 17 RA foresees that the readmission agreement between the EU and Ukraine will prevail over readmission-related bilateral agreements or other documents between Ukraine and EU member states.

It should be said that the set of Readmission Agreement provisions was of a quite general nature. They should have been regulated or particular conditions of readmission fulfillment should have been reconciled more clearly. And it should have been determined in some detail on who has to perform readmission, in what order, in which points and under which conditions. For regulation of these issues under art. 16 RA protocols should have been concluded for regulation of the next issues important for implementation: a) determination of competent authorities; b) border crossing points; c) mechanism of connection between competent authorities; d) means to bring persons back according to the accelerated procedure; e) conditions of returning persons in custody, including transit passage of citizens of third countries stateless persons into custody; f) additional facilities and documents necessary for implementation of this Agreement; g) methods and procedure of expenses recovery.

At present these protocols are being prepared and reconciled with EU member states[8].

For efficient implementation of the provisions of this Agreement in Ukraine a system of bodies was established, which were empowered to implement provisions hereof. On 2 April 2008 under art. 15 RA with the purpose of rendering mutual assistance in application and interpretation of the agreement the Joint Readmission Committee was established. The Committee consists of representatives of Ukraine and the European Union. According to the Agreement decisions of the Committee shall be binding for the Parties.

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[8] As of July, 2015 such protocols have been signed, in particular, with Czech Republic and Estonia.

According to the Agreement the Joint Readmission Committee in readmission matters was established for rendering mutual assistance in application and interpretation of this Agreement. Two key tasks were imposed on the Committee: a) monitoring of application of this Agreement and sharing information about implementation protocols, signed by Ukraine and every separate member state under art. 16 RA; b) preparation of proposals and development of recommendations for making changes in the Agreement.

The Committee works in the form of meetings taking place twice a year, in turn in Kyiv and Brussels[9].

On the last meetings the state of implementation of the Readmission Agreement between Ukraine and EU was discussed, as well as the EU's assistance in construction of points for maintenance of illegal migrants and state of processing implementation protocols between Ukraine and separate EU member states, which can be concluded under art. 16 para. 1 RA. Exchange of experience in conclusion of readmission agreements with third countries occurred. Except for authorities responsible for the Agreement implementation, common with EU, national mechanism of the agreement implementation was developed in Ukraine. The task for the implementation of the agreement provisions on national level was imposed on the following authorities and establishments, in particular:

- Department of Immigration and Citizenship;
- State Border Guard Service;
- State Department in citizenship, immigration and registration of natural persons of MIA;
- Ministry of Foreign Affairs;
- Ministry of Health;
- Ministry of Labor and Social Policy;
- Security Department of Ukraine.

[9] The first meeting of the Joint Readmission Committee was held on April 9, 2008 – in Kyiv. The second meeting – on 28 November 2008 in Brussels. The third meeting – on 6 May 2009 in Kyiv. The fourth meeting – on 26 November 2009 in Brussels. The fifth meeting – on 30 April 2010 in Kyiv. The sixth meeting – on 5 May 2011 in Brussels. The seventh meeting – on 15 May 2012 in Kyiv.

A long list of empowered authorities, absence of clear separation of obligations and absence of the unified authority significantly reduced work efficiency in this sphere.

An important step for establishment of such unified authority and provision of better interdepartmental coordination was made on 24 June 2009,[10] when State Migration Service of Ukraine was established that was "a specially empowered central executive body in migration, citizenship, immigration and registration of natural persons"[11]. But the Service didn't start functioning properly because of absence of necessary legislative acts, which would have determined its particular obligations and functions. The Ministry of Internal Affairs again assumed responsibility for citizenship, registration of persons and migration, State committee on nationalities and religion – for provision of shelter. Presently the Draft law on State Migration Service[12], the passing of which it is supposed to strengthen role of this body, has been developed. Presently the law has not been enacted, but on 20August 2014 the Regulation on State Migration Service[13] was approved, where competence of the newly established body was generally set.

Thus, it is an essential problem that many tasks are distributed among different bodies and institutions, that's why establishment of the unified strong body in the sphere of migration policy control is one of the most important tasks on the agenda.

Except for institutional mechanisms, in Ukraine a set of statutory instruments, promoting realization of the agreement provisions and forming normative mechanism of its implementation, are in force on the national level. The main elements of normative mechanism of implementation of the agreement include the following legal acts of Ukraine: Constitution of Ukraine(1996); Code of Ukraine on administrative offences (1984); Law on Citizenship of Ukraine (2001); Law on Immigration (2001); Law on refugees

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[10] Resolution of Cabinet of Ministers of Ukraine "On Establishment the State Migration Service" No. 643 of 24 June 2009.

[11] Ibidem.

[12] http://dmsu.gov.ua/uk/gromadske-obgovorenna/466-projektzakonu-ukrajini-pro-osnovni-zasadi -reguluvanna-derzhavnoji-migracijnoji-politiki-ukrajini.html.

[13] http://zakon4.rada.gov.ua/laws/show/360-2014-%D0%BF#n8.

and persons requiring additional or temporary shelter (2001); Law on State Border Guard Service of Ukraine (2003); Law on Border Control (2009); Law on Legal Status of Foreignc Citizens and Stateless Persons (2011).

Development of a new Law on Legal Status of Foreign Citizens and Stateless Persons was an important step. The appropriate draft came into force on December 25, 2011. In the new wording of the Law the issue of a voluntary return of foreigners and stateless persons, who has lost grounds for staying within the territory of Ukraine, has been firstly regulated. Also it is offered to regulate the issue of forced return and forced deportation and detention of foreign citizens and stateless persons, extradition and transfer. In the draft it is offered to determine the procedure or expenses recovery, related to deportation of foreigners. Also the act regulates issues related to realization of international readmission agreements.

At the same time in Ukraine there is no unified legislative act for this sphere, that's why there is an urgent need to enforce the Law on migration policy foundations that will determine strategy of the purpose and tasks of the integral migration policy of Ukraine.

To perform the abovementioned laws a set of statutory instruments has been developed, which come out *lex specialis*. Some of them are directly related to the readmission, in particular:

- Resolution of Cabinet of Ministers of Ukraine "On approval of plan of arrangements for realization of the Concept of state migration policy" of October 12, 2011 No. 1058;
- Typical regulation on points of sojourning foreign citizens and stateless persons, who illegally stay within the territory of Ukraine, approved by resolution of Cabinet of Ministers of Ukraine of 17.07.2003 No. 1110;
- Rules of entrance of foreign citizens and stateless persons in Ukraine, their leaving the territory of Ukraine and transit passage through its territory approved by resolution of Cabinet of Ministers of Ukraine of 29.12.95 No. 1074;
- Instruction on sequence of actions of internal affairs bodies and state border guard bodies in realization of provisions of the Agreement

between Ukraine and the European Union on readmission of persons of 12.11.2010 No. 552/862.

An important document is an instruction for internal affairs bodies and state border guards bodies on realization of provisions of the Readmission Agreement, which is fully based on the agreement and determines the sequence of actions necessary for realization of readmission by these authorities in case of accelerated and standard readmission procedures.

To perform this Readmission Agreement an action plan has been developed, which contains definite steps and arrangements intended for implementation of the readmission agreement. First of all, two following plans have to be mentioned:

- Plan of arrangements in realization of Concept of state migration policy of 12 October 2011 approved by resolution of Cabinet of Ministers of Ukraine No. 1058 with amendments made by order No. 312-r;
- National plan in realization of the second phase of Action plan on visa mode liberalization for Ukraine by European Union (migration and readmission block) approved by Order of the President of Ukraine of 20 August 2014 No. 805-r;

The action plan in realization of the Concept of state migration policy foresees a set of important arrangements: training of officials of state executive authorities, establishment of the unified national database of control of migration flows; -financial provision of staying of foreigners and stateless persons; furnishing of separate rooms and equipping with technical facilities with consideration of international experience; development of procedure of deportation and voluntary return of foreign citizens and stateless persons to their countries of origin; creation of network of points of sojourning foreign nationals and stateless persons, who illegally stay within the territory of Ukraine, and provision of their activity according to international standards and rendering of proper medical services to persons being kept in such points. It shall be noted that performance of planned arrangements will

promote an improvement of implementation conditions of the readmission agreement. Control of this task observation is within the competence of the State Border Guard Service.

Another important document is the National plan of realization of the second phase of the Action plan of visa liberalization. In particular, two important purposes related to readmission are determined in it:

- further efficient implementation of the Agreement between Ukraine and EU on readmission of persons and arrangements in reintegration of Ukrainian citizens (who return under the procedure of voluntary return, deportation or due to readmission); and
- provision of appropriate infrastructure (including detention centres), strengthening of capability of empowered authorities for provision of deportation of citizens of third countries, who illegally stay or/and cross the territory of the country, from the territory of Ukraine.

To achieve these purposes in items 30-33 and 42-45 of the Document a set of important arrangements intended for implementation of the agreement is foreseen:

– Carrying on of negotiations for the purpose of conclusion of implementation protocols with European Union member states for realization of the RA between Ukraine and EU;
– Rendering of informative and consulting assistance for Ukrainian citizens, who return to Ukraine according to the procedure of voluntary return or due to readmission;
– Carrying on negotiations for establishment of cooperation with non-governmental civic organizations;
– Continuation of negotiations for conclusion of agreements on readmission of persons with states of transit of irregular migrants;
– Provision of proper infrastructure (including detention centres), strengthening of capability in arrangement of efficient removal of citizens of third countries, who illegally stay and/or cross the territory of the country, from the territory of Ukraine;

– Involvement of international technical assistance for implementation of the Readmission Agreement[14].

In all the abovementioned directions the worked is performed.

Before conclusion of the RA there were concerns that after coming into effect of the agreement Ukraine will have to accept and keep millions of irregular immigrants and become a buffer zone or a sediment basin[15]. In reality, the situation was absolutely different and these concerns were not justified. During the first two years of the agreement validity (2010 – 2011) the State Border Guard Service admitted approximately 1,500 persons, from whom 57.4% - were Ukrainian citizens, 28.8% - citizens of CIS member states, 13.8% citizens of developing countries. According to statistical data of SBGS for January – September 2010 only 573 persons from neighboring countries were admitted under the accelerated readmission procedure, from whom Ukrainian citizens – 357 citizens, citizens of CIS — 157, citizens of other countries — 89. The results of the standard readmission procedure were not substantially different: according to data of MIA of Ukraine from all EU countries there were admitted little more than 800 persons, and all of them were Ukrainian citizens[16]. Consequently, the majority of persons being readmitted are Ukrainian citizens.

Furthermore, immediately after the beginning of implementation of the Agreement the tendency of reduction of cases of migrants for illegal crossing of the Ukrainian western border followed. According to the results of interviewing while entering to Ukraine in 2009 19,7 thousands were restricted, in the first half-year of 2010 – above 9,2 thousands of potential irregular

[14] http://zakon4.rada.gov.ua/laws/show/805-2014-%D1%80

[15] As it is known, plenty of routes and channels of illegal migration pass through the territory of Ukraine: Central European, Vietnamese, Afghan, Indo-Pakistani, Sri Lanka-Bangladesh, Chinese, Kurdish, Chechen, that's why a number of persons, who will come back to the territory of Ukraine, will be extremely large.

[16] Victor Chumak "Dzerkalo tyzhnia" No.40, 30 October 2010. Readmission of citizens under the standard procedure is limited by making inquiries by MIA on readmission of Ukrainian citizens to the territory of our state from Czech Republic, the Netherlands, Poland, Austria and Germany. Source: Information "On Implementation of the Agenda of Association of Ukraine – EU in the year 2013".

migrants. In 2009 total number of stopped irregular migrants reduced by 29%, in the first half-year 2010 – by 37%[17].

Consequently, the majority of irregular migrants, who have been admitted under the accelerated procedure, are Ukrainians and almost all, who return under the standard procedure, are Ukrainian citizens. Their quantity is much smaller than it was supposed before conclusion of the agreement. A few persons being readmitted are citizens of Vietnam, China, Afghanistan, Egypt, Nigeria and Somalia.

For provision of temporary shelter for irregular migrants in 2008 in Ukraine two detention centres for foreign nationals and stateless persons were created: 1) Rozsudov, Chernigiv region, of capacity – 208 persons; and 2) in Zhuravychi, Volyn region, of capacity - 165 persons)[18]. In both centers the perimeter security system is installed. In the in Rozsudov detention centre voltage stabilizers were received, which allows to deal with power supply problems and to provide proper functioning of the security system.

The detention center for migrants in Zhuravychi has been equipped with electronic identification system of migrants' identities, electronic locks, signaling films and window grids. The perimeter security system allows preventing escapes of migrants and the internal security system allows creating safe working conditions for staff of centers in case of possible mass riots. The installed security system meets EU standards and provides an efficient control and security of the center for migrants keeping. Except for technical assistance, the project stipulates carrying out of trainings and workshops for staff[19].

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[17] The majority of illegal migrants come from Russia, Belorussia and Moldova and 89% of illegal migrants are detained in checkpoints on Russian (36% from total number of potential illegal migrants), Belorussian (35%) and Moldavian (18%) border sections. Victor Chumak "Dzerkalo tyzhnia" No.40, 30 October 2010.

[18] http://www.dmsu.gov.ua/uk/dijalnist-dmsu/dijalnist-po-ptpi, Zhuravychi – is a former cantonment N7. At present the new center for temporary holding of illegal migrants is being constructed in Voznesensk district of Mykolaiv region, as well as in Donetsk region. http://dmsu.gov.ua/novyny/2-bez-katehorii/3172-v-mikolajivskij-oblasti-vidbulas-narada-shchodo-realizatsiji-proektu-budivnitstva-tsentru-timchasovogo-utrimannya-nelegalnikh-migrantiv-v-voznesenskomu-rajoni.

[19] http://www.dmsu.gov.ua/uk/dijalnist-dmsu/dijalnist-po-ptpi, EU supports Ukraine in fulfillment of the readmission agreement. // http://eeas.europa.eu/delegations/ukraine/documents/eucooperationnews/46_eucooperationnews_uk.pdf.

At present the centers are in a good condition, are not overcrowded[20] and in general meet international standards. It should be noted that volumes of financing, foreseen in the state budget, can hardly be considered sufficient. So, in 2008 – 2009 in the state budget there were 4 million UAH, from which 3 million UAH were for MIA needs and 1 million (around 600 thousand US dollars for that time) was for needs of the State Border Guard Service. At the same time the average cost of dispatch of one foreign migrant was around 400 – 600 US dollars, ignoring costs of detention, which could last of up to a year. Such shortage was compensated due to international projects of technical assistance of MOM, EU and other international organizations. In state budgets for 2012 – 2015 total budgets for migration of MIA and State Board Guard Service[21] were included.

Creation of network of detention centres, as well as of points for their temporary holding at border guard detachments and divisions is a more important task. At present construction of special facilities for keeping persons, having violated the state border is being made in Velyke Berezne. The ones in Solotvyno and Mukachevo are being finished[22]. EU assisted in construction of Volyn center for temporary holding of foreigners and irregular migrants and its provision and of analogous point in Chernigiv region with equipment, vehicles, and other technical means. With support of an EU project "Consulting assistance in creation of detention centres for irregular migrants in Ukraine – READMIT 1" the construction of seven points of temporary keeping in Mukachevo, Chop, Mosty, Sumy, Lviv and Luhansk border guard detachments is being finished. Means in creation of two points in Mykolaiv and Donetsk regions are being taken.

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[20] In 2008 – 2009 most foreigners came from Pakistan and Afghanistan, in 2010 – 2011 that were citizens of Somali and CIS countries (Georgia, Azerbaijan, Uzbekistan etc.) As we see, centers for temporary holding are not filled completely; national make-up of their residents depends on political situation and conflicts. http://www.dmsu.gov.ua/uk/dijalnist-dmsu/dijalnist-po-ptpi.

[21] Interview with Deputy Minister of Internal Affairs of Ukraine in 2008 – 2010. Vasiliy Marmazov. // UNIAN, 18.12.2009, http://www.unian.ua/news/352811-readmisiya-yakscho-lyudina-shojana-afrikantsya-tse-ne-oznachae-scho-vona-z-afriki.html, access on 15.01.2013.

[22] O. Ashcheka, Illegal migrants are being settled in Zakarpattya? // http://zakarpattya.net,ua/Zmi/89658-Zakarpattiu-pidseliat-nelehaliv.

Considering that in Ukraine the number of internally displaced persons has increased sharply, it would be expedient to consider an opportunity of creation of temporary housing for such persons in unfilled detention centres for irregular migrants and refugees.

An important step on the way of the agreement implementation was realization of project "Assistance to migrants on return to Ukraine" being rendered by the International Center of Migration Policy Development in cooperation with Repatriation and Return Service of the Netherlands and also of the project "Improvement of control of migration processes and co-operation in readmission in Eastern Europe (MIGRECO)[23].

According to data of the MIA also means are being taken to open five similar establishments, for which purpose budget costs (37 mln. UAH) and technical assistance of EU (30 mln. Euro)[24] are going to be provided.

It is obvious that efficiency of implementation of the agreement and its consequences for Ukraine significantly depends on the readmission space of Ukraine, i.e. availability of valid agreements on readmission with other third countries, particularly with those, to which belong the countries of increased migration risk.

Also, as it is shown by negotiations between Ukraine and EU, the main problem within the framework of this agreement[25] was connected to readmission of citizens of third countries, because Ukrainian citizens, who are being returned, as a rule, have accommodation, relatives and they needn't be supported. The situation with citizens of third countries is different. In this context existence of readmission agreements with third countries is vitally important, i.e. nature of readmission space.

For five years after coming into effect of the Agreement the readmission space of Ukraine has been significantly improved or the steps for its improvement have been made. As of July, 2015 Ukraine has signed 18 read-

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[23] Information "on Implementation the Association Agenda between Ukraine and the EU in the year 2014".

[24] Irregular migrants may be settled down in former cantonments. // http://www.26.com.ua/ru/dnews/v/26396.

[25] I. Somer, MFA: Simplified visa regime with EU has been almost agreed on February 27, 2006 // http://www.bbc.co.uk/ukrainian.

mission agreements[26], negotiations on implementation of the Readmission Agreement are being carried on with 13 EU member states.

Negotiation process on conclusion of bilateral agreements on readmission with five European countries (Albania, Bosnia and Herzegovina, Macedonia, Croatia, and Switzerland) and with seven CIS member states (Armenia, Belorussia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan). Also negotiations have been started on coordination of draft agreements on readmission and implementation of protocols with some countries, part of which is in the group of the countries at risk of migration: Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Belorussia, Lebanon, Libya, Bangladesh, India, Iran, Iraq, Pakistan, Syria, Sri Lanka, China, and Afghanistan[27]. Interdepartmental processing of draft protocols with Hungary, the Benelux countries, Portugal, Cyprus and Malta is occurring. Arrangements on resumption of work in processing the draft protocol with Romania are planned.

It shall be noted that Ukraine has not concluded readmission agreements with part of the countries yet, which are main source of irregular migration, who enter EU from the territory of Ukraine. These countries are Afghanistan, India, China, Pakistan, Vietnam, Moldova, Georgia, and Russia. Ukraine is carrying on negotiations on coordination of draft readmission

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[26] With EU (came into force on 01.01.2008), Bulgaria (on 02.08.2002), Vietnam (on 10.04.2009), Georgia (on 26.05.2004), Denmark (on 01.03.2009), Latvia (on 17.05.1998), Lithuania (on 29.03.1997), Moldova (on 23.12.1998), Norway (Law of Ukraine "On Ratification of the Agreement" enacted by the Supreme Council of Ukraine on 06.07.2011), Poland (on 10.04.1994), Russian Federation (on 21.11.2008), Slovakia (on 24.03.1994), Turkey (on 19.11.2008), Turkmenistan (on 13.03.2002), Hungary (on 04.06.1994), Uzbekystan (on 20.08.2002), Switzerland (on 01.10.2004). Source: http://dmsu.gov.ua/normatyvna-baza/mizhnarodni-dokumenty/readmisiia.

[27] In particular, work with Russian Federation has been finished. Thus, by resolution of Cabinet of Ministers of Ukraine of 25 June 2012 No. 402-r "On signing the Agreement between Cabinet of Ministers of Ukraine and Government of Russian Federation on readmission and the Executive protocol on readmission procedure to the Agreement between Cabinet of Ministers of Ukraine and Government of Russian Federation on readmission" Head of SMS of Ukraine was empowered to sign the abovementioned Agreement and Executive protocol. Ukrainian party completed internal state procedures required to sign Ukrainian-Austrian Implementation protocol to the Agreement. Draft protocol was approved by resolution of Cabinet of Ministers of Ukraine of 05.04.2012 No. 175-r., which empowered Minister of Internal Affairs to sign it on behalf of Ukraine. Internal state procedures required for preparation of signing international documents on readmission matters with Switzerland Confederation.

and implementation agreements with Georgia, Moldova, Turkmenistan, Russia[28] and Vietnam. At the earliest possible time Protocols with the majority of countries, which are source of illegal migration and their finishing, are expected to be concluded: Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Belorussia, Lebanon, Bangladesh, India, Iran, Iraq, Sri Lanka, China, Afghanistan, countries at risk of migration[29].

Also Ukraine has concluded separate readmission agreements with a part of EU member states. At present negotiations on conclusion of implementation protocols are being carried on, as it is stipulated by the Readmission Agreement. Currently Ukraine is a leader among countries of the Eastern Partnership by number of readmission agreements signed with EU member states[30].

International cooperation is of vital importance for successful implementation of the Agreement. In the field of migration and readmission Ukraine also actively cooperates with international organizations, first of all, the EU and UN.

Such cooperation with the European Union extends both to "mild" and infrastructural projects. In the first group two following projects shall be distinguished:

- Project "Creation of potential and technical support of Ukrainian state authorities for efficient countering action of irregular transit migration" (ERIT)[31].
- MIGRECO ("Improvement of control of migration and cooperation in readmission in Eastern Europe")[32].

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[28] The Agreement was signed at the end of 2012.
[29] Existence of Readmission Agreements between EU and Sri Lanka, Hong Kong, Macao, Algeria, Russia improves the situation to some extent. But number of such agreements is limited.
[30] Z. Brunarska, S. Manashviilli, A. Veinar, *Возвращение, реадмисия и реинтеграция в странах Восточного партнерства Научно-исследовательский* отчет 2013/18 //, http://www.carim-east.eu/publications/.
[31] ЄС підтримує Україну у виконанні угоди про реадмісію// http://eeas.europa.eu/delegations/ukraine/documents/eucooperationnews/46_eucooperationnews_uk.pdf.
[32] It is worth mentioning a set of realized projects, which promoted implementation of the agreement: "Technical assistance and strengthening of potential of governments of Ukraine and Moldova in fulfillment of readmission agreements with EU (GUMIRA, 2009-2011)" ,SIREADA "Support of implementation of Readmission Agreements between EU and RF, Moldova

Within the framework of these projects dedicated experts are trained in legal, technical and administrative aspects of readmission, improvement of monitoring techniques and estimation of state authorities activity in the field of readmission and improvement of state officials' awareness on readmission-related matters. This is a significant contribution in formation of institutional capability and improvement of efficient implementation and fulfillment of the Agreement. European Neighborhood and Partnership Instrument is a basis for establishment of the second group of projects.

Cooperation with UNO is taking place, in particular, within the frame of Söderköping Process[33]. The main purpose of this process is a broader cooperation with new EU member states and enlargement countries on the matters of giving shelter of migrants, migration and boundaries.

REINTEGRATION OF OWN CITIZENS AS AN IMPORTANT COMPONENT OF SUCCESSFUL READMISSION

As was mentioned above, Ukraine actively cooperates with the EU and other international organizations on different aspects related to readmission, including promotion of integration. However, it shall be emphasized that these projects are being financed and realized exactly by these organizations, although most of beneficiaries are Ukrainian citizens. Until now there were no efficient migrants reintegration programs in Ukraine. One of few documents is the Plan of arrangements on migrant integration in Ukrainian society for 2011 – 2015. At the same time this document stipulates only to provide informational and psychological assistance to persons, who are coming back.[34] The plan of arrangements on realization of Ukrainian Concept of migration policy foresees studying the issue of releasing citizens, who have been abroad for more than six months, from particular types of customs supervision.

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and Ukraine in promotion of voluntary return and reintegration "(2011- 2012), Effective control of labor force and its skills; ILO, financing of EU, 2011-2013.

[33] Söderköping Process – is initiative of Administration of UNO Supreme Commissioner on refugees and Swedish Migration Service.

[34] A. Poznyak, External labour migration in Ukraine as a factor in socio-demographic and economic development // http://www.carim-east.eu/media/CARIM-East-2012-RR-14.pdf.

However it shall be noted that the complex integration mechanism of Ukrainian citizens, who are coming back, in their society is absent so far. For example, there are no support programs when opening businesses, or programs of beneficial taxation. Institutional mechanism and financing[35] are absent as well.

INFLUENCE OF THE ASSOCIATION AGREEMENT ON COOPERATION IN THE FIELD OF READMISSION

The Association Agreement between Ukraine and the EU shall also regulate readmission issues. Besides, in the preamble to the Agreement it is stated that "the parties undertake to cooperate on the matters of migration, affording shelter and control of borders, using a systematic approach and paying attention to cooperation in struggle of illegal migration, human traffic and efficient fulfillment of provisions of the Readmission Agreement". Thus, under teleological method all provisions hereof shall be interpreted so that to ensure maximum efficient implementation of the Agreement. Consequently, on coming into effect of the Agreement, under the Law of Ukraine on International Agreements of Ukraine it shall prevail over Ukrainian laws and in case of conflicts of laws of the Agreement and of norms of national laws the norms of the Agreement shall be applied, in particular, those which stipulate maximum efficient implementation.

In the text of the Agreement the readmission matters are regulated in Section III "Justice, liberty and safety".

In art. 19 RA (Movement of persons) it is stated "the parties shall ensure complete fulfillment of the Agreement of readmission of persons of June 18, 2007 (through the Joint Readmission Committee, established under art. 15 RA".

Besides, art. 16 RA stipulates cooperation in the sphere of migration, affording shelter and control of borders including effective return policy (item g).

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[35] Ivashchenko-Standnyk. Readmisja, powrót i reintegracja migrantów na Ukrainie: kontekst społeczno-polityczny // http://www.carim-east.eu/media/.

Art. 19, para. 3 RA anticipates the successive introduction of a visa-free regime between Ukraine and the EU, and art. 18 RA – improvement of workers' mobility, provision of national mode for them according to bilateral Agreements with EU member states and also provision of more favorable conditions in the sphere of access to professional training. These provisions will for sure promote growth of migration flows.

Section VI of the Association Agreement also anticipates creation of the Deep and ComprehensiveFree Trade Area between Ukraine and EU. This part of the Agreement foresees liberalization of tariff regulation, non-tariff regulation and a deep regulatory harmonization of norms and standards. The Agreement regulates not only trade in goods and services, electronic trade, but also a number of important aspects tightly connected to trade: intellectual property rights, state procurements, investments etc. An efficient implementation of the Agreement shall result in a significant rise in trade between Ukraine and the EU.

Consequently, the Association Agreement does not include detailed provisions on readmission between Ukraine and EU, it clearly accents efficiency of its implementation. Rise in trade, introduction of visa-free regime and improvement of workers' mobility will certainly have influence on migration flows and motion of civilians between Ukraine and the EU, especially, in the medium and long-term period[36]. Effective implementation of the Association Agreement will ensure improvement in implementation of readmission mechanisms and procedures.

In light of the investigation made one can make the following conclusions:

– For the purpose of effective implementation of the Readmission Agreement Ukraine requires assistance of the EU;
– Pessimistic anxieties for mass increase of irregular migration and turning of Ukraine into a "buffer zone" owing to signing the Agreement did not come true;
– Ukraine needs to establish a single capable authority in the sphere of migration control, an accurate distribution of powers, development of migration policy strategy and passing a uniform legislative act;

[36] O. Poznyak, Соціальні наслідки Євроінтеграції України // http://www.idss.org.ua/public.html.

- Improvement of the readmission space requires conclusion of agreements and implementation protocols within the shortest terms with countries, which are countries of risk migration;
- Cooperation with EU and borrowing of positive experience of neighbors, in particular, of Poland, in both lawmaking and law enforcement are essential for the efficient implementation;
- Maintenance of the authorities, dealing with readmission and financing, necessary for proper functioning is vitally important;
- Development of efficient mechanisms of Ukrainian migrants reintegration is overwhelmingly important;
- Besides, it is necessary to activate and finish as soon as possible the procedure of legal drawing up of Ukrainian border with northern and eastern neighbors[37], Ukrainian-Belorussian borders (demarcation of land border), and provision of control over the border with the temporary occupied Crimea and temporary occupied parts of Donetsk and Luhansk regions, because they are potential sources of coming of illegal migrants, who come through Ukraine on their way to European Union member states[38];
- Taking into account a quick growth of internally displaced persons as a result of war with Russia and occupation of the Crimea, it would be expedient to consider an opportunity to afford a temporary shelter to such persons in points for temporary maintenance of migrants and in detention and reception centres, which are not overcrowded;
- Coming into effect of Section IV of the Association Agreement between Ukraine and EU, which anticipates creation of the deep and comprehensive free trade area between Ukraine and EU from January 01, 2016, will have a positive influence on the successful and efficient implementation of the Readmission Agreement between Ukraine and the EU.

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[37] Taking into account the war with Russia, demarcation of borders will be quite complicated.
[38] V. Kravchenko, *Реадмісійний Армреслінг* // Дзеркало тижня – No. 39 (618), 14-20 October 2006.

Finally, it would be expedient to express hopes that further implementation of the Readmission Agreement will not promote prevention of cooperation between Ukraine and the EU, but instead their integration and rapprochement and a successful implementation of agreements will promote creation of Area of freedom, security and justice in Europe.

IMPLEMENTATION OF THE AGREEMENT ON READMISSION BETWEEN THE EUROPEAN COMMUNITY AND UKRAINE – EXPERIENCES OF THE NADBUŻAŃSKI BORDER GUARD DIVISION IN CHEŁM

VIOLETTA ŻAKOWIECKA-GÓRNIK

GENERAL REMARKS

The term *readmission* comes from Latin and in the context of migration means repeated admission, (lat. *re* – again; *admissio* – allowing, access) *of a migrant foreigner to the country from which he came.*[1] This may be the territory of the country of origin or of a transit state, not being a country of origin of the migrant. Rules of conduct in this matter are governed by international agreements between states – agreements on readmission.

The European Union has received competence in the field of readmission under the Treaty of Amsterdam.[2] After Tampere the European Council recommended the EU Council to conclude readmission agreements with third countries or groups of third countries, or to include readmission clauses in other agreements (eg. on free trade zones) with these countries.[3] The literature emphasizes, however, that as a basis for development of these acts was the first readmission agreement with a third country, ie. multilateral readmission agreement of 29 March 1991 between the Republic

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[1] According to the Dictionary of Polish Language PWN "readmission" is a return of an irregular immigrant to the country from which he came; but also: the obligation to accept this person by this country. On the basis of: http://sjp.pwn.pl/sjp/;2514263, [access: 21.12.2014].

[2] On the previous practice in this regard writes M. Zdanowicz, *Readmisja w praktyce Polski i Rosji*, Białostockie Studia Prawnicze No 9, 2011, p. 132-134.

[3] Ibidem, p. 133.

of Poland and the countries of the Schengen Group[4]. This agreement – corresponding with the mechanisms laid down in the Schengen and Dublin Convention – was considered a model solution and became the impetus for the subsequent conclusion of bilateral readmission agreements between EU Member States and third countries. On 2 December 1999 the Council of the European Union adopted a resolution on readmission clauses in agreements concluded by the EC and mixed agreements. This resolution is the result of the entry into force of the Amsterdam Treaty and consequently a need to adapt standard readmission clauses formulated in 1995 to the new legal framework. These clauses had to be included in all agreements between the EC and its Member States on the one hand and third countries on the other.

In the common EU strategy of 11 December 1999 on Ukraine, the conclusion of a readmission agreement with this country was one of the measures proposed. On 13 June 2002, the General Affairs Council authorized the Commission to negotiate a readmission agreement between the European Community and Ukraine. In August 2002, the Commission transmitted a draft text to the Ukrainian authorities and the first formal negotiation round took place on 18 November 2002 in Kiev. Twelve further sessions were held alternately in Kiev and Brussels and, since November 2005, these negotiations took place in parallel with negotiations on an EC-Ukraine visa facilitation agreement. Moreover, formal negotiations were occasionally prepared by informal expert meetings.

At the last formal round on 10 October 2006, the Commission presented the Ukrainian side with a "package deal" on both agreements, which included, as far as the readmission agreement was concerned, a proposal for a 2 year transitional period for the entry into force of the provisions in the agreement dealing with the readmission of third country nationals and stateless persons. On 25 October the Ukrainian Ambassador to the EU informed the Commission that Ukraine could accept the "package deal", including the transitional period of 2 years. The final texts of the readmission

[4] For more see: P. Kazmierkiewicz, *Polish experience with regard to preparation, negotiation and implementation of readmission agreement with EU Member States*, Institute of Public Affairs 2006, p. 8-12.

and visa facilitation agreements were initialed at the occasion of the EU-Ukraine Summit in Helsinki on 27 October 2006.

At all (formal and informal) stages of the readmission negotiations, Member States have been regularly informed and consulted on the progress of the talks. On the part of the Community, the legal basis for the Agreement is art. 63 para. 3 lit. b), in conjunction with art. 300 TEC.[5]

1. THE READMISSION AGREEMENT – THE SCOPE

The Agreement is divided into 7 sections with 21 articles altogether. It also contains 8 annexes, which form its integral part, 4 joint declarations and 1 unilateral declaration by Ukraine. The readmission obligations set out in the Agreement (art. 2 to 4) are drawn up in a fully reciprocal way, comprising own nationals (art. 2) as well as third country nationals and stateless persons (art. 3) and "readmission in error" (art. 4). The obligation to readmit own nationals (art. 2) includes also former own nationals who have renounced their nationality without acquiring the nationality or a residence authorization of another State. In addition, article 2 is supplemented by a joint declaration concerning the deprivation of nationality.

The obligation to readmit third country nationals and stateless persons (art. 3) is linked to the following prerequisites: a) the person concerned held at the time of entry a valid visa issued by the requested State and has entered directly from this State's territory, or b) the person concerned held at the time of entry a valid residence permit issued by the requested State, or c) the person concerned illegally entered the territory of the requesting State directly from the territory of the requested State. Exempted from these obligations are persons in airside transit and all persons to whom the requesting State has either granted visa-free access or issued a visa or residence permit with a longer period of validity.

In return for Ukraine agreeing to the aforementioned obligation regarding the readmission of third-country nationals and stateless persons

[5] EC proposal of 18 April 2007 for a Council Decision concerning the signing of the Agreement between the European Community and Ukraine on readmission, Brussels, 26 April 2007, file No 2007/0071 (CNS).

(art. 3), the European Community agreed to delay for 2 years after the entry into force of the Agreement the applicability of these obligations (art. 20 para. 3). During that two-year transitional period, article 3 of the Agreement shall only become applicable to stateless persons and nationals from third-countries with which Ukraine has concluded bilateral treaties or arrangements on readmission. Moreover, during that two-year transitional period, the provisions in existing bilateral agreements or arrangements concluded between individual Member States and Ukraine concerning readmission of stateless persons and third country nationals shall continue to apply (art. 17 para. 2).

TWO TYPES OF READMISSION PROCEDURE

A readmission can be performed under standard or simplified procedure. The accelerated procedure (simplified) may be applied to a person that has been apprehended in the border region of the Requesting State within 48 hours from the moment of illegal crossing of the state border of that person (including seaports and airports) coming directly from the territory of the Requested State. In such a scenario the Requesting State may submit a readmission application within 2 days following this persons apprehension. Standard procedure (full) provides that a state examining the readmission application shall respond within 14 calendar days after the date of receipt of such application. Where there are legal or factual obstacles to the application being replied to in time, the time limit shall, upon duly motivated request, be extended, in all cases, up to a maximum of 30 calendar days.

AUTHORITIES RESPONSIBLE FOR IMPLEMENTATION OF READMISSION

The answer to the question what organ is responsible on the Ukrainian side for the implementation of the readmission depends on the procedure applied. Under accelerated readmission procedure competent is a border plenipotentiary of Ukraine on the proper (as to the occurrence of events) section of the common state border (Lutsk Division or Lviv Division of the State Border Guard Service of Ukraine. However in case of the standard re-

admission procedure the competence belongs to the State Migration Service of the Ministry of Interior Affairs of Ukraine.

Unlike on Ukraine on the Polish side regardless of the type of procedure, the competence for the readmission belongs to the Commander of the Division of the Polish Border Guard – (border plenipotentiary of the Republic of Poland). Although, depending on the place of the occurrence of events at the common state border, the Commander's competence is executed by the proper Commander of the Border Guard Outpost (assistant border plenipotentiary of the Republic of Poland).

READMISSION OBLIGATIONS

In case of the readmission of own nationals the Requested State shall, upon application by the Requesting State and without further formalities other than those provided for by this Agreement, shall readmit to its territory all persons who do not, or who no longer fulfill the conditions in force for entry to or stay on the territory of the Requesting State provided that evidence is furnished that they are nationals of the Requested State.

As far as the readmission of third-country nationals and stateless persons is concerned the Requested State, upon application by the Requesting State and without further formalities other than those provided for by this Agreement, shall readmit to its territory third-country nationals or stateless persons which do not, or no longer, fulfill the conditions in force for entry to or stay on the territory of the Requesting State provided that evidence is furnished that such persons:

- illegally entered the territory of the Member States coming directly from the territory of Ukraine or illegally entered the territory of Ukraine coming directly from the territory of the Member States;
- or at the time of entry held a valid residence authorization issued by the Requested State;
- or at the time of entry held a valid visa issued by the Requested State and entered the territory of the Requesting State coming directly from the territory of the Requested State.

READMISSION PROCEDURE

According to art. 5 of the Readmission Agreement, any transfer of a person to be readmitted shall require the submission of a readmission application to the competent authority of the Requested State. If the person to be readmitted is in possession of a valid travel document or identity card and, in the case of third country nationals or stateless persons, a valid visa or residence authorization of the Requested State, the transfer of such person can take place without the Requesting State having to submit a readmission application or written communication to the competent authority of the Requested State.

If a person has been apprehended in the border region of the Requesting State within 48 hours from the moment of illegal crossing of the state border of that person coming directly from the territory of the Requested State, the Requesting State may submit a readmission application within 2 days following this persons apprehension (accelerated procedure).

The readmission application shall contain the all available data of the person to be readmitted (e.g. given names, surnames, date and place of birth, sex and the last place of residence), as well as the proof of evidence regarding nationality, the conditions for the readmission of third-country nationals and stateless persons.

In every case after realizing the readmission procedure, in accordance with art. 5 of the Agreement, a protocol of handover-acceptance of the person shall be drawn up.

COMMON LIST OF DOCUMENTS REGARDING CITIZENSHIP

According to art. 6.1 and 6.1. b the following documents shall be considered as evidence[6] of the status of own nationals:

- passports of any kind (national passports, diplomatic passports, service passports, collective passports and surrogate passports including children's passports),
- national identity cards (including temporary and provisional ones),

[6] Proof of evidence regarding nationality are listed in the, annex 1 and 2 to the Agreement on Readmission.

- military service books and military identity cards,
- seaman's registration books, skippers' service cards and seaman's passports,
- citizenship certificates and other official documents that mention or indicate citizenship,
- driving licenses or photocopies thereof,
- birth certificates or photocopies thereof,
- company identity cards or photocopies thereof,
- statements by witnesses,
- any other document which may help to establish the nationality of the person concerned.

In case of third-country nationals and stateless persons the Parties will honor also other means of evidence confirming nationality[7]:

- official statements made for the purpose of the accelerated procedure, in particular, by authorized border authority staff who can testify to the person concerned crossing the border from the Requested State directly to the territory of the Requesting State,
- named tickets of air, train, coach or boat passages, which testify to the presence and the itinerary of the person concerned from the territory of the Requested State directly to the territory of the Requesting State (or Member States if the Requested State is Ukraine),
- passenger lists of air, train, coach or boat passages, which testify to the presence and the itinerary of the person concerned from the territory of the Requested State directly to the territory of the Requesting State (or Member States if the Requested State is Ukraine),
- official statements made, in particular, by border authority staff of the Requesting State and other witnesses who can testify to the person concerned crossing the border,
- documents, certificates and bills of any kind (e.g. hotel bills, appointment cards for doctors/dentists, entry cards for public/private institutions, car rental agreements, credit card receipts etc.) which

[7] Annex 3 and 4 to the Agreement on Readmission.

clearly show that the person concerned stayed on the territory of the Requested State,

- information showing that the person concerned has used the services of a courier or travel agency, official statement by the person concerned in judicial or administrative proceedings.

TIME LIMITS

In accordance with art. 8 the application for readmission must be submitted to the competent authority of the Requested State within a maximum of one year after the Requesting State's competent authority has gained knowledge that a third-country national or a stateless person does not, or does no longer fulfill the conditions in force for entry, presence or residence. Where there are legal or factual obstacles to the application being submitted in time, the time limit shall, upon request, be extended up to 30 calendar days.

A readmission application shall be replied to by the Requested State without undue delay, and in any event within 14 calendar days after the date of receipt of such application. Where there are legal or factual obstacles to the application being submitted in time, the time limit shall, upon request, be extended up to 30 calendar days.

In the case of a readmission application submitted under the accelerated procedure a reply has to be given within 2 working days after the date of receipt of such application. If necessary, the time limit for a reply to the application may be extended by 1 working day.

The Parties have concluded that the Agreement shall be without prejudice to the rights, obligations and responsibilities of the EU and its Member States as well as Ukraine arising from international law and, in particular, from any applicable International Convention or agreement to which they are Parties. Moreover they have agreed that nothing in the Agreement on Readmission shall prevent the return of a person under other formal or informal arrangements.

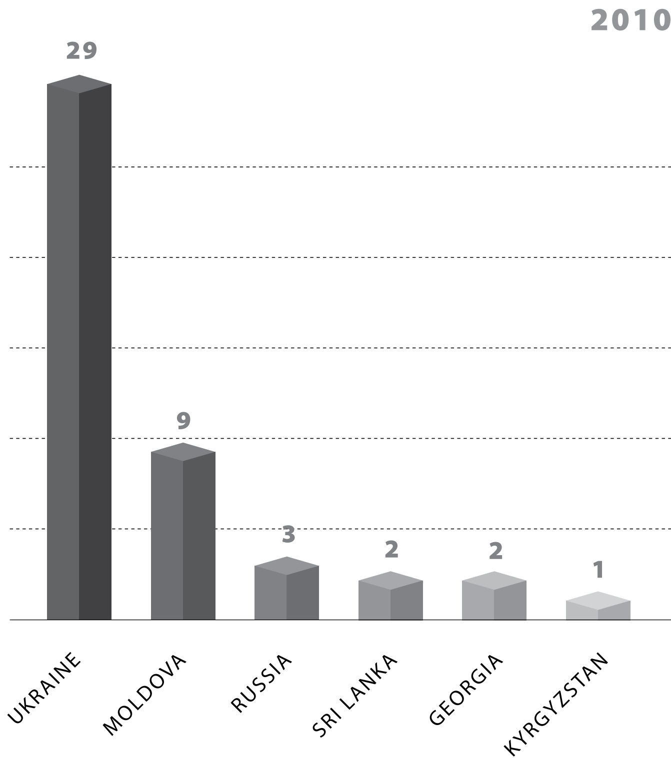
2. THE PRACTICAL IMPLEMENTATION OF THE READMISSION AGREEMENT WITH UKRAINE BY THE NADBUŻAŃSKI BG DIVISION

The Nadbużański Border Guard Division (NBGD) with its headquarter in Chelm is protecting the Polish state border with the Republic of Belarus and Ukraine with a total length of 467 km 570 m, including: the Polish-Belarusian – 171 km 310 m, Polish-Ukrainian – 296 km 260 m.

The area of official actions of the Nadbużański Border Guard Division covers the area of Lublin voivodeship and łosicki district being a part of the Mazowieckie voivodeship. NBGD performs its statutory tasks in 20 locations: 7 on the border with Belarus, 11 on the border with Ukraine and 2 performing its tasks in the interior of the country. The Regional Unit has under its control a total of 11 border crossings: 6 road crossings (3 on the border with Belarus, 3 on the border with Ukraine), 4 rail crossings (1 on the border with Belarus, 3 on the border with Ukraine) and 1 air border crossing point in Świdnik. As part of the BG Regional Unit office in Biała Podlaska operates a Guarded Centre for Foreigners.

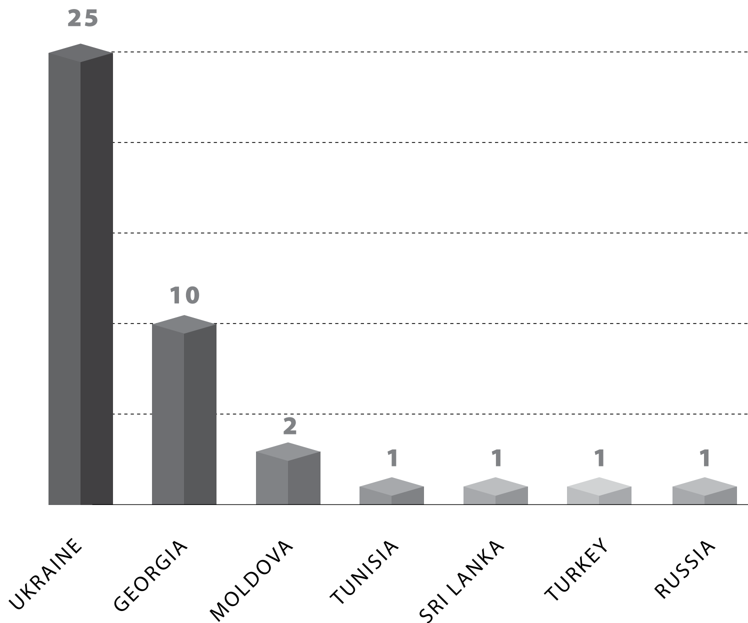
The tasks in regard to readmission with Ukraine are carried out by 2 facilities directly on the Polish-Ukrainian state border designated as transfer-acceptance points of people, ie. the BG outpost in Dorohusk or, the BG outpost in Hrubieszów – road border crossing in Zosin, and the BG outpost in Hrebenne.

In 2010 within the framework of readmission the Ukrainian side received 46 foreigners, and handed out to Poland 3 persons (2 nationals of Netherlands, 1 Latvian citizen).



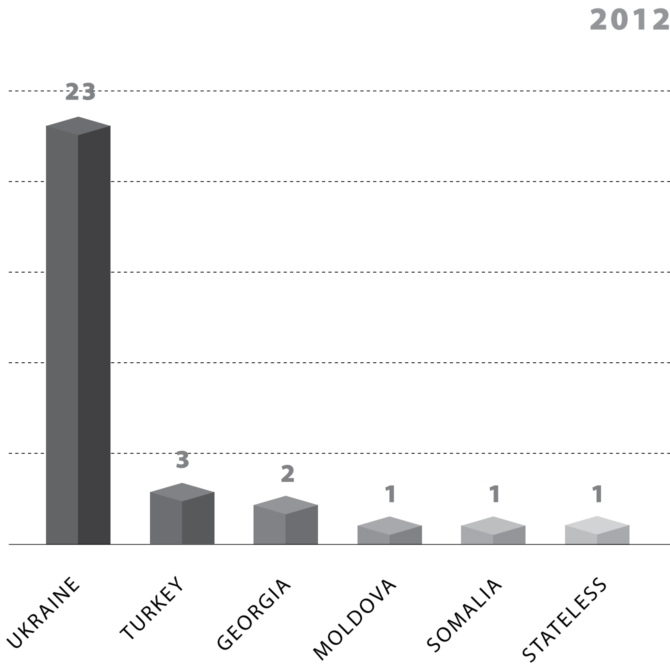
In 2011 within the framework of readmission the Ukrainian side received 41 foreigners, and handed out to Poland 10 persons (7 Polish nationals and 3 Russian Federation citizens).

Simplified procedure – (26): 10 citizens of Georgia, 2 citizens of Moldova, 1 citizen of Tunisia, 1 citizen of Sri Lanka, 1 citizen of Turkey, 1 citizen of Russia; standard procedure – (15): 15 citizens of Ukraine.



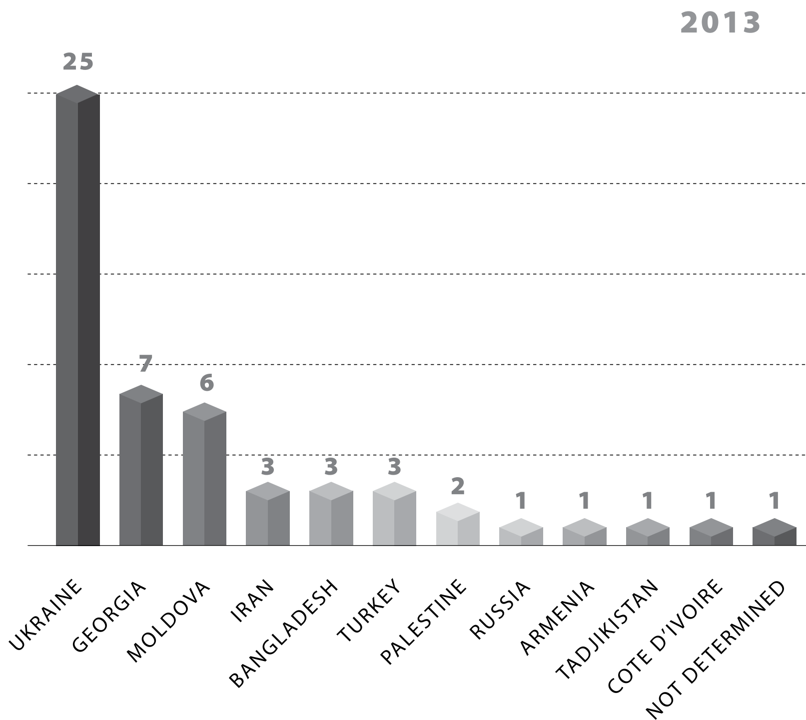
In 2012 within the framework of readmission the Ukrainian side received 31 foreigners and handed out to Poland 7 persons (3 Polish nationals, 1 citizen of Belgium, 1 citizen of Congo and 1 stateless person).

Simplified procedure – (26): 18 citizens of Ukraine, 3 citizens of Turkey, 3 citizens of Georgia, 2 citizens of Moldova, 1 citizen of Somalia, 1 stateless person; standard procedure –(5): 5 citizens of Ukraine.



In 2013 within the framework of readmission the Ukrainian side received 54 foreigners and handed out to Poland 2 persons (1 Polish citizen, 1 citizen of Latvia).

Simplified procedure – (49): 20 citizens of Ukraine, 7 citizens of Georgia, 6 citizens of Moldova, 3 citizens of Iran, 3 citizens of Bangladesh, 3 citizens of Turkey, 2 citizens of Palestine, 1 citizen of Russian Federation, 1 citizen of Armenia, 1 citizen of Cote D'Ivoire, 1 citizen of Tajikistan, 1 – citizenship not determined; standard procedure **– (5):** 5 citizens of Ukraine.



Referring to the above statistics it should be mentioned that the entry into force of the Readmission Agreement has not produced a dramatic increase in the number of persons transferred within the readmission framework from the EU to Ukraine. This confirms the thesis, that Eastern Europe is not a major transit route for migrants from Africa and Asia going to the European Union. Secondly it shows that when it comes to citizens of Eastern European countries violating the rules of stay in the EU, the process of their expulsion was taking place quite smoothly even earlier. Signing the Readmission Agreement with the EU has not resulted in a significant change. Undoubtedly the readmission agreement seems to be an effective mechanism in the fight against irregular migration of own nationals. Especially good is the cooperation in the field of accelerated readmission procedure of foreigners, ie. those who were apprehended in the border area within 48 hours from the moment of illegal crossing of the state border. It is noted, that in the case of Ukrainian citizens there has been a decrease of both the willingness to take the risks of illegal migration, as well as the popularity of the region. It also demonstrates the tendency to use fake passports of EU countries, as well as the titles of residence of those countries by illegal migrants. Above all, however, it indicates improving border management systems and a relatively high level of cooperation on both sides of the border.

3. IMPLEMENTING PROTOCOL BETWEEN THE GOVERNMENT OF THE REPUBLIC OF POLAND AND THE CABINET OF MINISTERS OF UKRAINE – LEGAL FRAMEWORK

On 27-28 September 2011 in Warsaw, delegations of the Republic of Poland and Ukraine carried out a second round of negotiations to discuss the Implementing Protocol between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on the implementation of the Agreement on Readmission between the European Community and Ukraine. During the negotiations some editorial changes were brought in the preamble and were put in Articles 1 and 7. Also some changes were made in the numbering of the articles and the amendments that were adopted by both parties. Agreement was made on the whole text of the Implementing Protocol,

ie. the title, preamble, articles 1-14 and the final clause. It was also agreed on an attachment, ie. handover/acceptance protocol. It was agreed that it would be drawn up as a bilingual document in both Polish and Ukrainian. It was also agreed that after the adoption of the whole project of the Implementing Protocol both texts will be the basis for the development of the English language version of it.[8]

In accordance with art. 16 of the Readmission Agreement, Ukraine and a Member State may draw up implementing Protocols which shall cover rules on: designation of the competent authorities; border crossing points for the transfer of persons; mechanism of communication between the competent authorities; modalities for returns under the accelerated procedure; conditions for escorted returns of persons, including the transit of third-country nationals and stateless persons under escort; additional means and documents necessary to implement this agreement; modes and procedures for recovering costs in connection with implementation of Article 12 of this Agreement.

The draft of the Implementing Protocol functions as a fixed version is still in the negotiation phase because of the lack of response of the Ukrainian side about the compatibility of the developed English version.

4. EXPERTS' MEETINGS AND CONSULTATIONS

According to art. 13 of the Implementing Protocol to the Agreement on Readmission, after mutual settlement, the competent authorities of the Parties can carry out working meetings and experts' consultation concerning implementation of this Protocol.

Based on the experience of the Nadbużański BG Division in Chełm a practice of working meetings at the border plenipotentiaries level was established, which were arranged once every six months (on average) and expert meetings of both parties with the State Migration Service of Ukraine on average once a year. The purpose of these meetings is to discuss current

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[8] Implementing Protocol between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on implementation of the Agreement on Readmission between the European Community and Ukraine drawn up in Luxembourg on 18 June 2007

cooperation in the fight against irregular migration and arrangements concerning the practical implementation of the readmission agreement.

For the purpose of the above actions on 20-24.03.2011 and on 23-24.10.2013 in Zamość were held meetings between representatives of Polish border services and representatives of the State Border Guard Service of Ukraine. Also on 16-19.04.2013 in Baranów Sandomierski was held a meeting of representatives of the Border Guard with the State Migration Service of Ukraine. The talks focused on assessing the rules of the functioning of the reception and transmission of persons on the common border who do not or no longer meet the conditions for entry or residence on the territory of Ukraine or on Polish territory, in accordance with the Agreement on Readmission between the European Community and Ukraine. During the meetings were discussed international laws on fighting illegal migration and the stage of implementation of the Agreement on Readmission between the European Community and Ukraine drawn up on 18 June 2007. The status of implementation of readmission agreements signed by Ukraine with other states was also discussed. Finally during the meetings the legal situation of illegal migrants on the territory of Ukraine in the light of legalization and asylum procedures was presented.

These actions were aimed at strengthening developed common standards for interoperability of services and responsible institutions and cooperation in the implementation of returns and identification of foreigners. Extremely important from the point of view of implementation of return procedures and identification of foreigners was to exchange experiences and establish working contacts with the State Migration Service of Ukraine, which now has taken over the responsibility for the implementation of the migration policy of Ukraine and the implementation of readmission agreements.

An important element of the meeting was to discuss existing practices in the implementation of the provisions of the readmission agreement in the context of the acquisition of competencies on readmission by the State Migration Service of Ukraine, ie.: the division of competences and powers of competent authorities of Ukraine regarding the readmission procedure. Readmission according to the standard procedure of Ukrainian citizens,

European Community Member States, third country nationals and stateless persons implements the State Migration Service of Ukraine. The authority competent and authorized to carry out an accelerated readmission procedure is the State Border Service of Ukraine. With regard to own citizens in a situation of voluntary departure of a person when citizenship is confirmed and proven, and also when a person holds is in a possession of a document confirming this fact, a formulation of a request for readmission is optional. The parties committed themselves only to provide telephone information about the fact of departure of such persons. With regard to standard readmission procedure, it was agreed that readmission motions will be sent electronically directly to the headquarters of the State Migration Service of Ukraine in Kiev, and also to the Regional Management Board of the State Migration Service of Ukraine, competent with respect to last period of residence or stay of a person in regard to whom the application for readmission is conducted.

This solution was agreed to speed up the procedures for identification of a readmitted person directly in the place of residence due to the fact that at the territory of Ukraine there is no central information system on population registration. It was also agreed on the way to fill in the handover/acceptance protocol that is in the Annex to the Implementing Protocol to the Agreement on Readmission. The possibility was recognized of applying art. 14 para. 2 of the Agreement, which may apply in particularly justified cases relating to exceptional situations when the delay associated with completing the formalities resulting from the content of the Agreement could cause a threat to the life or health of the person surrendered.

During these working meetings a rule was adopted, that the proper implementation of the provisions of the Agreement on Readmission, namely the settlement of the situation unclassified in the agreement will take place on the basis of so-called good practices. Therefore a common conclusion was developed that in order to avoid contentious situations it is appropriate for Border Guard, the State Border Service of Ukraine and the State Migration Service of Ukraine to commonly desire the entry into force of the Implementing Protocol to this agreement on readmission.

An important event from the point of view of experience of the Nadbużański BG Division was the expert visit, which was held on 03-07.09.2012 in Kyiv in order to establish cooperation and exchange of experiences with institutions and bodies involved in return and migration issues of the Ukrainian Party. One of the important points of the visit of representatives of the Border Guard in Kiev was a meeting at the State Border Guard of Ukraine and at the State Migration Service of Ukraine. This meeting was to summarize cooperation with the Ukrainian partner in relation to, among other things, the length of the protected section of the joint state border and due to the fact of formation on the territory of Ukraine of new institutions dealing with widely understood problems of migration, and to develop best practices for cooperation in this respect

5. JURISDICTION AND COMPETENCIES OF STATE AUTHORITIES IN REGARD TO MIGRATION, VOLUNTARY RETURN AND READMISSION

The State Border Service of Ukraine has experienced continuous structural changes since 1991 leading at the moment to creation of a border structure responsible for the protection of the Polish-Ukrainian state border. In 2003 the State Border Service of Ukraine in its structure separated the division dealing with the phenomenon of irregular migration, as well as matters of foreigners in the wider sense. The basic tasks of this division of the State Border Service of Ukraine set up to work with foreigners were divided as follows:

1) tasks on supervision and control of foreigners who violated law on the territory of Ukraine,
2) identification and confirmation of the identity of foreigners,
3) placing foreigners in detention centers,
4) organization of expulsions of foreigners,
5) issuing administrative decisions to foreigners,
6) cooperation with the State Migration Service of Ukraine in the placement of foreigners in detention centers and the implementation of forced returns.

The experience of the State Border Guard Service of Ukraine indicates that in the years 2010, 2011, 2012 half of all accepted foreigners from neighboring countries were people from the Polish-Ukrainian border, mainly citizens of Ukraine.

Ukrainian legislation on issues related to foreigners can be divided into the following acts: law on refugees, foreigners and stateless persons; readmission agreements and other national laws.

In 2011 there were created new implementing acts to the abovementioned laws regulating in detail the procedures related to foreigners. Over the next half a year more than 50 implementing acts were prepared. In July 2012 new instructions were also prepared regarding forced return and expulsions and procedures for the handling of detainees came into force. To implement the new regulations specific action has been undertaken aimed at training the SBGSU staff in the implementation of legal procedures related to foreigners and refugees. Overall it was planned to train approx. 70% of SBGSU staff in 2012. For this purpose cooperation was established with IOM-Kiev for the purpose of training aid.

Taking into account the wave of irregular migration on the territory of Ukraine that took place in the early 90s, in 2001 entered into force the Regulation of the President of Ukraine on the fight against irregular migration for the years 2002-2004. Border guards have experienced a reform adapting them to new tasks: from the bodies of a military service they have been transformed to the entities of state authority. A Management Board for Foreigners was created as part of the State Border Service of Ukraine for the coordination and supervision of activities and procedures that involve issues of foreigners. In 2004 appeared the Regulation on the deposition of detainees, which also gave basis for the creation of two types of centers for irregular migrants:

1) centers of temporary residence of foreigners, for people who crossed the border illegally and for people who have committed crimes. Such centers were established in three towns: Łukaczewo, Lviv, Mosciska,

2) special facilities for detainees created by institutions of the State Border Guard Service of Ukraine where a foreigner can stay up to 3 days.

The regulation on the stay of detainees in special facilities specifies in detail the conditions to be met by these facilities, eg. a requirement that one person must have 4 m^2 surface, if a person is sick – 7 m^2. These facilities meet the European standards.

Statistic data received from representatives of the State Border Guard Service of Ukraine related to the amount of rooms for detainees and temporary residence centers indicate that the State Border Service of Ukraine has in its administration 72 special spaces for detainees and 11 temporary residence centers for a total number of 489 persons. These centers are regularly visited by state authorities, the Ombudsman, and NGOs. Experiments in this area have been undertaken from the Polish side while using the financial assistance of the European Union.

Currently the legislative system of Ukraine leaves unresolved the legal issue of minor foreigners. Regulation on the stay of detainees in special facilities determines that a minor can be detained, but within 24 hours is to be passed on to the minor guardianship service. Such person shall also be subject to medical identification of age. This issue lies in the competence of the Institute for Juveniles in the State Migration Service of Ukraine. The experience of the Ukrainian side suggests that the problems of determining the age of a foreign minor mostly concerns the citizens of Afghanistan and Somalia.

On the other hand, adults who are suspected of committing an offense are detained for a period of 72 hours. The same detention period applies to people who have illegally crossed the border and persons who are to be transferred to a neighboring country. According to Ukrainian law, a person is placed in the centre based on the administrative protocol of detention or arrest protocol for committing an offense. Centers are subject to controls and visits by the Ukrainian Prosecutor's Office, IOM, the Commissioner for Human Rights, representatives of NGOs and state authorities. This monitoring are mostly initiated and financed by IOM. Cooperation between IOM

and SBSU is carried out on the basis of an agreement on mutual cooperation between IOM and the State Border Service of Ukraine.

Competences between the institutions are divided according to the scheme that the State Migration Service of Ukraine carries out activities on expulsion, voluntary return, identification of foreigners, readmission, while the State Border Service of Ukraine carries out procedures against foreigners who committed crimes. The procedure for detaining a foreigner includes activities related to the preparation of relevant documents: the protocol of detention of a person, instructions on rights of the person detained, conclusion of a protocol of questioning of a person, providing an interpreter, notifying the public prosecutor (in case of the apprehension for longer than 3 hours) or diplomatic institution (with the exception for situations where a person is applying for refugee status).

The Ukrainian legislation identifies three types of returns of foreigners: voluntary returns, forced returns and forced expulsions.

The issue of voluntary return falls under competences of the State Migration Service of Ukraine, and involve foreigners who have exceeded the period of stay on the territory of Ukraine and shall report the desire to voluntarily leave the country. Decisions on voluntary return are issued for a period of 6 to 60 days. Competence in realizing forced return has the Commander-in-Chief of the Border Guard, a commanding officer of the BG Regional Unit and the head of the Security Service. Forced returns apply to detainees who have violated Ukrainian law. The basis for the forced return (within 30 days) is the Act on Foreigners. If there is a need for organizing forced return under escort, it takes place at the expense of the state treasury. The person receives a stamp in a passport that is a ban on entry into the territory of Ukraine for a period of three years. In relation to forced expulsions only a court has the power to take such a decision following an application by the commanding officer of the BG Regional Unit. A court issues a decision for the time needed to organize the expulsion. Such a person shall be transported to a centre run by the State Migration Service of Ukraine. If within a one-year period no expulsion documents are prepared the person is released from the centre.

The State Migration Service of Ukraine has evolved a long way. In the years 1993-2010 there were several executive bodies that dealt with migration. This resulted in the dispersion of competence, since there was no single authority to coordinate all the activities on migration. In December 2010 administrative reforms were held, which led to the creation of a central authority, the State Migration Service of Ukraine, which resulted in a significant increase in the efficiency of services. SMSU competences relate to:

1) matters of citizenship,
2) issuing migration permits,
3) issuing temporary and permanent residence permits,
4) labor migrations,
5) identification of foreigners,
6) readmission,
7) voluntary returns,
8) refugee status and other forms of international protection,
9) databases (establishment and maintenance),
10) creation of Migration Control Police.

SMSU organizational structure includes departments of: management, finance, complaints, legal issues, international affairs, cooperation with citizens, passport issues and citizenship, refugees and foreigners, information technology. Department of Information Technology SMSU shall secure migration service and its bodies, develop, establish and operate telecommunication systems and introduce measures of information protection.

The main tasks are:

1) participation in the formation of state policy in the sphere of IT,
2) supervision of proper functioning of the SMSU information and communication systems,
3) the introduction and use of information and its protection,
4) implementation of information activities,
5) development of new models of technical and information means,
6) verification of individuals, personal biometrics data,

7) the establishment of the State System of Registration of Persons.

Ukraine already has some informational systems operating within the competences of separate institutions, but the idea is to create a single general system, which will unite all institutions. In addition to alphanumeric data system will contain biometric data, and the users of the system will be the Ministry of Internal Affairs, Ministry of Foreign Affairs, SMSU, which also will serve as system administrator. This project is financed primarily from the state budget and foreign institutions. This project will significantly improve the process of identifying and readmission of persons. Referring to the above, there yet remains the issue of migration service personnel to be prepared for new tasks. The SMSU employs not only people prepared for migration work but also teachers, psychologists, sociologists, social workers and assistants. A concept was established for the Migration Control Police to emerge from the strictly police ranks.

In order to facilitate the organizational changes a national plan of actions for legislative changes and initiatives aimed at establishing a new visa regime was adopted, as well as creation of new security documents having biometric features, and the creation of a centralized citizen identification system. The draft document was submitted to the Verkhovna Rada of Ukraine, which is to lead to its implementation into the national law of Ukraine.

SMSU pursues a number of different projects on migration and readmission, conducts consultations and dialogue with the parties in order to create new or adapt existing readmission agreements, and other matters of foreigners and refugees. It supports the reintegration of foreigners, realizes returns of foreigners and stateless persons to their country of origin, works on the creation of a central database, which would manage migration flows, and works on the expansion of the network of centers for foreigners. Many of the projects are implemented in cooperation with the IOM. Currently, within the framework of SMSU operate two centers of temporary stay for foreigners in Czernigow and Volyn regions.

Within the framework of legislative changes occurring in 2011 a new law on refugees and persons in need of protection came into force and a new

2020 action plan in the field of asylum was adopted. The annual number of received applications for refugee status is approx. 2500. To this end, was created the document “Concept of the State Migration Policy”, which involving matters related to information data bases, demographic and social conditions of development, - legal and social protection of Ukrainian citizens abroad, rights and freedoms, forms of protection, as well as compliance with the law by the foreigners.

A major problem is the lack of a unified database of people registered in Ukraine. Records of individuals are maintained in a paper form. Therefore, the aim is to create an electronic database that would include all persons registered on the territory of Ukraine. Applications for citizenship are now accepted in the bodies of the migration service. Citizenship can be acquired by people of Ukrainian origin. The Law on biometric documents is currently being prepared. The passports are to be equipped with two biometric features – fingerprints and a facial image of the person.

The “Concept of the State Migration Policy” is a strategic document not defining the problem but diagnosing this problem. The demographic crisis, ageing of the population, the outflow of labor force is of great importance in the implementation of the migration policy of Ukraine. The authorities responsible for carrying out migration policy are to develop relevant documents in this regard. Demographic strategies lie in the sphere of competence of the Ministry of social policy. Ukraine should create a normative act regulating the policy of personal outflow from Ukraine.

CONCLUSIONS

Referring to the abovementioned issues it should be noted that a few years after the Readmission Agreements between the EC and Ukraine, the Ukrainian side relatively smoothly implemented this agreement. Ukraine accepted the vast majority of transferred persons, although the number of migrants readmitted from the EU was relatively low. Despite the fact, that the Implementing Protocol to the Agreement still has not been ratified, the accelerated readmission procedure of persons apprehended within 48 hours from the moment of illegal crossing of the state border (in the framework

of which Ukraine accepts most of the readmitted persons) is implemented smoothly and quickly. More problems occur with the standard procedure, due to the lack of computerized databases in Ukraine.

The current development of the political situation in Ukraine does not point to the possibility of a significant increase of people readmitted to this country. There is a noticeable tendency of Ukrainians legalizing a long-term stay in Poland due to visa facilitation and the possibility of undertaking legal employment in Poland.

However, in case of a sharp deterioration of living conditions in Ukraine caused by the socio-economic or political crisis, there might be more frequent attempts to legalize stay in Poland based on a system of providing international protection to foreigners on the territory of Poland.

THE IMPACT OF EU VISA POLICY ON THE MOVEMENT OF PERSONS BETWEEN POLAND AND UKRAINE[1]

STANISŁAW DUBAJ

Ten years ago Poland became a full member of the European Union, and at the end of 2007 entered the Schengen area. From the perspective of this decade, our country became economically stronger, culturally richer – and generally gained much success. Poles have nowadays an unprecedented possibility to move freely within the territory of an integrated Europe, and they consciously enjoy it. Opening up to the west and south, we cannot forget about our closest neighbors from the east, remembering the words of John Paul II: *"Europe has two lungs: one will never breathe freely, if does not use both of them"*[2]. Therefore, for these years, Poland's cooperation with its eastern neighbors, in particular with Ukraine, constantly evolves and takes on new meaning. This is particularly reflected in the eastern Polish borderland (so called "eastern wall"), for the opening of the European space, with assumptions that it will be an opportunity for activation and development of the poor outermost region of our country, however,

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[1] While preparing analytical material used, among others, legal acts, available literature, statistical data of Border Guards and the Ministry of Foreign Affairs. The added value constitutes the analysis of the suggested issues from the point of view of the citizens of Ukraine (in particular section four of the paper). The works on the article have been completed before the dramatic development of events in the east and south of Ukraine, hence problems of intense migratory movement caused by the war are omitted. Currently, hopefully quite temporarily, the perspective of crossing borders should be broadened by persons seeking international protection in Poland (visa not required), but this issue has become actual only after completion of works on this article.

[2] Favorite metaphor of John Paul II. See. Apostolic Letter of Pope John Paul II Euntes in mundum (1988) on the occasion of the Millennium of the Baptism of Kievan Rus – cit. N. Davies, Europa, Krakow 1999 p.1126.

brought some disappointment – it became, despite numerous initiatives, a major barrier for the flow of people and goods with our closest partner in the east.

1. THE RULES GOVERNING THE MOVEMENT OF PERSONS ACROSS THE POLISH-UKRAINIAN BORDER AS AN EU EXTERNAL BORDER

Polish entry into the European Union and adoption of the Schengen *acquis* had a crucial significance in terms of regulations related to the cross-border movement of persons across Polish borders. The opening of the European space created new opportunities for the development of our country, but also brought the dangers of this openness. Along with the accession of Poland to the EU, Poland's eastern border has become at the same time a vital part of the Union border, which gave it a new meaning. Movement of persons across Polish borders – the borders of the EU and the Schengen area – is regulated by the Schengen Borders Code, which the Polish side and the other States bound by the Schengen *acquis*, implemented with effect from 13 October 2006.[3] In terms of the crossing of the border between Poland and Ukraine in personal traffic also maintains a bilateral agreement signed on 30 July 2003 in Kiev, amended by relevant protocol prepared in Warsaw on 30 November 2007.[4] In turn, crossing the Polish border under the local border traffic regime generally is governed by the provisions of the new Act of 12 December 2013 on Foreigners[5], which replaced the amended on 1 January 2009 Act of 13 June 2003 on Foreigners.[6] Detailed rules are speci-

[3] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) – OJ L 105, 13.04.2006.

[4] Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine laying down rules of personal traffic – M.P. of 2003 No. 56, it. 878. Protocol between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on amending the Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine laying down rules of personal traffic, signed in Kiev on 30 July 2003 – M.P. of 2009 No. 37, it. 571.

[5] Act of 12 December 2013 on Foreigners, Journal of Laws of 2013, it. 1650.

[6] "Chapter 2a. Crossing the border under the local border traffic" of the Act of 13 June 2003 on Foreigners – Journal of Laws of 2006, No 234, it.1694 with further changes as amended by

fied in each agreement on local (small) border traffic, concluded by Poland with the neighboring country – including, in the analyzed period with Ukraine, the provisions of a bilateral agreement signed on 28 March 2008 and entered into force on 1 July 2009.[7]

The Schengen Border Code provides that the crossing of external borders is only allowed at crossings established for that purpose. The Code also specifies exceptions when one is legally allowed to cross external borders outside border crossing points or fixed working hours[8]. All Member States shall introduce penalties, in accordance with their national law, for the unauthorized crossing of external border outside border crossing points or at times other than the fixed opening hours. Those penalties shall be effective, proportionate and dissuasive. In practice, most often these are financial penalties.[9]

In the framework of cross-border traffic with Ukraine land border movement of people may be established in the following areas, having the character of an international border crossing point (in alphabetical order): Dorohusk (road and rail crossing), Hrebenne (road and rail crossing – from 04.07.2005 a railway crossing is closed until cancellation), Korczowa (road crossing),

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the Act of 24 October 2008 amending the Act on Aliens Act and other acts – Journal of Laws of 2008, No 216, it.1367.

[7] Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on local border traffic signed in Kiev on 28 March 2008 along with Protocol signed in Warsaw on 22 December 2008 – Journal of Laws of 2009, No 103, it. 858.

[8] For example, on the border with Ukraine, the border can be crossed outside the public crossing points during the annual European Days of Good Neighborhood. The decision in this regard shall take chief border plenipotentiaries of Poland and Ukraine.

[9] For example – who crosses or attempts to cross the border of Poland in violation of law is committing an offense and is liable to a fine (Art. 49a of the Code of offenses – Journal of Laws of 1971, No. 12 it. 114, as amended. One should also be aware that other forms are also a crime, because who in violation of law crosses the boundaries of Poland using violence, threats, tricks or in cooperation with others – is punishable by imprisonment up to 3 years. Who organizes other persons crossing the border of the Republic of Poland in violation of law – is punishable by imprisonment from 6 months to 8 years. who organizes others to cross the Polish border against the rules - is punishable by imprisonment from 6 months to 8 years. Whoever in order to gain financial or personal benefit, enables or facilitates another person staying on the territory of the Republic of Poland in violation with law – is punishable by imprisonment from 3 months to 5 years – (art. 264 § 2 and 3 and art. 264a of the Criminal Code – Journal of Laws of 1997, No. 88 it.553 as amended. In turn, the sanctions imposed by other EU Member States in accordance with national law see – Journal of Laws of EU C 018 of 24 January 2008.

Krościenko (road and rail crossing), Medyka (road, rail and pedestrian crossing), Przemyśl (rail crossing) and Zosin (road – pedristrian crossing)[10]. Encouraging, however, is the fact, that in the near future it is planned to open two already built new border crossings in Dołhobyczów and Budomierz, as well as the fact, that the construction of up to seven new border crossing points available for all travelers is taken into consideration[11].

Each person crossing the external borders, must meet certain conditions - in particular must carry a relevant documents and undergo the procedure of border checks. These procedures are varied, depending on whether they relate to persons enjoying the Community right to move or third-country nationals, but all these procedures should be carried out with full respect for the dignity of the human person. The rule is that all persons shall be subject to a minimum check, whose main aim is to determine (confirm) their identities on the basis of the production or presentation of their travel documents.

"Such a minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents, of the validity of the document authorizing the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting. The minimum check, (...) shall be the rule for persons enjoying the Community right of free movement…"[12]. In addition, in order to reduce the

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[10] Information from the BG.

[11] In addition, working negotiations are also conducted aimed at establishing additional local border crossings available for residents of Polish-Ukrainian border areas in the framework of local border traffic regime. For details see. *Transgraniczny przepływ towarów i osób w Unii Europejskiej*, A. Kuś, M. Kowerski (ed.), Lublin- Zamość 2012 pp. 330-331. Budomierz border crossing point was opened on 2 December 2013. For details see http://www.bieszczadzki.strazgraniczna.pl/?selart12=1#art1 [03.12.2013].

[12] Art. 7 para.2 of Schengen Borders Code. However, on a non-systematic basis, when carrying out minimum checks on persons enjoying the Community right of free movement, border guards may consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health. For the interesting analysis of the occurrence of movement of persons within the EU and the resulting conclusion - see. eg. W. Stankiewicz, *Swoboda przepływu osób na terytorium Unii Europejskiej,* [in]: M. Gołoś, E. Olszewski (ed.), *Politologia i Stosunki Międzynarodowe. Od Wspólnot*

waiting times of persons enjoying the community right to free movement, border crossing points have accordingly marked (adequately to the formulas contained in Annex 3 to the Code) separate lanes designated for them[13].

Third-country nationals (e.g. Ukraine) are obliged to submit to other rules and procedures. They are therefore subject to thorough checks, both at the entrance to the territory of the Member States (e.g. Poland) and at the exit from this territory (naturally, entrance to the territory is treated as a priority). According to art. 5 of the Code, the entry conditions for third-country nationals (for stays not exceeding a three month period) shall be the following: they are in possession of a valid travel document or documents authorizing them to cross the border; they are in possession of a valid visa (except where they hold a valid residence permit)[14] – as referred to in para. 2 of this article; they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence; they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry; they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.

Third-country nationals, who do not fulfill all the entry conditions, shall be refused entry to the territory of the EU. The decision is made by the com-

Europejskich do Unii Europejskiej w 50.rocznicę podpisania traktatów rzymskich, Chełm 2007 No 2, pp.137-153.

[13] In addition, road crossings on the border with Ukraine (and other countries as well) have separately isolated so called green corridors, which can be used by travelers not having any goods to declare. It's worth mentioning that this applies to all travelers - those exercising the right for free movement as well as third country nationals.

[14] This is reflected in Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81 of 21 March 2001.). Lists of the states are constantly analyzed and, depending on the development of the situation in international relations periodically updated – see e.g. amendments of OJ L 141 of 4 June 2005; OJ L 405 of 30 December 2006. In turn, the issue of residence permits is regulated by the Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals - OJ L 157 of 15 June 2002 as amended by Council Regulation (EC) No 380/2008 of 18 April 2008 - OJ L 115 of 29 April 2008. For extended analysis of visa issues see. e.g. S. Dubaj, A. Kuś, P. Witkowski *Zasady i ograniczenia w przepływie osób i towarów w Unii Europejskiej*, Zamość 2008 pp. 36-45.

mander of the Border Guard Regional Unit under national law and has an immediate effect[15].

Despite the failure to meet certain conditions (one or more), third country nationals may exceptionally be allowed to enter the territory of a Member State, when justified by humanitarian reasons, an important national interest or international obligations. The right to entry can even be granted in a situation, when the person is listed in the SIS for the purpose of refusing entry. A Member State issuing an exceptional permit to enter is then obliged to immediately inform other Member States about this fact.

As for the procedure of checks on entry of third country nationals, it includes the following elements: 1) verification of the conditions governing entry (as described above); 2) thorough scrutiny of the travel document for signs of falsification or counterfeiting; 3) examination of the entry and exit stamps on the travel document of the third-country national concerned (in order to verify, that the person has not already exceeded the maximum duration of authorized stay in the territory of the Member States); 4) verification regarding the point of departure and the destination of the third-country national concerned and the purpose of the intended stay, checking if necessary, the corresponding supporting documents[16]; 5) confirmation of pos-

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[15] Detailed rules governing refusal of entry are given in Annex 5 to the Code. The foreigner may appeal the decision of the commanding officer of the BG Regional Unit of refusal to enter the territory of the Republic of Poland to the Commander-in-chief of the Border Guard. An appeal shall not cause implementation of the decision to refuse entry, since it is subject to immediate execution. A foreigner whose appeal has not been accepted by the commanding officer of the BG Regional Unit, may lodge a complaint to the Regional Administrative Court. The judgment of the RAC is not subject to a cassation complaint to the Supreme Administrative Court (hereinafter: SAC). The SAC does not consider complaints with respect to the authorization to cross the border by a foreigner unless the foreigner resides legally in Poland. Refusal of entry means that the foreigner does not enter the territory of the Republic of Poland, thus its complaint cannot be resolved by the SAC - Supreme Administrative Court decision of 25 September 2001 - signature V SA 1548/00. A foreigner who has been refused the right to enter the territory of the Republic of Poland, referring to the decision of the commanding officer of the BG Regional Unit to higher courts, must assert its rights while being outside the territory of Poland.

[16] A list of "supporting documents" which the border guard may request from the third-country national in order to verify the fulfillment of the entry conditions is included in Annex I. These can be e.g. invitations, entry tickets, enrolments to the list of participants, e.g. for journeys undertaken for political, scientific, cultural, sports or religious events or other reasons.

sessing the sufficient means of subsistence[17]; 6) verification that the third-country national concerned, his or her means of transport and the objects he or she is transporting are not likely to jeopardize the public policy, internal security, public health or international relations of any of the Member States.

Thorough checks on exit includes a mandatory verification that the third-country national is in possession of a document which is valid for crossing the border – also thorough scrutiny of the travel document for signs of falsification or counterfeiting and verification that this person is not likely to jeopardize the public policy, internal security, public health or international relations of any of the Member States. In addition, this check can include a visa check, verification that the person has not already exceeded the maximum duration of authorized stay in the territory of the EU and verification of the SIS and national data files (for persons and objects). Both while entering and exiting, travel documents of third-country nationals are subject to stamping (exceptions to this rule mentions art. 10 of the Code), which at any time allows to set the date and place of crossing the border by a third-country national. Travel documents for local border traffic are not subject to stamping while crossing the border. In addition, in accordance with the Schengen Borders Code, in justified cases, passengers may be subjected to a thorough second line check, which is carried out in a different place than the place of check of all people (so called First line)[18].

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[17] In accordance with art. 5 para.3 and art. 34 para.1 lit. c) of the Schengen Border Code, the reference amounts required for the crossing of their external borders are fixed annually by the national authorities. They are different for each Member State, and are evaluated according to the length and purpose of the stay and by reference to the average cost of cheap food and accommodation in a Member State (or the Member States concerned) multiplied by the number of days of stay. The data for each EU Member State see. - OJ C 247 of 13 October 2006. In Poland see applicable from 1 January 2009 Regulation of the Ministry of Interior of 22 December 2008 on the means of subsistence which a foreigner should have while entering the territory of the Republic of Poland and documents confirming the possibility of obtaining such means - OJ of 2008, No 235, it.1611.

[18] This happens in the case of detention of a person as to whom there is reasonable suspicion that he/she committed an offense; bringing to a service room in connection with a suspicion of committing the offense; identification of objects at that may pose a security risk in international traffic. This kind of controls are realized by the same-sex person and can be carried out in the presence of a third person (witness) - at the request of the person subject to inspection.

In specific situations, as a result of exceptional and unforeseen circumstances, border checks at external borders may be temporarily simplified (decision on this matter is taken by the commanding officer of the BG Regional Unit[19]. The simplified control procedure applies to people personally known to the border guard, and when the official knows that they are not included in the SIS and national databases and possess valid documents authorizing them to cross the border. In practice, this applies only to persons who frequently cross the border at the same crossing point.

It should be stressed that the Schengen Borders Code also includes special rules for border checks of certain categories of persons, such as heads of state and members of their delegations, pilots and other crew members, seamen, holders of diplomatic, official or service passports and members of international organizations, cross-border workers and minors[20].

The statistics below shows the flow of people across the Polish-Ukrainian border[21]:

- 2010 – 13035,4 thousand (including 8856 thousand foreigners and 4179,4 thousand Poles; in the framework of Local Border Traffic – 3596,4 just foreigners, Poles did not benefit from LBT regime)
- 2011 – 13870,5 thousand (including 10599,7 thousand foreigners and 3270,8 thousand Poles; in the framework of Local Border Traffic – 5041,6 just foreigners, Poles did not benefit from LBT regime)
- 2012 – 15039,7 thousand (including 12432,1 thousand foreigners and 2607,6 thousand Poles; in the framework of Local Border Traffic – 5969,5 just foreigners, Poles did not benefit from LBT regime)
- First half of 2013 – 7594,3 thousand (including 6467,4 thousand foreigners and 1126,9 thousand Poles; in the framework of Local

[19] It is believed that this exceptional and unforeseen circumstances appear in the situation where unforeseeable events lead to traffic of such intensity that it causes excessive waiting time at the border crossings, and all the resources in terms of staff, facilities and organization have been exhausted. The priority of detailed controls is directed to checks at entry to the EU.

[20] C.f. art. 19 and Annex VII to the Schengen Border Code.

[21] Based on: Ruch graniczny oraz przepływ towarów i usług na zewnętrznej granicy Unii Europejskiej na terenie Polski w 2012 r., Warsaw – Rzeszow 2013 p.66. Data for the first half of 2013 – www.strazgraniczna.pl [17.10.2013]

Border Traffic – 3348,9 just foreigners, Poles did not benefit from LBT regime).

2. THE EU VISA REGIME TOWARDS UKRAINE

Poland, joining the European Union was obliged to introduce a visa requirement for their neighbors who have remained outside the Union. Visas for Ukrainian citizens were introduced on 1 October 2003 while terminating earlier (in May 2003) an agreement on simplified border traffic[22].

The decisive factor was the need of loyal adherence to common EU arrangements, as well as concern for the safety of Polish citizens. The confirmation of this thesis was widely publicized in the media concerning frequent violations of the state border by migrants[23]. The introduction of visas for Poland's closest neighbors on the east, especially for Ukrainian citizens was a huge shock: Ukrainians took it with disbelief, as though Poland was seen as a friend of Ukraine and even as an advocate of the country in its relations with Brussels. Loading Ukrainians with visa obligation was even

[22] On the basis of art. 22 para. 1 in conjunction with art. 15 para. 1 of the Act of 14 April 2000 on international agreements - OJ No. 39 it. 443 Council of Ministers (with regard to Resolution No. 86/2002 of 10 May 2002) at the request of the Minister of Foreign Affairs consented to the termination of the Agreement between the Government of the Polish People's Republic and the Government of the USSR on the simplified procedure of crossing the state border by the citizens living in border areas, signed in Moscow on 14 May 1985 - OJ of 1986 No. 24 it. 115 and authorized the Minister of Foreign Affairs to make the appropriate notifications. Denouncing notes have been transferred on 24 May 2002 to the embassies of Ukraine, Belarus and Russia in Warsaw stating that the agreement expires one year after its termination – on 24 May 2003. In the public perception, the unilateral termination by Poland of agreement on simplified border traffic, did not win supporters for our country on the eastern border. For more see. S. Dubaj, *Transgraniczny przepływ osób w Unii Europejskiej – doświadczenia Polski w latach 2004-2009* [in] *Polska w strukturach Unii Europejskiej. Doświadczenia. Oczekiwania. Wyzwania*, Marczewska, M. Rytko (ed.), Lublin UMCS 2010, pp.173-197.

[23] Referring to the statistics, Polish-Ukrainian border was then the most endangered section of EU land border in terms of illegal migration – M. Dominiak, S. Dubaj, *Przestępczość graniczna zagrożeniem bezpieczeństwa i porządku publicznego – wybrane aspekty praktyczne na przykładzie Nadbużańskiego Oddziału Straży Granicznej* [in:] *Otwarcie granic rynku a perspektywa BYĆ I MIEĆ człowieka oraz narodu*, A. Kuś, P. Witkowski (ed.), Lublin KUL 2006 pp.97-110.

more difficult to accept, since Ukraine unilaterally abolished (on 1 September 2005) visa obligation to citizens of all EU states[24].

Over the last nearly 10 years the situation on the border has changed dramatically, the risk of illegal migration on the Polish-Ukrainian border nowadays is very small, and occasional[25]. Nevertheless the visa requirement for citizens of Ukraine is still maintained. This raises many unpleasant situations, even tensions in Polish-Ukrainian relations. Despite the substantial progressive liberalization of the visa policy of the EU and Poland towards Ukraine[26], visas are the litmus test of inter-state relations, having a very negative impact on overall good neighborly relations. The expectations of Ukrainians are clear – the visa requirement should be abolished. They support themselves with the thesis that if one says that Polish and Ukrainian are "two brothers", then why do not we trust each other? According to the author, you cannot talk here about the lack of good will on Polish side. This is certainly dictated by caution on the part of our country, which first of all

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[24] УКАЗ ПРЕЗИДЕНТА УКРАЇНИ Про встановлення безвізового режиму для громадян держав - членів Європейського Союзу,Швейцарської Конфедерації та Князівства Ліхтенштейн, Документ 1131/2005 від 26.07.2005 - http://zakon4.rada.gov.ua/laws/show/1131/2005 [18.10.2013 r.]. In response to Kiev's actions were immediately abolished fees for national visas for Ukrainians by the Czech Republic, Slovakia and Lithuania.

[25] Most exposed to the risk of illegal migration is the Ukrainian-Slovak border, which makes about 40% of all detentions on the eastern border of the EU – M. Jaroszewicz, Niemożliwe uczynić możliwym. Perspektywy ruchu bezwizowego pomiędzy UE a Wschodnimi Partnerami, Warsaw OSW 2012 p.14. "Ukraine's image in Europe worsened after the publication in early May 2011 report of Europol, in which it was defined as a state that has become one of the main trafficking routes to Europe and where organized crime is growing the fastest. In conclusion it was stated, that the possible introduction of visa-free regime with Ukraine would lead to increased activity of the Ukrainian criminal groups in Europe and the growth of trafficking…" - T. Vogel, *Ukraine slums Europol visa comments* cit: P. Bajda, *Stosunki UE-Ukraina – stan obecny i perspektywy na przyszłość*, 29.12.2011, http://www.omp.org.pl/artykul.php?artykul=254, [access: 24.05.2013].

[26] See. agreement between the European Community and Ukraine of 18 June 2007 on the facilitation of the issuance of visas (entered into force on 01.01.2008) – OJ L 332 of 18.12.2007 and the agreement of 23 July 2012 between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of issuance of visas (entered into force 01.07.2013) – OJ L 168 of 06.20.2013; The ***Action Plan*** towards ***visa*** liberalisation for Ukraine adopted by the European Parliament on 22.11.2010; also – Parlament upraszcza procedury wizowe dla Ukrainy i Mołdawii, Plenary Session 18.04.2013 - www.europarl.europa.eu/news/pl/headlines/ content/20130416STO07364/ [24.05.2013].

has to have in mind liabilities to the Union as a community of states. In fulfilling EU obligations, Poland is trying to alleviate the visa regime towards Ukrainians. Examples can be multiplied: increasing the number of consulates and their staffing; the abolition of fees for national visas[27]; introduction of a possibility of obtaining a visa through visa centers created – particularly useful in distant areas where there is no nearby Polish consular representation; implementing the principles of visa-free local border traffic.

Currently, the general rules for the issue of visas in the EU Member States are regulated by the Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), which entered into force on 5 October 2009 and is implemented since 5 April 2010[28]. This document consists of 58 articles contained in six sections: I – general provisions (art. 1-2); II – airport transit visa (art. 3); III – procedures and conditions for issuing visas (art. 4-36); IV –administrative management and organization (art. 37-47); V - Local Schengen cooperation (art. 48); VI – final provisions (art. 49-58). Thirteen annexes constitute an integral part of the Code.

The Regulation on Union Code on Visas seeks to include in one document (alike the Schengen Border Code) all regulations on the issuance of short-stay and transit visas and the decisions related to refusal, extension, cancellation, revocation and shortening of the period of validity of visas issued. It was developed based on the assumption that a common visa policy is one of the cornerstones for building a common area without internal border controls. Through consolidating and harmonizing the procedures and conditions for issuing visas, improvement of the transparency and clarity of the current law, it is intended to provide a clear legal status of visa policy instruments (so far scattered acts are mostly annexes to the unified Code), and hence its harmonization, guaranteeing equal treatment of all visa applicants. A kind of supplement to the Visa Code is the implementation of consultation procedures (when issuing visas) with the central authorities of

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[27] Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on the abolition of fees for issuing national visas, signed in Przemysl on 6 June 2012 - MP of 2012 it. 643.

[28] OJ L 243 of 15.09.2009.

countries subject to this procedure by means of specially created for this purpose Visa Information System[29].

A very important element in shaping a common visa policy are the agreed by the Member States common lists of third countries whose nationals must be in possession of visas when crossing the external borders (the so-called "black list" or "negative list") and those whose nationals are exempt from this obligation – for stays of up to three months (so-called "white list" or "positive list"). Such lists are listed as annexes (Annex I –d a negative list and Annex II – positive list) to the EU regulatory framework – Council Regulation No 539/2001 of 15 March 2001[30]. The determination of those third countries whose nationals are subject to visa requirement, and those exempt from it, is done by a considered individual assessment of a variety of criteria relating *inter alia* to irregular immigration, public policy and public security and the EU's relations with third countries, including the effects of regional coherence and reciprocity.

Third-country nationals, who are legally residing in the territory of one Member State and want to enter another Member State and, therefore, must have a visa, apply for this document at the consulate of the destination country. Depending on the adopted division criterion, one can distinguish several types of visas and documents having the same value for travel as visa[31]. An important step towards the harmonization of visa policy was the introduction of a uniform format for visa application. It is essential that the

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[29] The legal basis for the establishment of this system is the Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) – OJ L 213 of 15.06.2004. This Regulation also defines the purpose of the VIS, its functions and associated responsibilities, conditions and procedures for the exchange of data between Member States on applications for short-stay visas and related decisions, including the decision on annulment, revocation or extension the visa, in order to facilitate the examination of such applications and the related decisions. This act must be interpreted inseparably with the provisions of the Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) – OJ L 218 of 13.8.2008.

[30] OJ L 81 of 21.03.2001. These lists are constantly analyzed and, depending on developments in international relations periodically updated.

[31] For more see. e.g Kuś A, Kowerski M. (ed.) *Transgraniczny przepływ towarów i osób w Unii Europejskiej*, p. 275-276.

uniform format for visas contains all the necessary information and meets high technical standards, as regards to safeguards against counterfeiting and falsification. It is also designed so that it can be used by all Member States and is recognizable thanks to security features which are visible to the naked eye[32]. Visas issued by the Member States have a uniform format (sticker), which after filling is placed in the travel document or on separate sheets for affixing a visa (art. 27-29 of the Code).

The Visa Code distinguishes and defines precisely the following three kinds[33]:

1) uniform visa (means a visa, which allows the movement, transit and stay on the entire territory of Member States within a maximum of three months in any six-month period from the date of first entry into the territory of the Member States[34]; in order to improve the control authorities actions at the border; defining this category of visa the letters "C" is used with the annotation numbers denoting "the purpose of entry"; issuing this visa is regulated by art. 24 of the Visa Code);
2) visas with limited territorial validity (means a visa, valid up to as uniform visa, but valid for the territory of one or more Member

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[32] Details in this regard are contained in the Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas – OJ L 164 of 14.07.1995. This Regulation lays down only specifications not being confidential, complemented by further specifications, and which must remain secret (they cannot, therefore, be published) to prevent counterfeiting and falsification and which may not include personal data or references to them. Powers to adopt further specifications has the European Commission. They are available only to bodies designated by the Member States as responsible for printing and to persons authorized by a Member State or the Commission. Each Member State shall designate one body having responsibility for printing visas and also gives its name to the Commission and other Member States. In Poland this role is played by the State Security Printing Company. For more information see. S. Dubaj, A. Kuś, P. Witkowski, *Zasady i ograniczenia…*. p. 42. It should also be noted that since 2002 residence permits issued by Member States under their domestic law must also be issued in a uniform format. This provides for the provisions of Council Regulation (EC) No 1030/2002 of 13 June 2002 – OJ L 157 of 15.06.2002 as amended OJ L 115 of 29.04.2008.

[33] Existing types of visas and comprehensive analysis of the visa issues in the EU before the entry into force of the Community Code on Visas – see S. Dubai, A. Kuś, P. Witkowski, *Zasady i ograniczenia…*, pp. 37-39, 42-45.

[34] A stay longer than three months requires a type "D" national visa or residence document of one of the Member States, as referred to in the further part of this subsection.

States but not all Member States, but under the condition that agree to it; to define it is also used letters "C appended with the international symbol of the State in whose territory it is valid, for instance "AT" for the territory of Austria, "PL" for Poland or other way to check the validity of territorial restrictions – details in this regard are contained in Annex VII to the Visa Code and its issuance regulates art. 25);

3) airport transit visa (means a visa valid for transit through the international transit areas of one or more airports of the Member States[35]; for people frequently or regularly engaged in transit valid for a maximum of six months; is issued to citizens of third countries included in the common list – details contains Annex IV to the Visa Code, which is updated on a regular basis by the European Commission at the request of Member States[36]; this visa has a symbol "A"; the issuance is governed by art. 26).

As mentioned above, the stay (over three months) of foreigners from third countries subject to the visa requirement – e.g. the citizens of Ukraine in Poland[37] – is connected with the need to receive either a type "D" national visa or a residence document of one of the Member States (in Poland it is a residence card). Polish visa policy and its specific regulations are stemming directly from membership of our country in the EU and is determined by the applicable EU legislation. The problem of issuing visas to foreigners is regulated, in particular in Chapter IV ("Visas": art. 58-97) of the Act on

[35] Zone such as "closed for access to the inside but open to the outside" designates an area situated in the territory of a Member State, extending between the deck of the aircraft and the position of border control points, which includes the plate and the area of airports. Developed an interesting interpretation of these concepts – see. I. Wróbel, op. cit., p.121. The definition of this zone in Polish national law, see the Act of 13 June 2003 on Foreigners.

[36] Currently the list mentions citizens of 12 countries: Afghanistan, Bangladesh, Democratic Republic of the Congo, Eritrea, Ethiopia, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia, Sri Lanka. This does not apply to citizens of Ukraine.

[37] The new visa facilitation agreement between the EU and Ukraine from 23.07.2012 Although extends visa-free travel for Ukrainian citizens holding biometric service passports, but this provision will come into force only with the start of issuing biometric passports in Ukraine – OJ L 168 of 06.20.2013.

Aliens and issued implementing acts[38]. Generally speaking, Poland issues type C“ and type “A” visas strictly according to the rules of the Community Code on Visas. Long-term visas (stay over three months), marked with the letter “D” are issued to foreigners from third countries in accordance with Polish national law. According to the current practice of all Member States, these visas are issued in the form of a uniform format for visas as defined in Council Regulation (EC) No 1683/95, and are completed in accordance with the relevant provisions of Annex VII to the Community Code on Visas. The period of validity of type “D” visas does not exceed a one year period. If Poland allows the foreigner to stay for a period of more than one year, long-term visa shall be replaced (before the expiry of validity) by a residence permit. A foreigner holding a long-term visa is entitled to travel to other Member States for three months in any six-month period, under the same conditions as the holder of a residence permit. Third-country nationals who do not meet all the conditions but hold a long-term visa of another Member State shall be permitted to enter the territory of other Member States for transit purposes so that they may reach the territory of the Member State which issued the long-term visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit[39].

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[38] In particular, see - Regulation of the Minister of Internal Affairs and Administration of 22 April 2011 on visas for foreigners (entered into force on 31.05.2011) – Journal of Laws of 2011. No. 99 it. 579; Regulation of the Minister of Foreign Affairs of 17 March 2011 on visas and documents confirming the function of heads and members of diplomatic missions, heads of consular posts and members of consular staff of foreign countries and other persons assimilated to them in terms of privileges and immunities under the laws, agreements or commonly established international practice, as well as the status of members of their families, entitling to enter and stay in the territory of the Republic of Poland (entered into force on 04.04.2011) – Journal of Laws of 2011 No. 71 it.378; Regulation of the Minister of Foreign Affairs of 5 December 2007 amending the regulation on consular fees (entered into force on 21.12.2007) – Journal of Laws of 2007 No. 233 it.1718. The current format for visas (see Annex 1 to the abovementioned Regulation of the Minister of Internal Affairs and Administration of 22 April 2011) is valid from the day of our accession to the EU, from 1 May 2004 and fully meets the requirements of Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for this document. The visa sticker is printed on special paper by the National Security Printing Company.

[39] Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC)

While crossing the external borders BG officers are obliged to pay special attention to compliance of destination declared by a foreigner in the process of applying for a visa and during the crossing of borders. Currently, the following symbolic marking of the purpose of issue[40] for Schengen visas ("C") and national visas ("D"), which are placed on the visa sticker (in the line "remarks"): „01" – tourism visa; „2" – visiting family or friends; „3" – participation in sport events; "4" – for business purpose; "5" – for the work purpose in a period not exceeding six months over the next 12 months on the basis of a statement of intention to employ a foreigner registered in the district labor office; "6" – when the visa is issued for the work purpose on the basis of documents other than those referred to in art. 60 para. 1 p. 5 of the Act; "7" – participation in conferences, cultural events; „8" – for the purpose of carrying out the duties by the representatives of the authority of a foreign state or an international organization; "9" – in order to undertake studies of first degree, second degree or uniform master studies, as well as third degree studies; "10" – for the purpose of vocational training; "11" – for the purpose of education or training other than those referred to in art. 60 para. 1 p. 9 and 10 of the Act; "12" – for the teaching purpose; „13" - for the purposes of conducting scientific research or development; "14" – for the purpose of treatment; "15" – for the purpose of reunification with a national of a Member State of the European Union, the Member States of the European Free Trade Association (EFTA) – a party to the Agreement on the European Economic Area or the Swiss Confederation or being with him; "16" – for the purpose of participation in the cultural or educational exchange, humanitarian aid program or summer jobs program, and if the program is governed by an international agreement a party to which Poland, the visa sticker shall also include the name of the program; "17" – for the purpose to arrive to the territory of Poland as a family member of the repatriate; "18" – for the purpose of exercising rights deriving from possessing the Pole's Card; "19" – for the repatriation purpose; "20" – in order to use temporary protection; "21"

No 562/2006 as regards movement of persons with a long-stay visa – OJ L 85 of 31.3.2010.

[40] Cf. Regulation of the Minister of Internal Affairs of 5 May 2014 on visas for foreigners (Journal of Laws of 2014 it. 592).

– for humanitarian reasons, state interest or international obligations; “22” – for the purpose of temporary residence permits for family reunification; “23” – for a purpose other than specified in art. 60 para. 1 p. 1-24 of the Act.

Unfortunately, in everyday life the BG officers quite often deny a citizen of Ukraine the right to enter due to “different purpose of entry than declared when applying for a visa”. Apart from extreme cases, when e.g. the holder of a tourist visa (“D-01”) attempts to enter for commercial or announces he’s going to work (should then possess a type “D” visa with a different symbol than “01”), argued may be the case if the holder of the visa issued for educational or research purposes has right to enter Poland to do shopping or participate in a sporting event. Imperfections of Polish law in this area often hinder the lives of citizens of Ukraine – and conversations with citizens of Ukraine show, that these are not individual cases. According to the available statistics of the BG, annually this situation applies to thousands of foreigners, for instance in 2011 22 047 people were not allowed entry into Poland, in 2010 – 23 521 in 2009 – 26 889 (In total over the years 2009-2011 72,457 foreigners from third countries were returned from the border). Half of them were returned because of lack of a valid visa or residence permit, while another 40% did not have appropriate documentation justifying the purpose and conditions of stay. The largest number of refusals to enter the territory of Poland in the analyzed three years were issued to citizens of Ukraine – 35 339, citizens of Belarus – 13 787, Georgia – 10812 and Russia – 9557.

The urgent talks and negotiations (with the Ukrainian side first and then at the EU level) also requires the issue of changes in the possibility of crossing the border and staying in Poland within the framework of local border traffic of citizens of Ukraine wishing to undertake studies in Polish universities located in the border zone e.g. in Chełm, Jarosław and Przemyśl. At the moment, the existing law does not allow this[41], and yet at the stage of the adoption of Regulation No 1931/2006 the rapporteur

[41] Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention – OJ L 405/1 of 30.12.2006; Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on local border traffic...op. cit.

to the European Parliament mentioned the use of local border traffic for academic reasons[42]. The information provided by the potentially interested persons themselves (numerous discussions of author with students of WSSMiKS in Chełm, Ukrainian citizens permanently residing in the border area of Ukraine) shows that interest in such a facilitated possibility of residence may be quite significant. It is also a very important issue in the situation of deepening demographic decline in the EU and especially in Poland while seeking students from outside the EU.

3. POLISH CONSULAR OFFICES AND VISA OUTSOURCING IN UKRAINE

Ukraine[43] covers an area of over 600 thousand km^2 being almost twice as much as Poland and having a population of almost 10 million inhabitants more than our country, administratively divided into 24 oblasts (the equivalent of Polish voivodeship), two cities with special status (Kiev and Sevastopol) and one autonomous republic (Crimea). In terms of consular support Poland in Ukraine is represented by seven offices: Consular Section of the Polish Embassy in Kiev and six consulates general – in Lviv, Lutsk, Vinnitsa, Kharkov, Odessa and Sevastopol[44]. Individual consular districts are covering:

– Consular Section of the Polish Embassy in Kiev: the city of Kiev, Kiev-, Chernihiv-, Cherkasy- and Kirovohrad Oblasts;

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[42] P. 50 of the opinion.

[43] On 24 August 1991 Verkhovna Rada of the Ukrainian SSR adopted the Act of Independence of Ukraine, which proclaimed full independence of Ukraine. The answer to this fact was the statement by Minister of Foreign Affairs Krzysztof Skubiszewski of 26 August 1991, which provided favorable position of Poland to Ukrainian aspirations for independence and underlined the inalienable right of a country to freely determine their internal and external positions. On 4 January 1992 the two countries have established diplomatic relations and on 18 May 1992 presidents L. Walesa and L. Kravchuk signed the Treaty on good neighborhood, friendship and cooperation – Journal of Laws of 1993 No. 125, it. 573.

[44] The bilateral consular relations are governed in particular by Consular Convention between the Republic of Poland and Ukraine signed in Warsaw on 8 September 1991 (entered into force on 20.01.1994) – Journal of Laws of 1994 No. 60 it. 248. Moreover, in cases not covered by this convention, the provisions of the Vienna Convention of 24 April 1963 on Consular Relations apply – Journal of Laws of 1982 No. 13 it. 99.

- Consulate General of Poland in Lviv: Lviv-, Ternopil-, Zakarpattia-, Iwano-Frankivsk- and Chernivtsi Oblasts;
- Consulate General of Poland in Lutsk: Volyn- and Rivne Oblasts;
- Consulate General of Poland in Vinnitsa: Vinnytsia-, Khmelnytskyi- and Zhytomyr Oblasts;
- Consulate General of Poland in Kharkiv: circuit Kharkiv-, Sumy-, Poltava-, Dnipropetrovsk-, Donetsk- and Luhansk Oblasts;
- Consulate General of Poland in Odessa: Odessa-, Mykolaiv and Kherson Oblasts;
- Consulate General of Poland in Sevastopol: the city of Sevastopol and the Autonomous Republic of Crimea.

The oldest (apart from the one in Kiev) are consulates in Kharkiv and Lviv, which were created back in 1994. Consulate in Kharkiv was established as a completely new one, while the consulate in Lviv took over the base of the contemporary Polish Consular Agency in this city. Currently consulate in Lviv, due to the largest occupancy duties, is housed in two offices operating close to each other. Chronologically looking, in 2003 were created Consulates General of Poland in Lutsk and Odessa, what was related to the introduction on 1 October 2003 the visa requirement for citizens of Ukraine, dictated by the Polish accession to the European Union on 1 May 2004. In turn, in 2010 was created Consulate General in Vinnitsa, and in 2011 – in Sevastopol. In 2013 was planned the establishment of another Consulate General – in Donetsk, the fourth largest city in Ukraine, but the unstable situation in Ukraine makes the implementation of these plans in the near future quite doubtful, despite already purchased building and necessary equipment[45]. Consular office in Donetsk was to relieve consulate in Kharkov, which so far includes six oblasts.

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[45] So far, in the Donetsk region there was a possibility to receive a visa to Greece and the Czech Republic. Consulate of the Czech Republic, in consultation with France and Belgium also issues visas to these countries. This year it is also planned to open the consulate of Germany. For more see *В Донецке можно будет получить визу в Германию и Польшу*, http://www.unian.net/news/539585-v-donetske-mojno-budet-poluchit-vizu-v-germaniyu-i-polshu.html [17.10.2013]

The report prepared by the Ministry of Foreign Affairs states, that *"...in 2012 Polish consular service successfully continued the implementation of friendly policy for issuing visas to citizens of Polish eastern neighbors. This applied both to adapting visa practices to the changing needs and improving the efficiency of the visa process, as well as extending the legal base creating new tools and mechanisms for the extension of passenger traffic. This was accompanied by measures aimed at preventing illegal visa mediations increasing the costs of obtaining a visa, distorting the idea of implemented visa facilitations and discrediting the image of consular service and the results of so called smart visa policy towards the East. In terms of visa procedures, actions focused on further increasing in number of visas issued on the basis of set out in the Community Code on Visas principle of bona fide, with a validity of 1-5 years; facilitating the submission of visa application by the accredited travel agencies operating in the field of organized tourism by deviating from the territoriality requirement for offices use eVouchers, as well as the possibility of obtaining accreditation by the agency in every consular office (regardless of the place of establishment of the travel agency); expanding the use of visa outsourcing for handling passenger traffic, allowing to increase the global visa capacity of consular offices..."*[46].

The authors of the report emphasize that such a policy fosters the creation of pro-European societies of countries in Eastern Europe and corresponds to the interests of Poland and consular service tasks are an integral part of the delivery mechanism of our country's foreign policy towards its eastern neighbors. It is worth noting that the effectiveness of the activities in the area of visas carried out by the Polish consular service has allowed to increase in 2012 the total number of visas issued in Polish consular offices to 1 350 591 visas (an increase of 15% compared with 2011). Most visas (consistently for several years) issued consulates in Ukraine, Belarus and Russia, a total of 1,257 mln. (Growth 16%), which represents over 90% of all visas issued by Poland worldwide. In Ukraine, most of visas issued consulates in Lviv – 334 973, Lutsk – 96 745 and Kiev – 88 966. In turn, in 2011 Polish consular

[46] Raport polskiej służby konsularnej za 2012 rok, the Ministry of Foreign Affairs, Consular Department, Warsaw, June 2013, pp. 17-18.

offices in Ukraine issued 572 037 visas, including Lviv – 286 588, Lutsk – 115 207 and Kiev – 66 875. It is worth noting that since December 2011 in Lviv and Volyn consular district for Ukrainian citizens with permanent residence in one of those two circles were introduced visas specifying the purpose of a trip as a *"shopping" trip*, immediately gaining big interest[47].

Obtaining presented results was possible, among others, thanks to offloading consular posts of the obligations arising from the collection of applications as a result of the introduction of the visa outsourcing[48].

The decision to introduce (in August 2011) mediation mechanism in Ukraine[49]in collecting applications using external service providers, so called outsourcing has a strategic basis and was considered the most optimal solution to improve the functioning of Polish consular service in the visa sphere. Citizens of Ukraine and citizens of other countries having settled stay on Ukrainian territory may apply for a visa outside the consular office, in Centers for Collection Visa Applications (Visa Centers), conducted by the company VFS Global[50]. In Ukraine Visa Centers arose in 14 cities: Kharkiv, Khmelnitskyi, Donetsk, Dnipropetrovsk, Ivano-Frankivsk, Kiev, Lviv, Lutsk, Odessa, Rivne, Sevastopol, Ternopil, Vinnytsia and Zhytomyr.

The consular report for 2012 shows that visa outsourcing in Ukraine works very well. VFS Global has taken over 80% of all visa applications. An extensive network allows access to visa services without having to travel often large distances to the consular offices. At the same waiting time for

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[47] Raport polskiej służby konsularnej za 2011 rok, the Ministry of Foreign Affairs, Consular Department, Warsaw, April 2012 p. 21. Interesting data on travels from Ukraine to Poland for the purpose of shopping see. Ruch graniczny oraz przepływ towarów i usług na zewnętrznej granicy Unii Europejskiej na terenie Polski w 2012 r., Warsaw – Rzeszow 2013, passim.

[48] Legal basis for the government to establish cooperation with an external service provider is art. 40 of the Community Code on Visas – OJ L 243 of 15.09.2009. In turn, the new visa facilitation agreement between the EU and Ukraine of 23.07.2012 formally sanctioned the use of outsourcing companies services – OJ L 168 of 06.20.2013.

[49] Polish consular offices use visa outsourcing also in Russia and Turkey.

[50] The company VFS Global was selected to carry out Polish Visa Centers in a tender procedure. It operates in the visa outsourcing market since 2001 offering its services in 38 countries. In Ukraine this company cooperates with 14 EU Member States. VFS Global charges a fee of 20 euros for its services. This fee is independent of the fees charged by consulates for processing visa applications. More about VFS Global – http://www.vfsglobal.com [17.10.2013].

obtaining a visa was shortened. As a result, in many cases the actual cost of the trips to Poland decreased. The real benefit for consular services (due to outsourcing) rely on increasing the visa bandwidth of consulates, which generally transfers into far greater number of visas issued.

Critical comments related to outsourcing expresses PhD Joanna Fomina from Stefan Batory Foundation – acting, among others, as a coordinator of the project "Eastern Partnership Visa Liberalisation Index". The allegations concern limiting the contact with the consul, poor knowledge of visa regulations by employees of visa centers and the imposition of specific companies providing banking and insurance services. She also emphasizes that "... *the Visa Centers are clearly needed in towns distant from the consulates, but the Ministry of Foreign Affairs should rather provide appropriate funds for the consulates, rather than rely on outsourcing system...*"[51].

Opinions of Ukrainian citizens are extremely divided. As indicated the student of WSSMiKS in Chełm from Ternopil "...*I am very happy that I have the possibility to receive visa in my city. I do not have to travel 200 km. to Lviv twice. Despite I have to pay 20 euro, but I do not have to pay twice for the ticket to Lviv and waste a lot of time*"[52]. On the other hand another respondent "Włóczykij" writes *"It's a DISASTER! A so-called "FREE" visa now costs 20 euros. The consulate threw its own obligation to accept visa applications on a mediator – a private company (from India), for which clients (Ukrainians) pay from their own pockets...*"[53].

4. SURVEY CONDUCTED ON STUDENTS OF WSSMIKS IN CHEŁM - CITIZENS OF UKRAINE

Higher School of International Relations and Social Communication (WSSMiKS) in Chełm is a non-public university, functioning on the

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[51] J. Fomina, *Prywatne centra wizowe zamiast kolejkowej mafii?,* „Biuletyn Migracyjny" No. 39, Warsaw, December 2012, p. 4.

[52] Based on a survey conducted on 27-29 May 2013 by the author with students (citizens of Ukraine) of the Higher School of International Relations and Social Communication in Chełm. Extensive results of a research project are presented in the fourth section.

[53] Original spelling. Extensive post of Internet user "Włóczykij" of 18.07.2012, see http://www.wprost.pl/ar/ 331738,1/Ulatwienia-wizowe-dla-Ukraincow-Unijna-komisarz-mowi-nie/ [16.05.2013].

academic market since 2004 and providing education on the "Political Science" department at the bachelor and masters levels. In the academic year 2012/2013 it had 560 students mostly from Poland, but among them were also 153 from abroad (three from Lithuania, two from Belarus, one from Kazakhstan and 147 from Ukraine). On 27-29 May 2013 the author conducted a short survey research among full-time students – citizens of Ukraine. The study group consisted of 40 people who have studied at that time in the third year of bachelor program or masters studies. Surveys were filled by students present on these days at the classes – no other key for the survey was taken. It should be emphasized that the surveyed students resided in Poland for at least three years – BA degree (some of them were already almost five years – MA degree studies).

Students were asked eight following questions:

You are a student of WSSMiKS in Chełm – a citizen of Ukraine.

1) You're currently in Poland on the basis of:
   a) visas b) residence card?
2) Why did you choose once again (the most important reason):
   a) visa b) residence card?
3) Specific problems that you have encountered applying for the first time for: a) visa b) residence card?
4) Specific problems that you have encountered applying once again for: a) visa b) residence card?
5) You apply for visa in Ukraine:
   a) in consulate office b) using the visa outsourcing of VFB Global?
6) Why did you use visa outsourcing –if applicable?
7) Why do you think the European Union – including Poland – has established and maintains the visa requirement for the citizens of Ukraine?
8) What can (must) Ukraine do so that EU – including Poland – abolishes the visa requirement for Ukrainian citizens?

Anonymous results were as follows:

Ad. 1: You're currently in Poland on the basis of: a) visas b) residence card?

Out of 40 respondents (100%), 31 had visas (77.5%), while 9 had residence cards (22.5%). Students hold national visas "D-10" valid for one year – received residence cards also are valid one year.

Ad. 2 Why did you choose once again (the most important reason): a) visa b) residence card?

Of 31 respondents choosing a visa once again, the main reason for this decision pointed at the financial aspect. Some also pointed to the short waiting period for receiving this document in relation to the waiting time for a residence permit. On the other hand, foreigners legalizing their stay on the basis of residence permit (9 respondents) paid attention to the use of this document when crossing the border and the benefits of this stay (one of the respondents even reasoned from the further perspective – in terms of receiving in future long-term EU-resident status)[54].

Ad. 3 Specific problems that you have encountered applying for the first time for: a) visa b) residence card?

As indicated in the responses, one in four of the 31 persons who have chosen visa did not have any problems. We regret it should be noted, however, that nearly 75% of the respondents confirmed that there had been problems with obtaining this document. The most common problems related to the access to the Polish consulate office and long term for obtaining the document. Particularly worrying were signals from respondents regarding

[54] Detailed answers in the selection of visas were as follows: because it is free (20 people); because I am a student (3); because it is cheaper than residence card (2); quick issuing (2); I had no permanent place of residence and no registration (1); because for me that's better (1); because the card is not very much needed (1); no reason given (1). On the other hand, as a reason for choosing a residence card respondents indicated: it is easier to receive (1 person); studies (1); because it is the best form of residence on Polish territory (1); easier to cross the border (2); they do not put stamps on the border and a passport stays longer (1); because I had to register a car (1); I have more opportunities (1); because for every year of stay I get half a year stay in Poland (1).

not only the incompetence of the officials working at the consulate, but even rude behavior towards visitors[55].

Students who for the first time elected a residence card (9 people), the vast majority (6 persons) claimed that they had not encountered any problems when applying for this document. Mentioned problems (2 persons) related to the bureaucracy – too many complementary documents to be attached to the application. One of the respondents also pointed at too long waiting period for receiving a residence card.

Ad. 4 Specific problems that you have encountered applying once again for: a) visa b) residence card?

When applying once again for a visa, the students themselves already had some practical experience in this area and had the opportunity to confront their previous observations with older students. This can be an explanation to answers of 31 respondents, of which over 60% indicated having no problems with obtaining a visa. Concerning is, however, the repeated complaint of incompetence of officials working at the consulate and their

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[55] On the third question, respondents gave the following detailed answers: there were no problems (8 persons); incorrect certificate according to the consulate in Lutsk (4); very long queues (3); long waiting time for receiving a visa (3); every time we have to bring different documents when applying for visa (2); Internet registration (2); had to pay 20 euros for the service of visa center (2); registration in the queue for a visa (1); problems at the consulate in Lutsk (1); hard to receive, it takes a lot of different documents (1); disinformation in details (1); rude behavior of consulate staff (1); no reply from the workers of the consulate (2). Incomprehensible to the authorities of WSSMiKS in Chełm was the questioning by the Consulate General of Poland in Lutsk, Ukraine of issued over a number of years students certificates that comply with applicable regulations, took place in August 2012. This temporary problem arose when the unexpected dismiss of all visa consuls at that consulate. This issue was extensively discussed in media. See. e.g., MSZ odwołał konsulów z Łucka. Jest śledztwo – http://www.tvn24.pl/wiadomosci-z-kraju,3/msz-odwolal-konsulow-z-lucka-jest-sledztwo, 270328.html [19.10.2013] and Konsulat w Łucku – bezprawie i samowola - http://media. wp.pl/kat,1022943,wid,14826417,wiadomosc.html?ticaid=1118f6 [19.10.2013]. Also: Zapis przebiegu posiedzenia komisji - zaopiniowanie kandydata na stanowisko Konsula Generalnego RP w Łucku, Komisja Łączności z Polakami za Granicą Sejmu RP /No 39/, 19-04-2013 http://www.sejm.gov.pl/sejm7.nsf/biuletyn.xsp?documentId=596CA854211189FF-C1257B560033EC21 [19.10.2013]. The subject of certificates for student was quickly explained and solved the problem immediately, taking into account first of all the good of students.

rude behavior towards young visitors. Some students were also contesting the introduction of visa outsourcing[56]. In contrast, among 9 people who once again applied for a residence card, 8 did not report any problems. Only one person signaled a problem, indicating literally that *"I have to walk or ride around the whole Chełm to collect all sorts of papers"*.

Ad. 5 You apply for visa in Ukraine: a) in consulate office b) using the visa outsourcing of VFB Global?

Out of the 31 visa holders (100%), 17 received visas at consulates (55%), while 14 people used visa outsourcing (45%).

Ad. 6 Why did you use visa outsourcing –if applicable?

The above question met with quite ambivalent responses. Out of 14 persons declaring the use of visa outsourcing, many were satisfied with such assistance (43%) and few people (15%) also used it because they live far from the Polish consulate office. In total, more than half (58%) of respondents expressed a positive opinion from the aid in obtaining a visa (save time and money associated with travel to the consulate). But one cannot ignore another part of critical responses. Disturbing are statements confirming the reluctance of consulate staff to assist students and even requiring the use of services of an outsourcing company[57]. Although the voices of young students carry a degree of subjectivity (especially guided by impatience), they should be taken into account in the analysis, since consulate employee

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[56] 31 persons who have chosen visa granted following detailed response: there were no problems (18); they refused to issue a visa at the consulate and sent me to the visa center (1); incorrect certificate according to the consulate in Lutsk (1); rude employees of the consulate (2); students are ill-treated (2); Online registration and you have to wait for a long time (3); long queue and not working online registration system (2); different conditions for submitted documents (1); unnecessary for me and quite costly outsourcing services in Lutsk (1); you have to pay 20 euros and still had to go to Kiev (1).

[57] The respondents (14 people) gave the following specific answers: because there is no consulate in my place (2 persons); because the Polish consulate refused to issue a visa and ordered to go to the outsourcing company (5); because it's hard to get a visa at the consulate (1); I had to do nothing, I just gave the documents and took back visa (1); in the outsourcing company you receive visa faster than to at the consulate (2); there are no such queues as at the consulate (3).

behavior influences the general public opinion about Poles in the neighboring country.

Ad. 7 Why do you think the European Union – including Poland – has established and maintains the visa requirement for the citizens of Ukraine?

The respondents – young citizens of Ukraine are aware of the distinctiveness of the political systems now in Poland and Ukraine. They realistically assess the international situation, highlighting the fact that the duty of every sovereign country – in this case Poland – is to take care of its borders, political and economic interests. Poland, as a Member of European Union has to take care of both its own interests and the interests of the whole Union. Students regularly crossing the border are keen observers and also recognize the problems associated with cross-border crime and the need to fight this practice. Maintenance of visa requirements for Ukrainian citizens is also considered in the context of a failure by their country to fulfill EU conditions[58].

Ad. 8 What can (must) Ukraine do so that EU – including Poland – abolishes the visa requirement for Ukrainian citizens?

On this question, among the 40 respondents, more than half clearly answered that the most important is for Ukraine to choose a European course and the entry to the EU structures. Several people see the success in the change in power, elections of a new president and return of Yulia Tymoshen-

[58] Of the 40 respondents received answers were (some gave more than one answer): to reduce crime and migration (3); in order to prevent Ukrainian migration to the EU and Poland (8); so that the Union can protect its borders (1); to control border traffic (3); this is the EU external policy – I think it's made to reduce the movement of people from third countries (1); because the life in the EU is better than in Ukraine (1); because this way Polish budget receives money from the visas Ukrainians receive (1); because visa is a document that is quite costly and is a great mean for countries whose consulate issues visas (1); Ukraine has corruption, a lot of crime and smugglers (3); in order not to bring prohibited goods – for customs control (3); price for cigarettes, for products (1); because it's a different country (2); because Ukraine is not in Europe (1); because Ukraine is not in the Union (6); Ukraine does not fulfill the conditions and is not a part of the EU (1); because our states are neighbors (1); the EU needs to do that (1); because Poland is performing the duties of the EU and Ukraine is not a member of EU (1); in order for third countries to have more opportunities in life (1); the answer "do not know" (1); no response (3).

ko to the helm of power. Young Ukrainians also indicate a need for a general organization of the legal system in Ukraine, including in particular the need to fight corruption and the introduction of biometric passports. One of the respondents proposed to introduce visas for Poles going to Ukraine, and one simply believes that the abolition of visas by the European Union – including Poland for citizens of Ukraine simply is now possible[59].

To sum up[60], it should be noted that the young generation of Ukrainian citizens realistically assesses the current situation related to the movement of persons across the Polish Ukrainian border with Poland being a Member State of the European Union and Ukraine as a third country. Students are aware that every country – in this case Poland being in union with other European countries, must take care of its security and economic interests. One of the most effective tools to control migration and cross-border crime is the visa requirement, effectively sorting desirable and undesirable from the point of view of Poland (EU) citizens of other countries – in this case citizens of Ukraine. However, the respondents themselves note that the current EU visa policy, including Poland, is very liberal in relation to citizens of Ukraine, confirming – in today's challenges in the world – the partnership relationship with the eastern neighbor. Ukraine nowadays has no better friend in the EU than Poland. The abolition of the visa requirement for citizens of Ukraine, of course, is real, but probably in some distant future.

[59] Of the 40 respondents received answers were (some gave more than one answer): it must provide better agreements coming into force (1); raise the order in the country (2); to order the judicial system (1); the need to reduce corruption (2); must change and reform policy (2); must enter the EU (16); must choose European direction – to adapt the state legislation to the EU, comply with EU standards (4); needs to change the authorities – the Government (3); elect a new president (2); Yulia Tymoshenko should become a president (1); must have something valuable for the Poland or the EU (1); also introduces visa requirement for Poles (1); introduce compulsory biometric passports (2); controlling people leaving the EU (1); I do not know, I think now this simply is impossible (1); I think this is the task of migration structures (1); firstly of all the roads should be done proper way (2); the answer "do not know" (2); answer "a lot" (1); no reply (2).

[60] The conducted survey corresponds with the subject problems well presented by Dr. Marta Jaroszewicz in the publication of the Centre for Eastern Studies. For details see M. Jaroszewicz, Niemożliwe uczynić możliwym. Perspektywy ruchu bezwizowego pomiędzy UE a wschodnimi partnerami, Punkt Widzenia Nr 27, CES Warsaw, May 2012.

This requires intensive work primarily of the Ukrainian authorities, which must confirm the elected pro-European (pro-EU) direction in its policy, and in implementing existing European Union standards.

SELECTED SCHENGEN LEGAL INSTRUMENTS GOVERNING THE MOVEMENT OF PERSONS ON EXAMPLE OF THE EU BORDER WITH UKRAINE

ANNA SZACHOŃ-PSZENNY

INTRODUCTION

Schengen legal instruments applying at the external borders of the European Union cover the entire *spectrum* of measures regulating the movement of people. In the current political situation they have gained a distinct importance at the border with Ukraine, due to the aim at introducing facilitations for the citizens of this state while ensuring safe functioning of the Schengen area. Therefore, already existing Schengen legal instruments are constantly being developed and new ones are created within the EU secondary law.

This article aims to define and determine the basic tasks of Schengen legal instruments in relation to the "area without borders", which was created within the European Union and the Schengen area. Due to the scope of this article it is impossible to discuss all instruments in detailed way, therefore it focuses on selected instruments that play the main role at the Polish-Ukrainian border. The basis of Schengen legal instruments are the rules on crossing the external borders and related EU policies. Special attention should be paid to the Schengen Information System II (SIS II), functioning for over a year[1] which realizes the idea of the Schengen area, in particular manner. Beside the fact that SIS II governs the movement of persons and goods, it is also the most commonly used by customs and border services.

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[1] Law in the article as of June 30, 2015.

Schengen legal instruments created already at the beginning of the functioning of the Schengen area, in particular the compensatory measures were set up under the Convention implementing to the Schengen Agreement[2] and they are of fundamental importance here. Due to the development of passenger traffic and the deepening of European integration, not less important are the latest instruments and those that are currently in the project phase.

It must be noted that due to the difficult political and economic situation in Ukraine the immigration from Ukraine to the EU is growing steadily. Consequently the EU institutions face a dilemma of regulating such movement of people. EU Member States will be confronted with the need for proper application of the European Union law. Hence a question arises, concerning the sufficiency of the existing Schengen legal instruments. Therefore it is worth to present the most important of them and consider their effectiveness in passenger traffic, with regard to economic and political situation that take place currently in Ukraine. At the same time must be noted the importance of the role of Poland, as a state with the EU's external border with Ukraine.

1. SCHENGEN LEGAL INSTRUMENTS AS THE COMPENSATORY MEASURES DERIVATIVE

There is no fully legal or doctrinal definition of Schengen legal instruments. However, they can be determined by referring to the Schengen Agreement[3] and the Convention implementing the Schengen Agreement, that constitute the basis of the Schengen *acquis*[4], which is an integral part of

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[2] Convention implementing the Schengen Agreement, signed in Schengen on 19 June 1990, between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands (OJ L 239 of 22 September 2000), hereinafter referred to as the Schengen Convention.

[3] Agreement signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239 of 22 September 2000).

[4] The term of the Schengen acquis was set out for the first time in the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty of Amsterdam (OJ C 340 of 10 November 1997). Currently, it is replaced by Protocol No 19 on the Schen-

EU law. It should be noted that legal measures implemented by the Schengen agreements are continually being developed and adapted to the needs and changes in migration flows. Often the political changes cause intensity of these flows and consequently initiate the reforms of Schengen legal instruments.

In general, Schengen legal instruments can be defined as all legal measures relating to the abolition of internal border controls and accompanying enforcement of the checks at external borders. Their establishment is directly linked to the creation of the Schengen area, but also is a consequence of the development of the Schengen *acquis*, in particular within the framework of EU law, as well as the enhanced co-operation between EU and Ukraine.

It should be noted that the notion of Schengen legal instruments is broader than the compensatory measures. At the same time, it must be stressed that the basis for the creation of Schengen legal instruments in their current form, are the measures included in the Schengen Convention. Compensatory measures that have been established under so-called Schengen II[5], arose apart from then Community law, and subsequently, as a part of the Schnegen *acquis* have been incorporated into EU law and as Schengen legal instruments are developing within the EU legal order. The explanation of these concepts requires indicating the relation between the Convention implementing the Schengen Agreement and EU law. Schengen II has corresponded clearly with EU law and emphasized its role of abolishing control of the flow of persons at the common borders and facilitating the transport and movement of goods at those borders[6]. The personal context of Schen-

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gen acquis integrated into the framework of the European Union, annexed to the Lisbon Treaty (OJ C 83 of 30 March 2010). Schengen acquis includes: the Schengen Agreement; Convention implementing the Schengen Agreement, the Final Act and the accompanying joint declarations; Protocols and Agreements of accession to the Treaty of 1985 and to the Implementing Convention of 1990., conducted with Italy, Spain and Portugal, Greece, Austria and Denmark, Finland and Sweden as well as the accompanying Final Acts and declarations; The decisions and declarations adopted by the Executive Committee established by the Implementing Convention, together with the acts adopted for the implementation of the Convention by the organs empowered by the Executive Committee in decision-making.

[5] The term Schengen II is used to determine the Convention implementing the Schengen Agreement, but Schengen I determines the Schengen Agreement.

[6] Preamble of the Schengen Convention.

gen II has been extended to trade-related aspects that are characteristic to the customs union and the internal market. The Single European Act[7] has introduced the notion of the internal market as an area without internal frontiers, within which the free movement of goods, persons, services and capital is ensured. The internal market came into operation since the entry into force of the Treaty of Maastricht in 1993. Next, in 1995 the Schengen Convention entered into force with a purpose to adjust the Schengen area to the requirements of EU law. Schengen II and treaties shared the same assumptions - development of the internal market comprising an area without internal borders[8]. The Preamble of the Schengen Convention concludes that the intention of signatories is the implementation of internal market rules, without prejudice to the measures that have been taken then to implement the provisions of the Treaty establishing the European Community[9]. It should be noted that the provisions of the Lisbon Treaty[10] place emphasis on development of the areas covered by the Schengen *acquis*, in particular the principles and policies related to the abolition of internal border controls and strengthening the checks at external borders. This attitude affects directly relations with third countries, including Ukraine. Therefore the policies governing the movement of foreigners, namely immigration policy, visa and asylum are of significant importance.

Compensatory measures introduced by the Schengen Convention can be defined as measures related to strengthening the freedom of crossing internal borders, that serve to provide a level of safety. Initially, the rules on crossing the external borders were established, as well as common rules on supervision. The signatory states were obliged to provide each other with assistance and to maintain a constant and close cooperation with a view of effective implementation of checks and surveillance[11]. One of the most important compensatory means was the unification of the national policy to-

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[7] SEA has been signed in 1986, entered into force in 1987.
[8] P. Wawrzyk, Polityka Unii Europejskiej w obszarze spraw wewnętrznych i wymiaru sprawiedliwości, Warsaw 2007, p. 46.
[9] Preamble of the Schengen Convention. Currently TEU has been replaced by the TFEU.
[10] See Title V TFUE: The area of freedom, security and justice.
[11] Art. 7 the Schengen Convention. Currently art. 16 of the Schengen Borders Code.

wards foreigners, in particular the harmonization of immigration, visa and asylum policies[12]. So far, in the context of EU-Ukrainian relations, these first two policies mentioned above, have been of crucial importance[13]. Immigration policy can be understood as a set of standards regulating the issues of immigration, which is moving from third countries to Member States, contained in the primary and secondary law of the EU. It includes conditions of entry and residence of immigrants and procedural standards relating to the issuing of visas and residence permits[14]. Thus, the general concept of immigration policy covers also visa policy. Another compensatory measure is the police cooperation and judicial cooperation in criminal matters. The Schengen Information System (SIS) has become the most practical compensatory measure. As the Schengen legal instrument has been developed within the framework of EU law, via transformations and many improvements, to the currently functioning SIS II.

The basic compensatory measures mentioned above have been introduced by the Schengen Convention and incorporated into EU law by the Treaty of Amsterdam[15] in 1999. Since then, they are being intensively developed within the legal and institutional framework of the European Union. Schengen legal instruments can be defined as instruments established on the basis of compensatory measures, after the integration of the Schengen acquis into the legal framework of the EU. Some of them remained in essentially the same shape as in the Schengen Convention, which provisions are currently in the Schengen Borders Code[16]. Moreover, on the basis of the Schengen agreements new legal instruments were created, the most important are:

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[12]For more see: E. Borawska-Kędzierska, K. Strąk, Przestrzeń wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej. Polityka wizowa, azylowa i imigracyjna, Warsaw 2009.
[13] Due to the conflict in Ukraine in 2014 and the annexation of the Crimea by the Russian Federation, the number of submitted applications for refugee status is growing rapidly in Poland and other EU Member States.
[14] For more see: I. Wróbel, Wspólnotowe prawo imigracyjne, Warsaw 2008, p. 81 - 82.
[15]The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ EC C 340 of 10 November 1997).
[16]Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006, establishing a community code on the rules governing the movement of persons across borders (Schengen Borders Code), (OJ EU L 2009/02/24 as amended), hereinafter referred to as SBC.

the aforementioned SIS II together with the agency eu-LISA, a local border traffic, FRONTEX together with EUROSUR. As a result of the reforms of the Schengen area, a temporary reintroduction of checks at internal borders were extended and new rules were developed, on evaluating and verifying the application of the Schengen acquis. The first of these instruments is virtually irrelevant to the border between the EU and Ukraine, the second one, may indirectly affect passenger traffic. New legal instruments are planned, inter alia, RTP (registered traveler system) and EES (entry/exit system)[17], and the efforts to introduce a visa-free travel between the EU and Ukraine which is of particular importance for passenger traffic. At this point, must be stressed, the Polish efforts to promote the liberalization of the EU visa policy towards Ukraine, made particularly within the framework of the Eastern Partnership, culminating in the signing of an association agreement.

The most important compensatory measure, which has also become Schengen legal instrument in form virtually unchanged from the Schengen Convention, are the rules on crossing external borders. It is the instrument that most directly relates to the regulations on passenger traffic at the EU border with Ukraine. It should be discussed for a better explanation specific instruments concerning this frontier, which are local border traffic and in the longer term perspective, visa-free travel[18].

2. THE RULES ON CROSSING THE EU-UKRAINIAN BORDER

The rules on crossing external borders apply uniformly to all Member States of the Schengen area and the EU[19]. These rules were developed along with the creation of the Schengen area, then have been expanded in the

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[17] EC proposal: Regulation of the EP and of the Council amending Regulation EC No 562/2006 on the application of entry/exit system (EES) and a Registered Traveller Programme (RTP), Brussels 28 February 2013. COM 2013/096.

[18] Visa-free travel to the EU at border with Ukraine is still in the project phase. However, due to the political situation in Ukraine ongoing efforts to enter it. More on the issue further in article.

[19] The Schengen area consists of almost all EU countries, except the United Kingdom and Ireland. Currently Cyprus, Romania, Bulgaria and Croatia apply for the membership of the Schengen area (accessed after the Amsterdam Treaty, and therefore with the obligation to integrate fully with the Schengen acquis). In addition the Schengen area includes also non-EU countries: Norway, Iceland, Switzerland and Liechtenstein.

Schengen Convention and finally incorporated into the EU law. Currently rules relating to all internal and external borders, including the border between the EU and Ukraine. It should be noted that this frontier in the years 2004-2007 was merely the EU external border, but since 2007 is also the external border of the Schengen area. It should be stressed that even before the accession to the EU, Poland was obliged by the EU law to introduce visas for Ukrainians in 2003, which had a significant impact on passenger traffic at the Polish-Ukrainian border[20], which further became the EU-Ukrainian border. In this context, starting with the regulations of the Schengen Convention, is a need to analyze the rules related to crossing this border.

The Polish-Ukrainian border became the eastern external border of the EU on 1 May 2004. Since then, completely new rules on its crossing were introduced. This border gained the greater importance after the accession of Poland to the Schengen area on 21 December 2007, when the border with Ukraine has became an external border of the Schengen area. As a result, the so-called Schengen regime was applied, which governs the rules on crossing border and types of possessed visas, but also stays of Ukrainians on the Polish territory and the whole Schengen area.

The Schengen Convention, provides the division into internal and external borders, which subsequently has been incorporated into the Schengen Borders Code. It provides rules governing the movement of persons across the EU borders, and clearly confirms that the abolition of border controls at internal borders is the Union's objective, concerning the creation of an area without internal frontiers[21]. Therefore, the division into internal and external borders is the same in the European Union as well as the Schengen area. According to the SBC, the EU-Ukrainian border as an external border is also the external border of all EU Member States[22]. The concept of external borders means all those boundaries that are not internal borders[23],

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[20] Due to the scope of article and its subject matter, rules on crossing the Ukrainian-Polish border before 2003 will be skipped, because they were governed by the national law of Poland and Ukraine and international agreements between these two countries.

[21] Preamble SBC.

[22] Art. 2 para.2 SBC.

[23] Art. 1 SBC.

the common land borders of States - signatories, their airports intended for internal flights and sea ports intended for regular ferry connections exclusively „from" or „to" another port on their territories, without stopping at any ports outside those territories[24].

Changes in the rules on crossing the border between the EU and Ukraine should be considered in the context of the Polish road towards membership of the EU and the Schengen area. The preparation of Poland for accession to the Schengen area had already started at the stage of negotiations on the accession to the EU, that concerned inter alia: preparation of the eastern border to perform the function of an external border[25] and to involve in the SIS[26]. This is a consequence of the Treaty of Amsterdam, specifically due to the Act of Accession, which provides that from the date of accession of the new Member States, they are bound to apply the provisions of the Schengen *acquis* in the form as incorporated into the framework of the European Union by the Schengen Protocol, and acts building upon it[27]. An action plan concerning the implementation of the Schengen *acquis*[28] had been drawn up for each of the new Member States. The special task was addressed to Poland, in the form of adjustment of the Polish-Ukrainian border to perform the function of an external border of the EU and the Schengen area. This border has become a strategic EU border, which is provided by the fact that it is the longest section of the external border

[24] Art. 1 SBC.

[25] For more see: A. Maksimczuk, L. Sidorowicz, *Perspektywa Układu z Schengen na wschodniej granicy Polski. Implikacje ekonomiczne dla województwa podlaskiego*, [in:] F. Bocian (ed.), *Podlasie – determinanty wzrostu*, Białystok 2002, p. 63 and futher; R. Rybicki, Schengen i Polska, [in:] W. Czapliński (ed.), *Droga Polski do Unii Europejskiej*, Warsaw 2002.

[26] For more see: A. Hebda, P. Hofman, *Przygotowanie organów administracji publicznej do współpracy z Systemem Informacyjnym Schengen – budowa Polskiego Komponentu SIS,* [in:] B. Radzikowska-Kryśczak, A. Sadownik (ed.), *Polska w strefie Schengen. Refleksje po pierwszym roku członkowstwa*, Warsaw 2008, p. 24 and further.

[27] Article 3 para.1 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Polish Republic, the Republic of Slovenia and the Slovak Republic and the adjustments in the Treaties constituting the basis of the European Union (OJ L 236 of 23 September 2003), hereinafter referred to as the Act of Accession.

[28] Ang. Schengen Action Plan.

guarded by a single Member State. However, the common responsibility for the protection of the external borders is one of the cornerstones when it comes to maintaining security in the Schengen area[29], so the other Member States shall be jointly and severally liable to provide Poland with the necessary assistance in this regard. Due to the development and tightening of the external border, the so-called Schengern model was adopted. It is a kind of assumption of an ideal situation where majority of the external border crossing of people and goods are legal, according to the declared purpose. In order to prevent infringements of the Schengen model, a number of investments have been made, especially concerning the construction or expansion of border crossings, including those with Ukraine and development of the infrastructure for migration services[30].

As a consequence, there was a need for strengthening the cooperation between law enforcement services, especially police, border guards and customs authorities[31], bearing in mind the fact that borders are open for all, so not only law-abiding citizens will enjoy the right of free movement but also offenders may appear at borders. Development of best practices and joint trainings had measurable impact on better preparation of the officers of customs, police and border to carry out their duties. To ensure the proper implementation of the EU requirements in the functioning of the external border, the essential element in the functioning of the Customs Service and Border Guard is to cooperate with the corresponding services of the neighboring countries of Eastern Europe. It does not concern only fast and efficient service at the border crossings, but especially combating cross-border crime. Without effective cooperation with the services of Ukraine, the practical implementation of the EU standards of customs control would not be pos-

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[29] M. Droździkowska, *Schengen z perspektywy polskich doświadczeń*, [in:] B. Radzikowska-Kryś-czak, A. Sadownik, *Polska w strefie Schengen. Refleksje po pierwszym roku członkostwa*, Warsaw 2008, p. 10.

[30] A. Szachoń-Pszenny, *Acquis Schengen a granice wewnętrzne i zewnętrzne w Unii Europejskiej*, Poznań 2011, p. 225-228.

[31] *More on consequences of Polish accession into the Schengen area*, see: M. Zdanowicz (ed.), *Polska w Schengen*, Białystok 2009.

sible[32]. Hence, the only effective cooperation of Ukraine and other Eastern European countries with the countries of the European Union in combating threats emerging at the external border may contribute to facilitate the free movement of persons[33]. Such requirements arise from the dualistic international environment of Poland. It is caused by the fact that on the one hand the eastern border of Poland is an external EU and Schengen border, but on the other hand, Poland is located virtually between Eastern and Western Europe. The right to freedom of movement is not only one of the fundamental European freedoms, but mainly the fundamental principle connected with the human freedom[34]. The greater liberalization of the rules on movement of persons at the EU-Ukrainian border depends on the enforcement of its safety towards illegal immigrants and those who pose a security threat[35].

The process of Polish efforts towards the EU membership and the Schengen area had a very significant impact on the visa regulations with Ukraine. Changes in visa policy that have started before the Polish accession to the EU, demanded the introduction of the visa requirement for citizens of all countries from the so-called blacklist, including Ukrainians. Poland introduced visas with Ukraine on 1 October 2003[36], as the last country among those applying for EU membership and at the same time made efforts to minimize the negative consequences of this obligation. Visas were issued free of charge, Poland has also introduced multiple-entry and long-term visas, refused the obligation to present an invitation by those applying for a visa and made investments in the expansion of consular offices in Ukraine.

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[32] P. Witkowski, *Wspólna polityka celna a ochrona zewnętrznej granicy Unii Europejskiej*, [in:] A. Kuś, P. Witkowski (ed..), *Otwarcie granic rynku a perspektywa „Być i mieć" człowieka oraz narodu*, Lublin 2006, p. 94.

[33] A Szachoń, *Prawo do swobodnego przemieszczania się a kontrola przekraczania granic zewnętrznych Unii Europejskiej*, [in:] W. Gizicki, A. Podraza (ed.), *Granica Polski i Ukrainy: bariera czy szansa współpracy?*, Lublin 2008, p. 30.

[34] For more see: A. Szachoń, *Zagrożenia związane z przeniesieniem kontroli na granice zewnętrzne Unii Europejskiej*, [in:] A. Kuś, P. Witkowski (ed.), op. cit., p. 142 and further.

[35] A. Szachoń-Pszenny, *Acquis Schengen*…, p. 229.

[36] The introduction of visas for citizens of Ukraine, Belarus and Russia derives from the Council Regulation 539/2001 of 15 March 2001., listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81 of 21 March 2001).

Polish efforts, however, have not avoided the negative consequences of the introduction of visas for Ukrainians, inter alia: decline in passenger traffic on Polish-Ukrainian border, or financial consequences for Ukrainian entrepreneurs. Nevertheless, it has been a short phenomenon, because the visa order in the years 2003 - 2007 proved to be relatively liberal. The revolutionary change in the EU-Ukrainian relations concerning visas, was the Polish accession to the Schengen area. The introduction of Schengen visas provides a right of entry into the entire Schengen area within a limited period of time. Compared to the visa regulations before 2007, Schengen visa[37] has replaced a national short stay visa. Contrary to previous visas, a fee is charged and the stay in the Schengen area requires sufficient means of subsistence for each day of a stay as well as valid health insurance. Moreover, obtaining Schengen visas is associated with more restrictive conditions than previously issued visas. This caused numerous protests of Ukrainians against the new visa policy, as well as concerns of Ukrainians, relating to a new iron curtain which the EU cut itself from "poor, backward and unstable eastern neighbor" [38].

Visa policy is one of the most important Schengen legal instruments. The breakthrough in shaping the new realities in terms of passenger traffic at the Polish eastern border, was the date of 1 October 2003, so not the date of Polish accession to the EU[39]. Ukraine has introduced the principle of visa-free crossing of its border by Polish citizens and citizens of other EU Member States as the only one of the EU's eastern neighbors and therefore expects the same. Poland is consistently making efforts towards visa-free travel for Ukrainians, but this is dependent on the provisions of the EU law, strictly binding Poland. These efforts resulted in many positive effects in terms of visa simplification inter alia: shortened period of processing on visa applications[40], negotiated lower visa fees for Ukraine[41], and several catego-

[37] More on Schengen visas later in article.

[38] M. Trojanowska-Strzęboszewska, *Reżim wizowy Schengen na granicy polsko-ukraińskiej,* Institute of Public Affairs, Analysis and Opinions, 83/2008, p. 2-3.

[39] S. Dubaj, *Przepływ osób w Unii Europejskiej,* [in:] S. Dubaj, A. Kuś, P. Witkowski, *Zasady i ograniczenia w przepływie osób i towarów w Unii Europejskiej,* Zamość 2008, p. 46.

[40] In general, the visa applications are processed within no more than 10 days.

[41] Fees for all kind of visas in case of Ukrainians - 35 EUR. For more see: V. Motyl, *Umowy między Ukrainą a Unią Europejską o uproszczeniu reżimu wizowego oraz o readmisji,* [in:] A. Kuś,

ries of Ukrainian citizens[42] receive visas free of charge[43]. Nevertheless, the visa requirements are still too restrictive and bureaucratic, but mostly too expensive for an ordinary citizen of Ukraine[44].

Fundamental functions of the border remained unchanged at the external borders with third countries which, in relation with Ukraine is mostly land border on the Bug river. The Schengen Convention has established uniform rules on checks at external borders, in particular the so-called compensatory measures, which aim to compensate a specific security deficit that arose as a result of the abolition of controls at internal borders. Harmonisation of checks standards at external borders requires sustained cooperation between Member States, due to the fact that these boundaries have become a guarantee of security of the EU and the Schengen area. The abolition of internal borders controls and the guarantee of full implementation of European freedoms must be secured by proper protection of external borders. Therefore it can be stated that the abolition of checks at internal borders resulted in a doubling of controls at the external borders[45].

3. SCHENGEN LEGAL INSTRUMENTS GOVERNING EU-UKRAINE VISA RELATIONS

Rules on crossing the external borders as a basic legal instrument of the Schengen area are supplemented by equally important visa regulations. They were included in the Schengen Convention and complement the immigration policy towards foreigners. With regard to Ukraine this connection is unbreakable because, as already mentioned citizens of Ukraine are included on the so-called visa black list.

In accordance with the provisions of the Schengen Convention, a foreigner is any person, other than a national of a Member State of the Euro-

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T. Sieniow (ed.), *Układ z Schengen. Szanse i zagrożenia dla transgranicznej współpracy Polski i Ukrainy*, Lublin 2007, p. 31, 39.

[42] For ex ample, Ukrainians having close relatives lawfully resident in Poland, diplomats, pupils, students, teachers, academics, pensioners, etc., S. Dubaj, op. cit., p. 49.

[43] More on Schengen visas and rules on its issuing for Ukrainian, see article: S. Dubaj in the publication cited above.

[44] A. Szachoń-Pszenny, *Acquis Schengen*…, p. 281-283.

[45] Ibidem, p. 33.

pean Union[46]. Such term of foreigner implies that the regime on crossing the external borders of the Schengen area was *de facto* intended as the EU's one[47]. On the basis of the EU law, the definition of „a foreigner" is replaced by the „third country national"[48], which is a difference in terminology only, because these terms are semantically identical[49]. The EU law has introduced an obligation to possess visas for the particular group of third-country nationals, which, along with the extension of the Schengen area, have become at the same time, Schengen visas for Ukrainians, called as uniform visas or short-term ones. Introduction of uniform visas to the entire Schengen area, next to national visas, provided the significant simplification relating to the freedom of movement within the EU. The provisions of the Schengen Convention concerning visas are being replaced by the Community Code on Visas[50]. Foreigners holding Schengen visas, legally entered the territory of the Schengen signatory state, may move freely within the territory of any other state of this area, during the period of validity of their visas, provided that they fulfill the entry conditions[51].

Proceeding towards foreigners has been harmonised due to the integration of the Schengen area and the EU, and thus having common external borders. The adoption of a uniform visa policy increases the safety of Member States of the EU and the Schengen area. In case of Ukrainians arriving to the Schengen area for a period of stay not exceeding 3 months (in the 6-month reference period) the Border Guard checks if they possess a valid document authorizing them to cross the border, along with a visa. In addition, they are required to document the purpose and conditions of the intended stay and check whether the foreigner has a sufficient means of subsistence, both for the period of the intended stay and for the return to their country of ori-

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[46] Art. 1of the Schengen Convention.
[47] W. Czapliński – comments on art. 40 TUE (currently art. 20 TUE), [in:] C. Mik, W. Czapliński, *Traktat o Unii Europejskiej. Komentarz,* Warsaw 2005, p. 314.
[48] For more see: I. Wróbel, *Status prawny obywatela państwa trzeciego w Unii Europejskiej,* Warsaw 2007.
[49] A. Szachoń-Pszenny, *Acquis Schengen…*, p. 46.
[50] Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009, establishing a Community Code on Visas (Visa Code), (OJ L 243 September 2009).
[51] Art. 19 of the Schengen Convention.

gin[52]. Third-country nationals, having the right of residence in the territory of a Member State, on the basis of the fulfilled conditions, are guaranteed the right to move freely within the territory of other Member States. Foreigners entering the territory of the Schengen States are granted two distinct types of visas: short-term (Schengen) and long term (domestic). Short-term visas valid for the entire Schengen area are issued for a period of 3 months and entitle to one or more entries, provided that neither, the length of a continuous stay nor the total length of successive visits, exceeds three months within any 6-month period, calculated from the date of first entry. Schengen visas are issued by Member States consular offices and diplomatic missions. The period of validity of the travel document cannot be shorter than the period of a visa validity and no visa shall be affixed to a travel document that has expired in any Member State. If a travel document is valid only in the territory of one or several countries of the Schengen area, visa affixed is valid only within those territories[53].Visas for a period exceeding three months are domestic visas and entitle also to transit through the territories of the other Schengen states in order to reach the territory of the State which issued the visa, unless the holders do not meet the general conditions on entry[54]. After entering the Schengen area, foreigners holding valid residence permits or a temporary residence permit issued by another State of the area, they should immediately go into its territory[55]. All control activities towards foreigners are taken with the respect to the human dignity[56] contained in regulations of international law and constitutional traditions of the Member States[57].

Ukrainian citizens, who meet the above requirements and hold Schengen visas, are guaranteed the similar right to freedom of movement as granted to nationals of the Member States. In addition, each Schengen state has the right to extend the stay of a foreigner on its territory on the exceptional circumstances or in accordance with a bilateral agreement concluded before

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[52] Art. 5 of the Schengen Convention.
[53] Art. 10-14 of the Schengen Convention.
[54] Art. 18 of the Schengen Convention.
[55] Art. 23 para.2 of the Schengen Convention.
[56] See art. 6 para. 1 of the Schengen Borders Code.
[57] A. Szachoń-Pszenny, *Acquis Schengen*…, p. 52-54.

the entry into force of the Schengen Convention, beyond the period of three months. In addition, each state of the Schengen area has the right to extend the stay of a foreigner on its territory in exceptional circumstances or in accordance with a bilateral agreement concluded before the entry into force of the Implementing Convention, beyond the period of three months[58].

It should be noted that Poland has introduced facilitations for Ukrainians in this regard by abolishing the fee for issuing domestic visas. The expression of liberalization of the visa regime was the Polish-Ukrainian agreement signed between the Government of the Polish Republic and the Cabinet of Ministers of Ukraine on abolition of fees for issuing domestic visas. The agreement entered into force on 15 September 2012 and resulted in lack of fees for visas to stay from 3 months to 1 year for Ukrainians. The abolition of visa fees is the next step, after signing an agreement on local border traffic in 2008[59], on the way towards visa liberalization for Ukraine, as a country that has been affected significantly by the changes in the functioning of the Polish-Ukrainian border after Polish accession to the European Union, and later to the Schengen area[60].

Ukrainians, who have legally entered Poland on the basis of Schengen visas, should comply with respect of the Polish legal order within it territory[61]. This obligations covers also foreigners residening in the territory of a signatory state who enter the territory of another Schengen state[62]. Third-country nationals who are not eligible for short stays in the Schengen area or are not

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[58] Art. 10 of the Schengen Convention.

[59] Agreement between the Government of the Polish Republic and the Cabinet of Ministers of Ukraine on rules governing local border traffic, signed in Kiev in 28 March 2008 along with Protocol drawn up in Warsaw on 22 December 2008. (OJ of 2009. No. 103 pos. 858), hereinafter referred to as LBT agreement. In addition, see. - The Act of 6 March 2009 on ratification of the Agreement between the Government of the Polish Republic and the Cabinet of Ministers of Ukraine on local border traffic (OJ No 103, item. 858) and the Government announcement of 20 June 2009 on the binding force of the Agreement between the Government of the Polish Republic and the Cabinet of Ministers of Ukraine on rules governing local border traffic (OJ No 103, item. 859). More on this topic further in article.

[60] On the basis of information available at websites: www.lwow.msz.gov.pl and www.emn.gov.pl [access: 1 June 2014].

[61] These obligations are determined by national law at the discretion of a particular EU Member States and the Schengen area.

[62] Art. 22 of the Schengen Convention.

fulfilling these conditions any longer, they should immediately leave the territory of the Schengen area. If they have not left the territory of a Schengen state voluntarily or it can be assumed that they will do so, they must be expelled from the territory of the Schengen area, in accordance with national law. The same procedure is applied in cases when immediate departure is required for reasons of national security or public order[63]. The practical protection of these principles is provided by the functioning of the Schengen Information System, that controls the movements of foreigners who have committed an offense against order and security in the Schengen area[64].

4. THE SCHENGEN INFORMATION SYSTEM II AS AN EXAMPLE OF INSTRUMENT REINFORCING THE SECURITY OF THE EU BORDER WITH UKRAINE

EU-Ukrainian border and the entire eastern land border of the EU, unlike other external borders, is strictly connected with a number of new challenges. The most serious of these relate to the problem of so-called "soft security" associated with illegal immigration and smuggling, particularly organized crime. The Schengen Information System has become a very effective support in combating this threat, now expanded and improved as the SIS II. It is one of the most important compensatory measures and perhaps the most developed instrument since the Schengen Convention. The Schengen Information System applies the provisions of the Schengen Convention relating to the movement of persons within the Schengen area, as well as goods that come along with them, including means of transport. Its purpose is to maintain order and public security, including the national security on the territory of the Schengen area. The provisions of the Schengen Convention regarding the SIS has been replaced by a regulation[65] and a decision[66]

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[63] Art. 22 para. 1-3 of the Schengen Convention.

[64] A. Szachoń-Pszenny, *Acquis Schengen…*, p.53 i 70-71.

[65] Regulation No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II), (OJ L 38 of 28 December 2006), hereinafter referred to as the SIS II Regulation.

[66] Council decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), (OJ L 205 of 07 August 2007), hereinafter referred to as Decision on the SIS II.

on the establishment, operation and use of the Schengen Information System II (SIS II). Establishment of the SIS II was associated primarily with the needs of the extended Schengen area.

The second generation Schengen Information System was launched on April 9 2013[67]. It is an improved and expanded version of SIS I and temporarily functioning transitional arrangements. It contains more data on persons and objects that allows for better cooperation of border guards, customs and police, and thus increase safety in the EU. The system operates continuously - 7 days a week, 24 hours a day and is based on an extensive computer system of information exchange between Member States. Technical improvement of the SIS II is to be a five times higher capacity and the ability to support a greater number of Member States[68]. The operational management of the SIS II, since 9 May 2013, was entrusted to the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA)[69].

The SIS II gathers information about wanted persons, missing or being subjected to supervision, as well as information about items lost, misappropriated or stolen[70]. Alerts concern mainly foreigners, exchange of supplementary information and additional data for the purpose of refusing entry or stay in the territory of the Member States[71]. Consequently, people who are trying to cross the EU-Ukrainian border illegally or carrying prohibited goods, eg. moving by stolen car, are apprehended quicker and more effectively. The SIS II enhances security not only on the Polish border, but also all Schengen states. The system also includes alerts for new categories of data on objects and documents, and creates links between alerts, eg. between

[67]It has been launched on the basis of: Council decision 2013/157/EU of 7 March 2013 fixing the date of application of Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II), (OJ L 87 of 27 March 2013).

[68] Ultimately, the SIS II is prepared for the 30 Member States.

[69] Regulation 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and jus (OJ L 286 of 1 November 2011).

[70] Eg. means of transport, identity documents - filled with promissory notes or recorded banknotes.

[71] Art. 3 of the SIS II Regulation.

the offender and search object. Information on people has been extended to biometric data (photographs and fingerprints). The second generation Schengen Information System has been improved by the ability to enter additional data, for example such alerts can be entered as: "armed", "aggressive", "fugitive"[72], and also gives the reason of entering into the SIS II and the action to be taken against a person and links to other alerts entered in the system. This information is directed primarily to the bodies responsible for control and protection of the border, at the Polish section of the EU-Ukrainian border to the Border Guard and Customs Service. The right to use the SIS II database also entitles other national authorities responsible for ensuring security in different dimensions and at different levels, with particular emphasis on safety of the free movement of persons and goods within the EU. In Poland these are (in addition to those mentioned above): police, courts, prosecutors, and Head of the Office for Foreigners[73]. Therefore, it can be stated, that the SIS II concerns securing of the external borders from smuggling and illegal immigration, but also to relating to the security of the entire Schengen area[74].

The SIS II consists of three basic components[75]: the C-SIS II, central system (consisting of a uniform national interface NI-SIS and the CS-SIS - a technical support function containing the database); N-SIS II, national systems in each Member State and the communication infrastructure between CS-SIS and NI-SIS. This infrastructure allows the transfer of the SIS II data by a dedicated encrypted virtual network and exchanged between SIRENE[76]. Function C-SIS II comprises the data register and ensures standardization of data registers of particular national departments by provid-

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[72] Art. 20 of the SIS II Regulation.
[73] Art. 3-5 of the SIS II Regulation.
[74] A. Szachoń-Pszenny, *Uruchomienie Systemu Informacyjnego Schengen drugiej generacji w 2013 r. jako wzmocnienie bezpieczeństwa swobodnego przepływu osób i towarów,* Monitor Prawa Celnego i Podatkowego 5/2013, p. 191.
[75] Art. 4 para.1 of the SIS II Regulation.
[76] Commission decision 2010/261/EU of 4 may 2010 on the security plan for central SIS II and the communication infrastructure(OJ L 112 of 05 May2010). Practical principles of SIRENE determines the Sirene Manual, which is a set of guidelines describing in details the rules and procedures of bilateral or multilateral exchange of supplementary information.

ing them electronically. Each Member State is responsible for construction, operation and maintenance its N-SIS II and connecting it to NI-SIS. Border and customs services while performing controls, use a computer processing of data, including personal data, descriptions of people, biometrics and descriptions of the items. Officers have the right to use these data to carry out duties and during checks may obtain information about whether the controlled person is registered in the system and who entered the information and what measures need to be taken[77]. In the framework of the SIS II, national competent authorities entered alerts on persons for the purpose of refusing entry or stay in the Schengen territory[78]. The basis for such alert is the decision taken on an individual assessment, made by the competent administrative authorities or courts, in accordance with the procedural rules set out in the law of the Member States. If such a decision is based on a threat to public policy, public security or to national security which may be posed by the presence of a foreigner in the territory of a Member State shall be entered into the SIS II[79]. Alerts in the SIS II for the purpose of refusing entry or stay in the Schengen territory refer not only to convicted foreigners, but also those suspected to have committed serious offenses. These alerts also apply to foreigners with reasonable grounds to believe that they intend to commit such acts in the Schengen area. Additionally, they are accompanied by a prohibition on entry or eventually a prohibition on residence[80].

The second generation Schengen Information System has been built on a common technical platform accompanying by the Visa Information System (VIS)[81], which aims to ensure the exchange of information on issued

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[77] P. Wawrzyk, *Porozumienia z Schengen w systemie Bezpieczeństwa Wewnętrznego Unii Europejskiej*, [in:] K. Wojtaszczyk (ed.), *Bezpieczeństwo Polski w perspektywie członkostwa w Unii Europejskiej*, Warsaw 2002, p. 55.

[78] Art. 24 of the SIS II Regulation.

[79] Art. 24 of the SIS II Regulation.

[80] A. Szachoń-Pszenny, *Uruchomienie Systemu…*, p.193 and further.

[81] The legal basis for the establishment of the VIS is Council Decision 2004/512/EC of 8 June 2004 on the establishment of the Visa Information System (VIS), (OJ L 213 of 15 June 2004), and the implememtation of the objectives of this Decision is the Regulation of the European Parliament and Council Regulation No 767/2008 of 9 July 2008 concerning the Visa information System (VIS) and the exchange of data between Member States on short-stay visas (Regulation on VIS) OJ L 218 of 13 August 2008. The Visa Information System was launched on 11 October 2011.

visas and those seeking their release, between Schengen signatories. The Visa Information System is built like SIS II and the information exchange between the central system and the national systems allows for verification of applications by consular offices abroad and the exchange of the data on visas. Thus, it makes a measurable contribution to improvement of the management of the common visa policy in the EU, which results directly in increased level of security of EU citizens. In addition, VIS supports efforts to combat illegal trade in visas, illegal immigration and terrorist threats, while causes also a positive effect on speeding up procedures for issuing visas to persons traveling in good faith. This last aspect is particularly important for Ukraine[82]. The Visa Information System and the SIS II are some of the practical and technical legal instruments guaranteeing the security of the Schengen border between the EU and Ukraine.

In practice the second generation Schengen Information System is useful particularly at the EU border with Ukraine. Important role in handling alerts in the SIS II lies on the Polish officers of the Customs Service and Border Guard because, as already stated, their duties are carried out mainly at the eastern external border of the EU and the Schengen area. Dual function of the Polish-Ukrainian border which is one of the longest external borders and its legal crossing, determines the security of all Schengen states, especially those that do not have external borders[83].

Actions on strengthening the security of the eastern border are also undertaken by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)[84] and the European Border SurveillancSystem (EUROSUR)[85]

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[82] S. Dubaj, *Przepływ osób w Unii Europejskiej*, [in:] S. Dubaj, A. Kuś, P. Witkowski, *Zasady i ograniczenia w przepływie osób i towarów w Unii Europejskiej*, Zamość 2008, p. 53 - 54.

[83] A. Szachoń-Pszenny, *Uruchomienie Systemu…*, p. 199.

[84] Regulation No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX),OJ EU L 304 of 22 November 2011, hereinafter referred to as FRONTEX Regulation.

[85] Regulation No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ EU L 295 of 06 November 2013, hereinafter referred to as EUROSUR Regulation.

formed recently within its framework. These are one of the latest legal instruments of Schengen. In 2011 FRONTEX has been provided with a new mandate as a result of reforms initiated by the so-called Arab Spring, which caused a massive influx of illegal immigrants into the EU. In order to avoid such situations, powers of the Agency were expanded, including measures for better protection of the external borders, which also affects the EU-Ukrainian border. FRONTEX is involved in facilitating and improving the efficiency of the application of existing and future measures of the EU on management of external borders[86]. EUROSUR is one of such measures, which began functioning from 2 December 2013. The main goal is to establish a common framework for the exchange of information and cooperation between Member States and the Agency, to improve situational awareness and increase the capacity to respond at the external borders. EUROSUR aims at detecting and combating illegal immigration and cross-border crime and their prevention, as well as contributing to protect and save the lives of migrants[87]. In terms of passenger traffic at the border between the EU and Ukraine, EUROSUR contributes to monitoring land borders and detecting and combating illegal immigration[88]. EUROSUR as a common framework of information exchange, is designed similar to the SIS II, which is also a Schengen instrument designed to serve the exchange of information. The task of EUROSUR is to reduce the number of illegal immigrants who manage to enter the EU as well as improving internal security by preventing cross-border crime such as human trafficking and drug smuggling. Therefore, EUROSUR will constitute a new policy instrument, improving cooperation and systematic exchange of information on external borders between Member States and FRONTEX[89]. Cooperation within the framework of FRONTEX and EUROSUR affects application of new Schnegen instruments at the EU – Ukraine border[90].

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[86] Art. 1 para. 2 of FRONTEX Regulation.
[87] Art. 1of FRONTEX Regulation.
[88] Art. 2 of EUROSUR Regulation.
[89] Preambule of EUROSUR Regulation.
[90] For more see: A. Szachoń-Pszenny, *Zmiany prawne w zarządzaniu granicami Unii Europejskiej i strefy Schengen w 2011 roku – część II,* Monitor Prawa Celnego i Podatkowego 3/2012, p.111-114.

5. SCHENGEN LEGAL INSTRUMENTS LIBERALIZING MOVEMENT OF PERSONS AT THE EU BORDER WITH UKRAINE

Schengen legal instruments are intended not only to ensure the safety of an "area without borders", although, of course it is a primary goal. In a broader aspect, their function is the regulation of passenger flows, which in the dimension of the free movement of persons affects EU citizens and foreigners fulfilling the conditions of stay in the Schengen area. It may seem to be difficult to see, due to the fact that during the enlargement process of the EU and Schengen area, most of the actions have been taken in the field of management of external borders referred to the issue of security, with a very low reference to the impact of these changes on the functioning of Ukrainian citizens, especially border communities[91]. In this context, the concept of Schengen legal instruments liberalizing movement of persons should be understood as all the principles simplifying and facilitating crossing external borders. With regard to the EU-Ukrainian border they also derived from the Eastern Partnership (EaP), which is an important element of the European Neighbourhood Policy (ENP).

The European Union cooperates with the countries situated along the eastern external border and this collaboration takes place in three dimensions. The first is the dimension of relations with Eastern Europe as the entire area, the second, is the dimension of relations with individual countries, including Ukraine, and the third, is a multilateral cooperation within regions[92]. These forms of cooperation are expressed by the European Neighbourhood Policy[93], which aims to support close cooperation in policy and culture as well as security cooperation between the EU and third countries[94]. Within the framework of the European Neighbourhood Policy, the EU grants privileged position to third countries, in foreign policy and

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[91] W. Matejko, *Wyzwania transgraniczne państw obszaru Schengen – jakość funkcjonowania przejść granicznych na zewnętrznych granicach Unii Europejskiej,* [in:] T. Kapuśniak, K. Fedorowicz, M. Gołoś (ed.), *Białoruś, Mołdawia i Ukraina wobec wyzwań współczesnego świata*, Lublin 2009, p. 125.
[92] A. Moraczewska, *Transformacja funkcji granic Polski*, Lublin 2008, p. 234.
[93] For more see: J. Maliszewska-Nienartowicz, *Europejska Polityka Sąsiedztwa: cele i instrumenty*, Sprawy Międzynarodowe 3/2007, p. 64 and further.
[94] P. Świeżak, *Europejska Polityka Sąsiedztwa. Bilans funkcjonowania na przykładzie Ukrainy,* Bezpieczeństwo Narodowe 3-4/2007, p. 121 - 122.

economic integration. In longer term perspective, ENP assumes the establishment of a free trade area and participation in other freedoms of the internal market. The European Neighbourhood Policy obligates the contracting states to carry out political and socio-economic reforms[95]. The cooperation covers the EU-Ukrainian border, comes also from the European Security Strategy, which indicates that the European Union should strive to build security also in its neighborhood, mostly at the east of the EU, and therefore cross-border cooperation is essential[96]. The European Security Strategy and the ENP aimed at improving the Union's relations with Ukraine, broadly, the dimension of international cooperation between countries of Eastern and Western Europe. The security of the EU-Ukraine border is currently one of the fundamental problems of the European Union[97].

Eastern Partnership, as one of the key elements of the ENP, constitutes the latest stage in the evolution of the EU policy towards Eastern Europe. It began on 7 May 2009, on the basis of declaration announced at the inaugural summit of the Eastern Partnership in Prague[98]. The Eastern Partnership was established on the basis of the Polish-Swedish project emphasis on deepening development of bilateral cooperation. Increased cooperation in the sphere of immigration policy shall take place within framework of the EaP, which in log term perspective aims to create a visa-free travel regime in bilateral relations with selected countries. This matter is particularly important in relation towards Ukraine[99].

Precisely, one of the most important aspects of the EaP is the promotion of citizens mobility and visa liberalization in a secure environment. The EaP is to be demonstrated, through agreements on visa facilitation and readmission agreements. The actions towards liberalization of the visa regime shall

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[95] A. Moraczewska, op. cit., p. 244.

[96] R. Wlazło, *Europejska Agencja Obrony jako instrument rozwoju zdolności UE w latach 2003-2006,* Warsaw 2006, p. 8.

[97] A. Szachoń-Pszenny, *Acquis Schnegen…*, p. 200 i 280-281.

[98] The Council of the European Union, Joint Declaration of the Eastern Partnership Summit in Prague, Brussels, 7 May 2009., 8435/09 (Presse 78), hereinafter referred to as EaP.

[99] M. Słowikowski, *Współczesna odsłona polityki Unii Europejskiej wobec Białorusi, Mołdawii i Ukrainy. Koncepcje, narzędzia i perspektywy*, [in:] T. Kapuśniak, K. Fedorowicz, M. Gołoś (ed.), *Białoruś, Mołdawia i Ukraina…*, Lublin 2009, p. 208.

be taken gradually, in line with the global approach to EU migration, until full visa liberalization, as a long term goal, provided that all the conditions for well-managed and secure mobility are fulfilled[100]. The establishment of the EaP is to accelerate the implementation of the idea of democracy and prosperity, bringing lasting and tangible benefits to citizens of all participating countries[101]. Such a benefit for Ukrainian citizens, especially residents of the border area, is local border traffic (LBT), which is also included within the achievements of the EaP. Local border traffic has affected the EU-Ukraine trade relations and improved the trade conditions for trade and investments, that is also one of the dimensions of the EaP[102].

Local border traffic with Ukraine derogates from the general rules of traffic crossing the Schengen area[103]. Hence, it can be called Schengen legal instrument in broad meaning and resulting from the EaP at the same time. Placing Ukraine in the so-called visa black list of countries whose nationals are obligated to possess visas wishing to enter EU territory, adversely affected cross-border relations. Local border traffic established between Poland and Ukraine under the provisions of Regulation 1931/2006[104] and the intergovernmental agreement on rules governing local border traffic[105], assumed the abolition of the visa requirement for a large group of

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[100] Point 7 of the EaP.
[101] Point 21 of the EaP.
[102] Point 5 of the EaP.
[103] Art. 35 SBC concerning local border traffic, provides that the SBC is without prejudice to EU rules on local border traffic and to existing bilateral agreements on local border traffic.
[104] Regulation No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (OJ L 405 of 30 December 2006, as amended and the correction in the Journal., OJ EU L 29 of 3 February 2007), entered into force on 19 January 2007, hereinafter referred to as Regulation LBT.
[105] Agreement between the Government of the Polish Republic and the Cabinet of Ministers of Ukraine on local border traffic, signed in Kiev on 28 March 2008, along with the Protocol drawn up in Warsaw on 22 December 2008. (OJ of 2009 No 103 pos. 858), hereinafter referred to as agreement on LBT. In addition, see. - The Act of 6 March 2009, on ratification of the Agreement between the Government of the Polish Republic and the Cabinet of Ministers of Ukraine on local border traffic (OJ No 103, item. 858) and the Government announcement of 20 June 2009, on the binding force of the Agreement between Polish Government of the Republic and the Cabinet of Ministers of Ukraine on local border traffic (OJ No 103, item. 859).

persons, residing (not just citizens of Ukraine) the area of Ukraine bordering the European Union. That contributes to mitigate passenger traffic problems. The term local border traffic means, the regular crossing of the external land border by the residents of border area in order to stay in this area, due to the social, cultural, family reasons or justified economic ones, for a period not exceeding three months[106].

In accordance with the provisions of Regulation on LBT, the border area means an area that extends no more than 30 kilometers from the border. However, if any part of the local administrative districts lies between 30 and 50 km from the border line, it shall be considered as part of the border area[107]. Poland sought to maximize the range of the border area with Ukraine and such efforts were taken towards the European Commission. In 2007, Poland has proposed the extension of the border area until Lviv. Polish efforts have been taken under the provisions of the Schengen Borders Code allow for introduction of local border traffic, while ensuring that SBC is without prejudice to bilateral agreements on local border traffic[108]. Unfortunately, the European Commission did not share the position of Poland and consequently did not apply a special solution that was worked out towards Russia and the Kaliningrad Oblast (fully covered by the LBT).

Signing the agreement on local border traffic with Ukraine is an expression of compliance with the principles of the EaP. The agreement emphasized that the European Union recognized the abolition of the visa obligation for citizens of Ukraine for the long-term goal[109]. Meanwhile, by derogation from the obligation to hold a visa for Ukrainians, residents of the border area, cross the external border of the EU and the Schengen area on simplified rules, in connection with the authorization to cross the border within LBT. Moreover, it has been allowed to create special border crossing points open only to border residents, or reserve specific lanes to border residents at ordinary border crossing points[110]. LBT permit entitles one to multiple

[106] Art. 3 point 3 and art. 5 of LBT Regulation.
[107] Art. 3 point 2 of LBT Regulation.
[108] Art. 35 of SBC in fine.
[109] Preambule of the LBT agreement.
[110] Art. 15 para.1 of LBT Regulation.

border crossings and stay in the border area, for the purpose specified in the contract for a maximum period of stay up to 90 days within a period of six months from the date of first entry. In practice, the Ukrainians regularly traveling the external land border under the LBT are generally known to officers of the Border Guard and are subjected to only random checks. Entry and exit stamps shall not be affixed in LBT permit, hence any abuse of the local border traffic shall be subjected to the sanctions under national law[111]. LBT agreement with Ukraine is the realization of the principles developed in the EU law after the introduction of the Schengen *acquis.* According to these principles local border traffic is a mitigation of the requirements related to the tightening of border controls at the external borders. Local border traffic is a certain compensation of stringent requirements of the Schengen regime towards the citizens of Ukraine[112].

So far, LBT agreement with Ukraine has proven to be the most effective instrument in the field of visa liberalization. It has a positive impact on the dynamics of passenger traffic between the Schengen states, especially Poland and Ukraine, with slight negative consequences (a very few number of cases of the regime infringements). Although, the EU-Ukrainian movement of people did not reach the level from 2007, local border traffic contributed to a significant improvement in the statistics of crossing the border with Ukraine[113].

It should be mentioned that within the EaP is foreseen the signing of new association agreement that will include, inter alia, provisions concerning the establishment of deep and comprehensive free trade areas[114]. One of the dimensions of achieving this goal towards Ukraine was the signing on 27 June 2014 the economic part of the association agreement, whose aim is to create such a free trade area (DCFTA). First, the political part of the association agreement EU - Ukraine has been signed on 21

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[111] The LBT permit should include clearly stated information that its holder is not authorized to leave the border area and that any abuse shall be subject to penalties.
[112] A. Szachoń-Pszenny, *Acquis Schnegen…*, p. 285-290. For more see article: A. Parol in hereby publication.
[113] Point 5 EaP.
[114] Point 5 EaP.

March 2014. Complete signing of the association agreement is an expression of support for the new Ukrainian leadership while escalating conflict with Russia and the political crisis. The agreement on free trade area with Ukraine, which are the most important part of the association agreement, will open the EU market for Ukraine, inter alia, through the progressive abolition of customs duties. Rapprochement with the EU in terms of trade should also result in the liberalization of passenger traffic between the EU-Ukrainian border. Successful completion of the adoption of the association agreement, including agreements on deepening the free trade area will also lead to the abolition of visas for Ukrainians traveling to the EU, which still is a very important issue for Ukraine[115].

The Presidents of the European Commission and European Council confirmed after the signing of the economic part of the association agreement, that this is only the beginning of closer cooperation between the EU and Ukraine. The Union's aim is to integrate the economies of Ukraine, Georgia and Moldova[116]into the EU market. Visa-free travel will bring closer the EU and East European society[117]. Within the Polish foreign policy is it said that by mid-2015, Ukraine may sign an agreement on visa-free travel with the EU[118]. The EC Delegation in Kiev reported that Ukraine has completed the first stage of preparations for the possibility of visa-free travel for its citizens to the EU countries. It was confirmed that Ukraine have already met all the political, legal and institutional conditions for visa-free travel. The second phase was launched, during which representatives of the European Commission will carried out on-the-spot checks, to control how the new laws and procedures are being implemented. Ukrainian authorities responsible for border traffic[119] will be controlled as well.

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[115] O. Bashuk Hepburn, T. Kuzio, *Poland and Sweden towards Ukraine,* http://www.euractiv.pl/analizy/polska-i-szwecja-wobec-ukrainy-005071 of 30 April 2014.

[116] These countries have signed association agreements with the EU at the same time.

[117] On the basis of information available at website: http://polish.ruvr.ru/news/2014_06_27/Rompuy-obieca-Ukrainie-i-Gruzji-zniesienie-wiz-z-UE-0785/ [access: 27 June 2014].

[118] www.rp.pl/artykul/1110322.html of 16 May 2014.

[119] www.kresy.pl/wydarzenia,ukraina?zobacz/ukraincy-blizej-ruchu-bezwizowego# of 27 May 201.

The institution of visa-free travel has a special character. In the EU policy, the logic of the security and concerns about influx of illegal migrants still dominates the desire to open up towards foreigners from these countries, filling the contents of EaP and build more friendly relations with the eastern partners. Thus, in the EU approach on visa issues in the East, the paradigm of security policy predominates over foreign policy[120].

The abolition of visas for Ukrainians might be the legal instrument constituting the mitigation of the Schengen regime, it would derive also from objectives of EaP, which is a progressive liberalization of the visa regime, as well as the challenge of a political nature. Observing very tense Russian-Ukrainian relations, it seems that the introduction of visa-free travel would be a facilitation for Ukrainians, but also the support of pro-European aspirations of Ukraine and already started economic reforms towards the EU. Ukraine is on the next stage of the implementation of the Visa Action Plans(PD)[121] aiming at complete removal of visa requirements. It should be noted that visa-free travel does not mean that Ukrainians entering the Schengen area will be able to move around without any time limitations. Since the establishment of the Schengen area, it has been stated that entry of a foreigner into the territory of any Member State means the entry into the entire Schengen area for a maximum period of 3 months in a 6-month period of reference[122]. The visa waiver would facilitate the entry significantly and also open up more opportunities for Ukrainians when it comes to short stays in the Schengen area.

More broadly, Schengen legal instruments also include the abolition of Poland's long-term visa fees for Ukrainians and the reduction of fees for Schengen visas[123]. However, this is broader understanding of legal instruments of the Schengen area, in this case dependent on the findings adopted by national authorities. The agreement with Ukraine on the facilitation of

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[120] M. Jaroszewicz, op.cit., p. 22.
[121] Visa Action Plans for Ukraine to liberalize the visa regime were adopted at the 14th EU-Ukraine summit, which took place on 22 November 2010.
[122] Art. 5 para. 1 lit a i b of the Schengen Convention and art. 5 para.1 lit.a and b of the Schengen Borders Code.
[123] From 60 to 35 EUR.

issuance of visas[124], introduced in 2003, is a new Schengen legal instrument of a liberalizing character. These facilitations extended categories of applicants exempt from the fees for issuing visas . In fact, it is the result of Polish efforts for greater liberalization of the visa regime with Ukraine, and does not derive directly from the Schengen *acquis*. We must express the hope that Polish efforts to liberalize visa policy will finally allow for the introduction of visa-free travel by the EU towards the citizens of Ukraine.

CONCLUSION

Analysis of the chosen legal instruments on the EU-Ukrainian border, indicates the division into those strengthening security at the border and liberalizing border traffic. In terms of external borders, especially the eastern border, these can be described as similar instruments in the strict sense and broad sense. The category of Schengen legal instruments in the strict sense includes those deriving directly from the Schengen Convention, and arose as compensatory measures aiming at fulfillment of the security deficits after the abolition of checks at internal borders. Hence, these instruments are to reinforce security at external borders, including the strategic border of the EU and the Schengen area which is the eastern border, especially EU-Ukrainian border, currently most important in political terms. The most crucial Schengen legal instruments in the strict sense are: the rules governing the crossing of external borders, immigration and visa policy, SIS II, FRONTEX, along with EUROSUR-I.

Schengen legal instruments in the broad sense do not derive directly from the Schengen Convention and do not aim at providing security of "area without borders" as a main objective. These instruments have been created on the basis of the EU legal acts developing the Schengen *acquis*, but primary have been caused by the political declarations promoting various forms of cooperation with third countries. Thus, their aim is the liberalization of the Schengen regime by facilitating the movement of people. Regarding to the

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[124] Agreement between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of issuance of visas, OJ L 168 of 20 June 2013.

EU-Ukrainian border, the most important instrument is the existing local border traffic and the proposed visa-free travel. The first one, is an exception from the rules on crossing the external borders with legal basis in SBC, the second is likely to be the result of an association agreement with Ukraine. The original basis for their creation, as opposed to instruments in the strict sense, were not the acts forming the core of the Schengen *acquis,* or even created on the basis of secondary legislation. The European Neighbourhood Policy has become a pretext for discussion on the creation of these instruments, along with the EaP, that is the most important concerning the EU-Ukrainian border. It influenced the signing of an association agreement with Ukraine, which one of the consequences is to be visa-free travel, embodying the liberalization of the EU visa policy towards Ukrainians.

As can be observed, the reason for creation of Schengen legal instruments in the broader sense have become political events, caused by Ukraine's efforts towards EU integration. Such regularity can be observed also in relation to instruments in the strict sense, where the most recent are the result of legal reform of the Schengen area, which initiated political events in North Africa and the consequent massive influx of irregular immigrants. Due to the recent situation in Ukraine, it is expected that the EU will take actions towards the liberalization of visa traffic on the EU border with Ukraine.

Responding to the question from the introduction, whether existing Schengen legal instruments prove sufficient, a few solutions can be indicated, that allow for a positive diagnosis. The answer would be slightly easier without such a complicated political situation in Ukraine, which must be taken into account as resulted in the need for reforms at the Ukrainian side as well as the EU. This is primarily the liberalization of passenger traffic rules at the EU-Ukrainian border, while taking into account security of the "area without borders". In this context, the role of Poland should be emphasized, because the efficiency of actions taken by Polish border and customs service determines the security of other countries of the Schengen area. Thus, the protection of Member States from smuggling and illegal immigration, means the proper protection of the EU border with Ukraine. In this context, maximizing security of the "area without borders" must be

provided while ensuring the greatest possible openness to the citizens of Ukraine and other eastern neighbors of the EU. The introduction of visa-free travel would be a specific legal instrument of the Schengen towards Ukraine. It will change the border's nature, between the EU and Ukraine, to more open, which confirms the integration aspirations of Ukraine into the EU. In addition, this instrument would constitute a new liberalizing measure, next to the existing and well functioning Schengen legal instruments at the border.

Experience of effective cooperation between Ukrainian customs and border services and those of the Member States represented by the Polish Customs Service and Border Guards, inter alia, during the UEFA Euro 2012, should bring closer the perspective of visa-free travel with Ukraine. Within the cooperation at the external borders with third countries, proposed already in the Schengen Convention, common border checks have been launched (so-called one stop) on the Polish side, performed by Polish and Ukrainian services. This solution has accelerated the checks significantly. Moreover, one stop allowed the connection of border checks and customs clearance in one place, by officers of both types of services. In practice, these solutions have proved useful, without disturbing the security of the EU and the Schengen area. The permanent re-establishment of these solutions might be worthwhile to consider by EU institutions, which at the same time would mean the implementation of the idea of EaP concerning better cooperation between the EU and third countries. With regard to the EU-Ukrainian border, the intermediate solution would to be a temporary visa-free travel, which is particularly needed in the current political situation in Ukraine. At the same time, it would allow to check whether such solution does not violate the principles of functioning of the Schengen area. Moreover, a good solution would be to introduce systems of RTP and EES, included in the project so-called smart borders. RTP and EES systems would state the instruments liberalizing passenger traffic at the border between the EU and Ukraine, although promoting the movement of persons "in good faith" as instruments guaranteeing the security of the EU and the Schengen area. Consequently, development of Schengen legal instruments at the EU-

Ukrainian border, should seek a compromise between the free movement of persons, including visa-free travel for Ukrainians, and security of the "area without borders".

LOCAL BORDER TRAFFIC AS AN INSTRUMENT OF IMPLEMENTING THE AREA OF FREEDOM, SECURITY AND JUSTICE - THE EXAMPLE OF AGREEMENTS WITH UKRAINE

AGNIESZKA PAROL

INTRODUCTION

Local border traffic (LBT), also known as simplified, local or tourist traffic[1], includes the freedom of movement of natural persons across the common borders of the States-parties to the agreement. Implemented as a part of the LBT, freedom of movement stems from social and family ties or specific tourist conditions[2]. The European Union law introduces a legal definition in the LBT Regulation[3], which states that Local border traffic is "the regular crossing of an external land border by border residents in order to stay in a border area, for example for social, cultural or substantiated economic reasons, or for family reasons, for a period not exceeding the time limit laid down in this Regulation"[4].

Local border traffic next to visa policy, in particular simplified visa regime and visa free regime, is an important instrument for exercising the freedom of movement of persons who do not enjoy the rights deriving from

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[1] Terms local, small and minor can be used interchangeably.

[2] Sometimes also economic reasons appear, for example: possession of land on both sides of the border. A rich cognitive source on shaping the LBT agreements by European countries is a document of the European Commission (EC): Developing the acquis on 'Local Border Traffic', SEC (2002) 947.

[3] Art. 3, par. 3 of the Regulation No 1931/2006.

[4] For more see: A. Parol, *Konsekwencje członkostwa w Unii Europejskiej i strefie Schengen dla ruchu osobowego na wschodniej granicy Rzeczpospolitej Polskiej - analiza prawna* [forthcoming].

EU citizenship[5]. In addition to extending the scope of the personal freedom of movement, it also affects the territorial scope of the Area of Freedom, Security and Justice[6], in a sense of broadening its scope of impact by the border areas of neighboring third countries[7].

Local border traffic affects the AFSJ not only in the subjective and territorial dimension, but also is important for its legal dimension. The consequence of implementation of the Regulation on local border traffic[8] is the harmonization[9] of LBT principles in the national legislation of the Member States [hereafter MS] of the EU and the Schengen Area. Harmonisation of the legal regime of LBT takes place not only in the legislation of MS, but also in national law of neighboring countries which are parties to the agreements. In this way, LBT affects the external dimension of the Area[10]. The cooperation of the European Union and its MS with third countries carried out under the process of shaping the LBT regime is also not indifferent to the European Neighborhood Policy and the Eastern Partnership.

According to information provided to the European Commission (EC), fourteen agreements on LBT were signed[11], the provisions in seven of them

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[5] The personal scope of the freedom of movement of persons resulting from the institution of European citizenship includes both, nationals of EU Member States, as well as nationals of non-EU Member States being a party to the Schengen Agreement. Derivatively this right belongs also to the family members of the above-mentioned citizens.

[6] Further referred to as Area or AFSJ.

[7] Cf. A. Szachoń-Pszenny, *Zakres terytorialny i prawny strefy Schengen* [forthcoming].

[8] Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (OJ. L 405, 30.12.2006, p. 1, as amended). Further referred to as Regulation No 1931/2006 or LBT Regulation.

[9] The use of the term harmonization instead of unification, which classically is used to describe the effect of the adoption of EU legislative regulations (for example: A Szachoń-Pszenny, *Źródła prawa Unii Europejskiej*, [in:] A. Kuś (ed.), *Prawo instytucjonalne Unii Europejskiej w zarysie*, Lublin 2012, p. 224) seems reasonable because of the fact, that the LBT Regulation is materially similar to a directive, shaping the legal framework for the freedom of Member States, which shape the final LBT agreements in bilateral agreements with neighboring third countries.

[10] For more information on the external dimension of AFSJ see: Communication from the Commission, *A strategy on the external dimension of the area of freedom, security and justice,* (COM(2005)491, final version of 12.10.2005).

[11] Communication from the Commission to the European Parliament and the Council, Second report on the implementation and functioning of the local border traffic regime set up by Regu-

have already come into force[12]. A third country that realizes the biggest number of these agreements (three in particular) is Ukraine. Realized agreements concern Polish-Ukrainian[13], Slovak-Ukrainian[14] and the Hungarian-Ukrainian[15] border zones. In addition, the European Commission also consulted the agreement between Romania and Ukraine[16].

1. SHAPING THE LOCAL BORDER TRAFFIC REGIME IN EU LAW

With the entry into force of the Treaty of Amsterdam[17], which incorporated *acquis* Schengen into Community law, the creation of the Area of Freedom, Security and Justice was initiated. The first step undertaken at EU level was the adoption by the European Council in the 1999 Programme of Tampere[18], which, despite the fact it was a political document

lation No 1931/2006, COM(2011) 47 final version of 9.02.2011, further referred to as Second report of the Commission.

[12] List of notifications of bilateral agreements under Article 19 of Local Border Traffic Regulation, source: http://ec.europa.eu, access on 23.12.2013.

[13] Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on local border traffic conditions, signed in Kiev on 28 March 2008, and the Protocol signed in Warsaw on 22 December 2008, between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine to amend the Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on local border traffic conditions, signed in Kiev on 28 March 2008 (Journal of Laws of 1.07. 2009, No 103, Item 858), further referred to as PL-UA LBT agreement.

[14] *Zmluva medzi Slovenskou Republikou a Ukrajinou o malom pohraničnom styku*, 441/2008 with changes, source: http://jaspi.justice.gov.sk, access on 2.01.2014, further referred to as SK-UA LBT agreement. Legal analysis of the agreement was based on the English version of the law. English-language translation was acquired through the Slovakian national contact point on Local border traffic (Department of the Central Visa Authority OCP UHCP, the Ministry of Internal Affairs of the Slovak Republic).

[15] Agreement between the Government of the Republic of Hungary and the Cabinet of Ministers of Ukraine on the rules of local border traffic, Act No CLIII of 2007, source: www.njt.hu, access on 2.01.2014, further referred to as HU-UA LBT agreement. English is one of the three authentic languages of the agreement.

[16] On the current status of the agreement see: http://mae.ro/en/node/21716, access on 02.12.2014.

[17] The Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, (OJ C 340/01 of 10.11.1997). Further referred to as Amsterdam Treaty or TA.

[18] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, Bulletin EU, No 10/1999. Further referred to as the Tampere Programme.

and had no legally binding force, exerted significant influence on the construction of the Area. Tampere Programme defined AFSJ as a space of uniform legal regulations, which is to ensure freedom of movement of persons in conditions of safety and justice. As a result of the implementation of the Tampere Programme and its continuation – Hague Programme[19], the area of uniform laws was established, under which the freedom of movement of persons is executed. Confirmation for this were the provisions of both the Constitutional Treaty [20] and the Lisbon Treaty[21], which explicitly stipulated that "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 appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime"[22]. As results from the above definition, the creation of "an area without internal borders" is inseparably connected with the creation of an external border, which plays a key role in the control of persons and goods admitted to the territory of the EU Member States. According to the Schengen Border Code[23] external borders mean the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders[24].

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[19] The Hague Programme: strengthening freedom, security and justice in the European Union, (OJ C 53/01 of 3.03.2005, p. 1), further referred to as the Hague Programme.

[20] Draft of Treaty establishing a Constitution for Europe, (OJ C 169 of 18.7.2003, p. 1).

[21] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306/01 of 17.12.2007). Further referred to as Lisbon Treaty or TL.

[22] Art. 3 par. 2 of the Treaty on European Union, (OJ C 326 of 26.10.2012, p. 13, consolidated version). Further referred to as Treaty on European Union or TEU.

[23] Art. 2 par. 2 of the Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), (OJ L 105 of 13.4.2006, p. 1 as amended). Further referred to as Schengen Borders Code or SBC.

[24] At the same time it should be remembered, that SBC constitutes a development of the Schengen acquis to Iceland, Norway, Switzerland and Liechtenstein and is also covered by the opt-out and opt-in rules of UK, Ireland and Denmark.

The European Council pointed out on the issue of effective management of the external border in 2001 during the meeting in Laeken[25]. As a result of conclusions presented by the Presidency, the European Commission issued a communication to the European Parliament and to the Council "Towards integrated management of the external borders of the EU Member States"[26]. Among the legislative measures the European Commission has distinguished the short-term and medium-term actions. Creation of a single LBT regime was assigned by the EC to the short-term actions. The Commission pointed to the need to recognize the priorities and the adoption of appropriate legal measures while pointing at the forthcoming enlargement of the 10 countries in Central and Eastern Europe and their participation in the planned regulation. At the same time it is important, that in accordance with the position presented by the Commission, *ius contrahendi* in the field of LBT agreements with third countries had the then Community[27]. The Commission also indicates the passive attitude of the Executive Committee established by the Schengen Agreement[28] and its legal successor, the Council[29] in the use of their prerogatives in shaping the local border traffic regime.

At the same time it should be stressed that the lack of legislative actions of the Executive Committee or later Council did not mean depriving LBT of any legal framework at the level of Schengen agreements. According to

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[25] European Council meeting in Laeken on 14 and 15 December 2001, Spotkania Rady Europejskiej 1993-2002, Monitor Integracji Europejskiej, p. 16.
[26] COM (2002) 233of 07.05.2002), further referred to as communication. This document marked the five elements that were to shape a common policy on management of external borders. These were: common corpus of legislation, common co-ordination and operational co-operation mechanism, common integrated risk analysis, staff trained in the European dimension and inter-operational equipment, burden-sharing between Member States in the run-up to a European Corps of Border Guards (p. 12).
[27] Cf. Communication, p. 13.
[28] Art. 3 par. 1 of the Convention Implementing the Schengen Agreement of 14 June 1990, (OJ L 239 of 22.09.2000), states that „more detailed provisions, exceptions and arrangements for local border traffic, and rules governing special categories of maritime traffic such as pleasure boating and coastal fishing, shall be adopted by the Executive Committee", see S. Peers, *EU Justice and Home Affairs,* Oxford 2011, p. 210.
[29] With the incorporation of the Schengen acquis into EU law, the Executive Committee has been replaced by the Council.

the Common Manual[30] on an exceptional basis, it was permissible to cross the external border at places other than designated and outside designated hours by persons holding permits issued by Member States through implementation of bilateral international agreements on LBT.

The Schengen Convention itself[31] excluded the need of LBT agreements for prior consent of the other MS, which was a general principle in the agreements on simplification or abolition of border controls. But it was as a result of the European Commission that LBT received (in place of the existing national) EU legal framework.

Soon after issuing a communication, the European Commission prepared a working document[32] summarizing the method of shaping the LBT regime both by the then MS and the candidate countries. The obtained statistics were used for the purpose of first and subsequent legislative proposals on LBT. At the same time in a month after the presentation of the communication by the European Commission (13 June 2002), the Council for Justice and Home Affairs adopted a "Plan of management of the external borders of the EU Member States", which was subsequently approved by the European Council on 21-22 June 2002 in Sevilla[33].

The consequence of actions of the Council and the European Council was the submission by the European Commission (in August 2003) of two legislative proposals. The first one concerned the establishment of a regime

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[30] Part I, par. 1.3 of Common Manual (Common Manual on external border controls), (SCH / Com-ex (99) 13), the content was amended by Council Decision 2002/352/EC of 25 April 2002 on the revision of the Common Manual (OJ L 123 of 09.05.2002, see (OJ C 313 of 16.12.2002). The attention draws also the fact, that before the changes to the Common Manual by the indicated Council decision, agreements on Local border traffic concluded by Austria, France, Germany and Italy were part of the Schengen acquis. They were contained in Annex No 3 to the Common Manual, which was subsequently deleted.

[31] Art. 136 of the Schengen Convention.

[32] Developing the Acquis on 'LocalBorderTraffic', SEC(2002) 947, further referred to as working document.

[33] European Council meeting in Seville, 21-22 June 2002, Spotkania Rady Europejskiej 1993-2002, Monitor Integracji Europejskiej, No 27, See S. Parzymies, *Polityka azylowa i imigracyjna w uchwałach Rady Europejskiej w Sewilli,* Sprawy Międzynarodowe 2002/4, p. 27 and following.

of LBT at the external land borders of the MS[34]. The second covered the issues of establishing LBT at the temporary external land borders between MS[35]. Both proposals were based on the provisions of the EC Treaty[36]. Proposals proved to be not without defects and because of procedural reasons, related to placing differentiated subject matter of different legal regime in one legislative proposal[37], have been withdrawn. Therefore, the Commission has adopted new proposals at the same time withdrawing the previous ones. This time also two proposals were filed, but differentiated, not on the basis of potential entities of the agreements, but on the basis of subject of the regulation[38]. Still before the procedure of adoption of "new" applications has been completed at the European Council meeting on 4-5 November 2004, The Hague Programme was adopted. According to the conclusions contained in the Programme, the Council decided to extend the co-decision procedure to certain areas covered by Title IV of the EC Treaty, including measures related to external borders[39]. As a result, from 1 January 2005 both the external bor-

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[34] COM(2003)502 – 2003/0193 (CNS). As indicated earlier, the term local and Local border traffic mean the same. The Polish language version, the legislative proposals used adjective "local", which on the stage of works in the EP and the Council has been replaced with the adjective "small". The English version consistently used the concept of local border traffic, while French and German languages: respectively le petit trafic frontalier and Kleiner Grenzverkehrs.

[35] COM(2003)502 – 2003/0194 (CNS).

[36] Art. 62 par. 2 of the Treaty establishing European Community in the version introduced by the Amsterdam Treaty (OJ C 340/01 of 10.11.1997), further referred to as TEC. Currently it is art. 77 par. 2 p. b of the Treaty on Functioning of the European Union (OJ C 326 of 26.10.2012, p. 13, consolidated version), further referred to as the Treaty on Functioning of the European Union or TFEU.

[37] Within the same proposal were placed the provisions relating to control at the external borders and provisions for the introduction of special visas for residents of border areas because of the local border traffic. They were subject to a different legal regime. In terms of external border controls the consultative procedure was in force (Council Regulation), while in terms of a special type "L" visa, which was to be issued for the purpose of local border traffic, the co-decision procedure was expected (Regulation of Council and of EP).

[38] See M. Zdanowicz, A. Doliwa-Klepacka, *Możliwość liberalizacji reżimu wizowego w ramach współpracy państw w Partnerstwie Wschodnim*, [in:] M. Zdanowicz, T. Dubowski, A. Piekutowska (ed.), *Partnerstwo Wschodnie. Wymiar realnej integracji*, Warsaw 2010, p. 156-157.

[39] Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV part III of the Treaty establishing the European Community, subject to the procedure laid down in Art. 251 of the Treaty (OJ L 396 of 31.12.2004, p. 45). In this way, was exercised the option for simplified Treaty revision procedure provided in the Treaty, (art. 67 par. 2 TEC).

ders and visa issues were subject to the co-decision procedure, now known as the ordinary legislative procedure[40]. Finally, the Commission made another change by combining existing proposals and presenting to the Council and the EP the fifth proposal[41], which was finally adopted on 20 December 2006. The Regulation entered into force on 19 January 2007. Since the entry into force, Member States have begun work on bilateral SMT agreements and contracts already closed were to be adapted to the Regulation.

As to the implementation of the LBT Regulation, the European Commission has prepared two reports. The first report[42] is from the year 2009, and the second was prepared in 2011. The content of the second report[43] does not imply that the reporting obligation will continue.

2. THE LEGAL NATURE OF LOCAL BORDER TRAFFIC AS AN AFSJ INSTRUMENT

Local border traffic concerns the external land border of European Union Member States. Delimitation of borders of the MS of the European Union's internal and external borders and the related division of distinction in the way of crossing these borders is a part of the Schengen *acquis*[44].

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[40] Co-decision procedure consisted generally on a legislative act to be jointly adopted by the Council and the European Parliament on the proposal of Commission. Adoption of legislative act takes place within up to three readings. LBT Regulation was adopted and signed by the Presidents of the EP and of the Council after the first reading. For more information on the co-decision procedure see A. Szachoń-Pszenny, *Legislative procedures,* [in:] A. Kus (ed.), *The outline of the institutional law of the European Union,* Lublin 2009, p. 188.

[41] Proposal referring to a Regulation of the European Parliament and of the Council laying down rules for local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions COM (2005) 56.

[42] Report of the Commission to the European Parliament and to the Council on the implementation and functioning of the local border traffic regime introduced by Regulation (EC) No 1931/2006 of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States, COM(2009)383, final version of 24.07.2009, further referred to as the first Commission report.

[43] Communication of the Commission to the European Parliament and to the Council, Second report on the implementation and functioning of the local border traffic regime introduced by Regulation No 1931/2006, COM(2011)47, final version of 09.02.2011, further referred to as the second report of the Commission.

[44] See Judgment of the Court of 26 October 2010, case C-482/08, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union.*

Legal definition of Schengen acquis is contained in the Protocol integrating the Schengen acquis into EU law annexed to the Treaty of Amsterdam. According to the Protocol the Schengen acquis is: the Schengen Agreement, the Schengen Convention, protocols and accession agreements to the Agreement and the Convention and the decisions and declarations adopted by the Executive Committee. Due to the dynamic development of the acquis, the above list is not exhaustive. After adding the Schengen acquis to EU primary law, there has been a development in the formula of secondary legislation and the Accession Treaties concluded after 1999. Content of the secondary legislation determines whether it will be listed as a secondary legislation of the Schengen acquis. These are "acts build upon the Schengen acquis" and "acts in a different way related to the Schengen acquis". These wordings are used in the preambles of secondary legislation or acts of accession. According to the CJEU, recognition of a legal act as the Schengen acquis is based on objective factors, in particular its objectives and content of the act. Nevertheless, each accession treatie concluded after 1999 provides the exhaustive list of legal instruments which are part of the Schengen acquis. Therefore, the literature distinguishes between Schengen acquis of the narrow and wide meaning. As narrow concept, the Schengen acquis is defined as a catalog of acts mentioned in the Treaty of Amsterdam, while a broad concept includes additional legal acts adopted in the EU legal framework for the purpose of development of this acquis[45].

The LBT Regulation is also a part of the Schengen acquis. This classification follows directly from the preamble[46] of the act, which states that, the Regulation constitutes a development of provisions of the Schengen acquis. Similarly, the preamble[47] states, that the objective of this Regulation is to lay down the criteria and conditions for the establishment of a LBT regime

[45] For more see: A. Szachoń-Pszenny, *Acquis Schengen a granice wewnętrzne i zewnętrzne w Unii Europejskiej*, Poznan 2011, p. 23-24; P. Wiśniewski, *Dorobek (acquis) Schengen- charakterystyka podstawowych dokumentów i jego stosowanie w Polsce*, [in:] W. Bednaruk, M. Bielecki, G. Kowalski (ed.), *Polska w strefie Schengen*, Lublin 2010, p. 84 and following.; K. Rokicka, *Acquis Schengen w Polsce*, Europejski Przegląd Sądowy 4/2006, p. 59.

[46] P. 17 of the regulation No 1931/2006.

[47] P. 14 of the regulation No 1931/2006.

at external land borders. This directly affects the Community acquis on external borders. As far as regulation is part of the Schengen acquis, its provisions are distinct from the provisions of the Schengen Borders Code, which shapes the rules of crossing the external and internal borders of the Member States. In particular, LBT Regulation states, that "the local border traffic regime constitutes a derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union which are set out in (…) Schengen Borders Code"[48]. This position was confirmed by the Court of Justice of the European Union in its preliminary ruling to the first question concerning the interpretation of the Regulation[49]. According to the Court, both literal interpretation and the teleological interpretation are supporting the autonomous interpretation of the LBT Regulation. Given the way of formation of bilateral agreements and the implementation of European Commission's controlling powers, the autonomous interpretation of the LBT Regulation has not been so obvious. Therefore, it seems necessary to present the evolution of approaches to LBT regime at the level of legislative works, which led to the adoption of this regulation and influenced its interpretation. Paying attention to the genesis of the solutions used in the formation of the LBT regime makes it possible to process a correct systematic interpretation.

As was previously indicated, the European Commission's legislative proposals have been preceded by a working document, which compared agreements concluded by the then Member States and 10 candidate countries in Central and Eastern Europe. Prepared by the European Commission this statistical data had a significant impact on the content of the regulation draft, since they accounted for some averaging of national solutions. As the Commission indicated, initially there was a lack of clear and precise

[48] P. 3 of the regulation No 1931.2006. See also: S. Dubaj, *Uproszczenia w przekraczaniu granic-mały ruch graniczny*, [in:] A. Kuś, M. Kowerski (ed.), *Transgraniczny przepływ towarów i osób w Unii Europejskiej*, Zamosc 2011, p. 281.

[49] Judgment of the Court Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v. Oskar Shomodi, C-254/11, (further referred to as Shomodi case). For more see: A. Parol, Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-254/11, *Oskar Shomodi*, Monitor Prawa Celnego i Podatkowego 7/2013, p. 284 and following.

definition of local border traffic. LBT agreements concluded by MS differed from each other greatly in terms of geographical coverage, personal coverage and the documents authorizing the use of local border traffic. As the EC pointed out[50], while some of these differences were justified by geopolitical conditions or adopted definition of the border zone, the remaining issues encouraged the EC to point out the need to adopt a common and uniform minimum standard. Ultimately, the European Commission adopted a legislative proposal[51] setting more favorable LBT rules than they were at the national level. At the same time, a comparison of the legislative proposal to the content of an existing regulation draws attention to the significant evolution that has experienced LBT regime within the framework of the readings before the European Parliament and the Council.

Firstly, only the EP[52] made a clear distinction between the LBT regime and the Schengen Borders Code. It seems that originally local border traffic was, in fact, closely connected with the Schengen Borders Code. The European Parliament introduced in the preamble to the resolution, that the LBT regime constitutes an exception from the general rules governing border control of persons crossing the external borders of the Member States. However, as the ECJ stated, the autonomy of the Regulation is limited, according to this position, *"the spirit[53] of Regulation No 1931/2006 tends to interpret it, if necessary, in an autonomous way."*[54]

Secondly, also during the first reading the conditions referring to the length of stay in the border area were revised. According to the draft, people living in the border areas could stay in the border area of a neighboring MS

[50] Working document, p. 3.
[51] Legislative proposals of the European Commission in the years 2003 and 2005, as a rule, had convergent views on the objectives and basic assumptions of local border traffic. Therefore, we will discuss the last of the proposals.
[52] Legislative resolution of the European Parliament on the proposal for regulation of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions (P6_TA(2006)0049). At the stage of first reading in the European Parliament, term "local border traffic" in the Polish language version was changed to Local border traffic.
[53] The teleological interpretation.
[54] *Shomodi*, p.25.

for up to seven days. The legislative project moreover stated that the total length of successive visits should not exceed three months within any half-year period. The EP substantially modified these provisions. According to the amendments introduced by the EP which have been accepted by the Council, the MS are given the freedom to set a maximum length of stays, with the only reservation, that the maximum duration of uninterrupted stay should not exceed three months[55]. In the final version a LBT Regulation did not include any restrictions on the frequency of visits. In practice, Member States, while shaping the content of bilateral agreements, included provisions on the maximum length of an uninterrupted stay, which was of course consistent with the LBT Regulation, and the provisions on the frequency of visits, which proved to be contrary to the wording of the Regulation[56]. Member States' position was based on an interpretation of art. 2 p. of the Regulation[57]. In accordance with the provision, the local border traffic regime does not affect long-term stays. Member States, on the basis of the Schengen Convention[58], interpreted the long-term stays as ones exceeding three months within half-year period, whether they are carried out under an authorization of LBT or a visa. Therefore, in accordance with the position of the MS, while shaping the limitations in the frequency of stays they were operating under the prerogatives conferred upon them. Such an interpretation cannot be accepted since there are in fact significant differences between long-term stays and the LBT regime other than length of stay. It should be emphasized that LBT is being carried out upon presenting a permit, while the general principles apply to traffic carried out on the basis of visas. A fundamental difference between visa and LBT is that the primary eligibility criterion for

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[55] Parliament also introduced the principle of a minimum annual domicile for third-country nationals residing in the border zone.

[56] See Shomodi case. It should however be noted, that the European Commission both at the stage of inspection ex-post and ex-ante did not consider restrictions as to the frequency of visits to be incompatible with the Regulation. See the first and second EC report.

[57] T. Molnár, *Regulating Local Border Traffic in the European Union – Salient Features of Intersecting Legal Orders (EU Law, International Law, Hungarian Law) in the Shomodi Case (C-254/11)*, [in:] M. Szabó, P.L. Láncos, R. Varga, *Hungarian Yearbook of International Law and European Law 2013*, Den Haag 2013, p. 466.

[58] Art. 18 of the Schengen Convention.

person to apply for visa is its nationality, while in the case of LBT the actual place of residence is crucial. Moreover the grounds for receiving the documents (permit/visa) are different, as well as the manner and moment of the verification of the premises.

Thirdly, the Commission intended to introduce LBT along with new type "L" visa. It was supposed to be a document entitling to cross the border only in the framework of LBT. This had an impact on the choice of legal form in which the rules on LBT were adopted[59]. The EP instead of type "L" visa suggested a permit, defined as "specific document (...) entitling border residents to cross an external land border under the local border traffic regime"[60]. The EP proposal met with acceptance of the Council. Despite the cancellation of the adoption of a new type of visa, the legal form of the act was not changed, for example, from the regulation to the directive or decision.

Fourthly, the EP withdrew from the diversification of external borders to those relating to the Member States in relation to which the Schengen acquis applies in its full and those that were subject to temporary derogation[61]. The regulation states, that the legal regime of LBT is constituted at the external border of the MS[62]. In practice, the Regulation is implemented

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[59] In the legislative proposal (p. 6) European Commission declares: "as far as the rules on the uniform visa are concerned, including the procedures and conditions for issuing such visa, the Community competence is exclusive. However, by its own nature, a regime of local border traffic can only be put in practice on the initiative of the concerned Member States, which are therefore authorised to conclude bilateral agreements with neighbouring third countries, if they consider it appropriate. (...)In this spirit, the legal instrument chosen to establish general rules on local border traffic is a Regulation addressed to the Member States, which sets the rules to be respected by Member States when establishing a local border traffic regime with neighbouring countries. As the proposed initiative is developing the Schengen acquis, the form of a Regulation has been chosen in order to assure a harmonised application in all Member States applying the Schengen acquis.

[60] Art. 3 par. 7 of the Regulation No 1931/2006.

[61] Under the terms of the accession treaties for countries, which joined the EU after the incorporation of the Schengen acquis into the framework of the treaty, applied legal principle of a two-stage turn in the application of the Schengen acquis, see art. 3 of the Document concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and the adjustments to the Treaties on the European Union (OJ of 30.04.2004, pos. 90, No. 864).

[62] Art. 1 par. 1 of the Regulation No 1931/2006.

also by the states that are not covered by Council Decision on the full application of the Schengen acquis. This is how the agreement between Romania and Moldova is implemented since 2010. The agreement was *ex ante* controlled by the EC. It was also covered by the first and second report of the Commission. In the case of EC there are no objections to the possible conclusion of LBT agreements by Romania. On the contrary, the Commission emphasizes that it is one of the few agreements that are fully compliant with the provisions of LBT Regulation.

Fifthly, the Committee on Foreign Affairs[63], which was reviewing a draft of the LBT Regulation tried to push through the possibility to use LBT in access to economic activity[64]. This amendment did not meet with the acceptance of the plenum of the EP. The lack of acceptance of the EP plenum met also a proposal to introduce a reference to the European Neighborhood Policy at the preamble to the Regulation[65].

The European Parliament has not raised any major objections[66] in terms of the size of the border area. According to the EP extending this zone of more than 30 km would cause difficulties in conducting an effective control. Parliament also stated that the boundaries of the border area should not be equated with ethnic boundaries. At the same time, EP extended the buffer zone of 35 km to 50 km.

The conclusion is that the LBT regime has been significantly modified at the stage of legislative works. Of particular importance is a matter of shaping

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63 For the preparation of the report before the first reading in Parliament hold responsible the Parliament's Committee on Civil Liberties, Justice and Home Affairs deliberating under the chairmanship of Slovenian politician Mihael Brejc. The project however opined Committee on Foreign Affairs.

64 I report of the Committee on Civil Liberties, Justice and Home Affairs, European Parliament, final version A6-0406/2005, p. 37.

65 Ibidem, p. 35.

66 The legislative proposal (p. 24) stressed that the development of the final proposal on the size of the border area was preceded by an examination of 2003 proposals. At the same time the European Commission said it would be prepared to consider allowing some flexibility in the setting of the border area in a bilateral agreement if the definition given in the Regulation on local border traffic in specific cases would lead to a situation contrary to the idea of regulation, which provides for the possibility of an exceptional extension of the border area in order to prevent artificial splits of communities (p. 12).

the relationship between the Schengen Borders Code and the LBT Regulation, thus shaping the relationship between the general principles of crossing the external borders and the principles of LBT. It should be emphasized that the LBT constitutes a development of the Schengen acquis, which stems from the language and the system interpretation of the Regulation. It has however an autonomous interpretation with respect to the Schengen Borders Code, although indicated autonomy is not unlimited. You can also state that, according to the intention of the EU legislature, the LBT regime shall serve for the purpose of realization of the Area of Freedom, Security and Justice as the EU policy. Judging from the proposed and unaccepted amendments it can be concluded that the relationship between LBT and the European Neighbourhood Policy should have a complementary rather than a basic nature.

3. COMPARATIVE ANALYSIS OF BILATERAL AGREEMENTS ON LBT USING THE EXAMPLE OF AGREEMENTS WITH UKRAINE

Ukraine is a third country bordering the European Union, with the biggest number of concluded agreements on LBT (due to its specific geographical location). Ukraine currently borders four MS of the European Union and implements agreements on LBT with three of those – Hungary, Poland and Slovakia. The fourth state – Romania – is currently leading negotiations on the conclusion of an agreement with Ukraine; the European Commission has already consulted the content of the agreement, but there is no information that the agreement has already entered into force. Due to the length of the border between the Member States of the European Union and Ukraine, the largest border area was created within the Polish-Ukrainian border zones[67]. Consequently much smaller border areas have been established between Ukraine and Hungary and Slovakia[68].

[67] The actual external borders should be recognized those lying between third countries and the Schengen countries (including members and non-members of the EU). While the potential external borders should be considered those, in respect of which no decision has been taken on the full application of the Schengen acquis. It can be stated, that the Council decision indicates for membership in the Schengen area. In the case of LBT there is no need to distinguish EU Member States applying opt-out clause, since de facto they have no right to conclude a LBT agreement.

[68] The length of the Ukrainian-Slovakian border is 90 km (approx. 1%), not much longer is the Ukrainian-Hungarian border, which extends over 103 km (approx. 1%).

The border between Poland and Ukraine is 535 km long which represents approx. 12% of the total length of Ukraine's borders (land border is approx. 62% and maritime border approx. 38%). Also approx. 12% of the total length of the border takes the border with Romania (531 km), but as was previously mentioned, the LBT agreement covering the Ukrainian-Romanian border area still has not entered into force. A justification of the current status quo is the fact that Romania is still not fully applying the Schengen acquis. On the other hand, the border meets the criteria of the external border. Interpreting the legal definition of the "external borders" based on the Schengen Borders Code (art. 2, par. 2) it should be noted that these are the borders between Member States and third countries. As previously discussed, on the stage of legislative works the EC proposed separation of the external borders of Member States applying the Schengen acquis in its full from those with temporary derogation. Such a diversification was not accepted in the final content of the regulation. Therefore LBT covers the external borders of the EU Member States in a uniform manner regardless of the degree of application of the Schengen acquis. Confirmation of such a position is carried out since 2010 LBT agreement between Romania and Moldova in respect of which the European Commission had no major complaints. At the same time, in the light of the Romanian-Moldovan agreement, it seems reasonable to say that the LBT relates to actual and potential external borders of the Schengen area.

The oldest yet implemented agreement is the one with Hungary. It has been forwarded to the European Commission's consultation in May 2007, and entered into force on 11 January 2008. Agreements with Poland and Slovakia have been forwarded to the Commission in the first quarter of 2008, the same year the Agreement with Slovakia came into force. Due to the changes in content of the agreement in terms of border zone coverage the entry into force of the agreement with Poland was delayed, and is carried out since September 2009.

The referenced LBT agreements, as implemented in accordance with EU law, are shaping the national LBT regimes in a rather similar way. The final shape of the agreements, however, resulted from the will of states parties to

the agreements, which advantage of the prerogatives granted to them by LBT Regulation in many ways, and sometimes even exceeded these prerogatives. The provisions of the agreements are in line with the Regulation in terms of the definition of LBT[69], rules on crossing the external borders[70] and conditions for derogation. Differences can however be pointed out in three main areas: territorial, subjective and temporal.

The territorial diversity of LBT area involves covering three separate border areas with the indicated legal regime. The differences, however, are not based solely on the criterion of geographical location, including the length of the external border, but also on the degree of compliance of designated size of the border area with the LBT Regulation. All three agreements at the ex-ante stage were criticized for non-compliance with the provisions of the Regulation. Hungary despite being summoned to make changes in the agreement implements it in its original version. Poland amended the Agreement so as required by the EC[71]. Slovakia also modified their agreement. The changes that the Slovak authorities introduced

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[69] PL-UA and SK-UA agreements on LBT repeat the definition of Local border traffic, but the HU-UA agreement has no autonomous definition, therefore, it is assumed that binding is the definition resulting directly from the LBT regulation. It should also be noted that the HU-UA agreement is the shortest one and a full interpretation requires parallel analysis of the Regulation. The other two agreements appear to be more autonomous. For example, PL-UA and SK-UA agreements repeat directly or with slight modifications the definitions of basic concepts mentioned in the Regulation. Therefore the question arises, which method of forming the content of the agreement is more favorable. From the perspective of the EU Member States, it seems that the degree of completeness of agreements is of little importance while they are interpreted in accordance with EU law. From the perspective of third countries, which as a rule are not bound to the acquis communautaire, the better solution seems to be shaping the complete agreements.

[70] For derogations from the general rules on crossing the external borders see: S. Dubaj, O*sobowy ruch graniczny na granicach zewnętrznych po wejściu Polski do strefy Schengen ze szczególnym uwzględnieniem koncepcji wdrażania zasad małego ruchu granicznego*, [in:] W. Bednaruk, M. Bielecki, G. Kowalski (ed.), *Polska w strefie Schengen*, Lublin 2010, p. 116-117.

[71] The Commission challenged the adopted width of the border area as incompatible with EU law, according to which it should be 30 km. It also considered to be incompatible with EU law requiring Ukrainians, crossing the border under the contract, health insurance covering the costs of treatment in Poland, as well as identified that the agreement should be revised in terms of definition of people affected by the prohibition to entry: K. Czornik, *Miejsce Ukrainy w polskiej polityce zagranicznej po „pomarańczowej rewolucji". Próba bilansu*, [in:] M. Stolarczyk (ed.), *Stosunki Polski z sąsiadami w pierwszej dekadzie XXI wieku*, Katowice 2011, p. 151-152.

to the final version of the agreement, according to the European Commission, are still not sufficient to ensure full compatibility of this bilateral agreement with the LBT Regulation[72].

In the subjective scope all agreements, in accordance with the Regulation, expand freedom of movement for border area residents, regardless of their nationality[73]. Therefore, local border traffic can by used not only by citizens of countries parties to the agreement, but also citizens of other countries residing in the border zone. In place of the citizenship condition were introduced two positive conditions resulting from the application of the principle of domicile and the need to justify ones stay and one negative condition that results from the use of derogatory clauses.

Border area residents are to prove at least three years' permanent residence in the area[74]. Such a solution is raising the minimum requirements set out in the LBT Regulation, where the domicile is indicated for least one year period[75]. At the same time the three-year residence requirement is exempted to family members of the person who filled the condition of domicile[76]. The catalog of family members includes spouses and children of your own or your spouse, including adopted children if they remain under the care of a parent[77]. In addition, the Slovak-Ukrainian agreement includes an age restriction for children of an entitled person which is 21 years[78].

In response to the indicated position of the European Commission Poland has changed the definition and scope of the border area, still left unchanged the issue of medical insurance.

[72] First Report of the Commission, p. 7.

[73] Zgodnie ze statystykami zaprezentowanymi przez KE w ramach drugiego sprawozdania (s. 4-5) MRG cieszy się największym powodzeniem przy granicy ukraińsko-węgierskiej, gdzie z zezwoleń w 2011 r. korzystało 13% osób uprawnionych, w większości jest to mniejszość węgierska zamieszkująca strefę przygraniczną. Jednocześnie ze względu na wielkość strefy przygranicznej najwięcej zezwoleń wydały organy polskie. Zgodnie ze sprawozdaniem do 2011 r. zostało wydanych ok 1,2 mln zezwoleń, co jednak oznacza, że otrzymało je ok 2,7% uprawnionych.

[74] Art. 1 par. 1 of the PL-UA agreement on LBT; art. 1 par. 1 of the HU-UA agreement on LBT; art. 2 of the SK-UA agreement on LBT.

[75] Art. 3 par. 6 of the Regulation No 1931/2006.

[76] In accordance with the Regulation (art. 3 par. 6 sent. 2): "In exceptional and justified cases specified in these bilateral agreements, a period of residence of less than one year can also be considered as sufficient."

[77] Art. 2 par. 1 of the PL-UA agreement on LBT; art. 2 ust. 2 of the HU-UA agreement on LBT.

[78] Art. 2 par. 3 let. e) of the SK-UA agreement on LBT.

It should be emphasized that the LBT Regulation only forms principles for treatment of some of the inhabitants of the border area of a third country[79], and for the remaining ones[80] reserves only the need to apply the principle of comparability[81]. In accordance with the principle of comparability, the MS are obliged to shape the content of the LBT agreements so that the "third country granted persons enjoying the Community right of free movement and third-country nationals legally residing in the border zone of this MS treatment at least comparable to that which has been allocated to border residents of the third country." Applying this principle, states parties of the indicated agreements applied uniform rules to residents of the border zones on both sides of the border[82].

The second positive condition is that one needs to have the reasons justifying the use of the LBT regime. Catalogues specified in the agreements include a repetition of the provisions of Regulation No 1931/2006, thus indicating social, cultural, family or economic reasons[83]. At the same LBT does not include economic and other contacts, which are considered to be economic activity or employment[84]. Verification eligibility is carried out by the competent authority at the stage of granting the LBT permit.

Third, the negative condition concerns a potential threat to public order, internal security, public health or international relations of states-parties[85]. In particular, it is verified whether or not this person is signed in the SIS II or national databases in order to refuse entry. The use of LBT is

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[79] Assuming that the bilateral agreement forms a single border area part of which is located on the territory of the EU member state, and part at the territory of a third country.
[80] Ie. citizens of non-member countries of the EU, which are members of the Schengen area.
[81] See art. 14 of the regulation No 1931/2006.
[82] Due to the unilateral introduction by Ukraine a visa-free regime for EU citizens, Local border traffic is not used by the EU citizens. See art. 1 par. 2 of the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas (OJ. L 332, 18.12.2007, p. 68). The agreement entered into force on 1 January 2008.
[83] Art. 1 par. 5 of the HU-UA agreement on LBT, art. 6 par. of the SK-UA agreement on LBT, art. 1 par. 1 let. a) of the PL-UA agreement on LBT.
[84] Art. 9 par. 3 of the SK-UA agreement on LBT, art. 1 par. 5 of the HU-UA agreement on LBT, art. 1 par. 1 let. a) of the PL-UA agreement on LBT.
[85] Art. 3 par. 1 let. b) of the HU-UA agreement on LBT, art. 1 par. of the SK-UA agreement on LBT, art. 1 par. 1 of the PL-UA agreement on LBT.

entitled only to those persons who have not been entered into the national database, and the SIS II.

LBT is done on the basis of presenting a permit, which is issued by the relevant national authorities. In accordance with Regulation No 1931/2006 permit is issued for the period of 1-5 years. According to the Polish-Ukrainian agreement, the first permit is issued for 2 years[86]. Subsequent permits are issued for 5 years, as long as the use of the first one was consistent with its purpose, while the period for which permit is issued can not be longer than the period of validity of the passport. In other agreements it stipulated only that the permit can be issued for a period of one to five years, but it cannot be issued for longer than the period of validity of the passport[87].

In terms of opportunities to shape the rules for issuing permits Slovakia took the opportunity to issue permits free of charge. Other countries charge a fee of 20 euros[88.] At the same time states parties exempted from having to pay any fees: disabled people, pensioners and children under the age of 18 (in the agreement with Hungary also children who are dependent on their parents and are under 21).

The Polish-Ukrainian agreement also includes an obligation to be covered by medical insurance guaranteeing health care coverage incurred medical expenses in emergency and consequences of accidents and the cost of medical transport to the country of permanent residence. The European Commission even before the agreement entered into force, then in the next report accused the Polish side that the obligation of having insurance is incompatible with the interpretation of the LBT Regulation. Poland argues that such insurance is needed to protect health care institutions (mostly hospitals) in the border area from possible increased costs in connection with the nursing care delivered to third-country nationals benefiting from the LBT. In this way the Polish side wants to protect its national health care sys-

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[86] Art. 5 par. 4 and 5 of the PL-UA agreement on LBT.

[87] Cf. art. 2 par. 1 of the SK-UA agreement on LBT, art. 6 par. 11 and 12 of the SK-UA agreement on LBT.

[88] Art. 9 of the PL-UA agreement on LBT, art. 2 par. 3 and 6 of the HU-UA agreement on LBT.

tem, which seems to be inefficient[89]. The European Commission argues that this problem could be solved in other ways, eg. by an agreement between the health care authorities of the countries concerned, such as the agreement signed between Hungary and Ukraine. The Polish side instead of systematic solution in the form of subsidiary international agreement applies the principle, under which the medical insurance requirement is imposed on individuals, preventing any load for the public health care system. Similarly, the principle of general deterrence was applied in a form of limiting the frequency of use of LBT[90]. Here, however, the other Member States have acted similarly to Poland.

In terms of temporal aspect, in addition to domicile principle, State parties have introduced restrictions on the length and frequency of stay in the border area. The Poland-Ukraine agreement limited the time of a single stay up to 60 days, and at the same time introduced a restriction on the frequency of use shaping the upper limit for 90 days within every 6 months[91]. The other two agreements limit the stay to a maximum of three months[92] (90 days)[93] within every 6 months (180 days). As already indicated above in accordance with the ECJ interpretation, 6-month stays frequency limitations are inconsistent with the Regulation which only specifies the maximum time of a single uninterrupted stay[94].

4. THE LEGAL POSITION OF AGREEMENTS ON LOCAL BORDER TRAFFIC IN NATIONAL LEGISLATION AND EU LAW

The EU powers in shaping the LBT regime result from the transfer of competence in visa and border policy[95]. According to the principle of paral-

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[89] Similarly, the Polish side has a problem with the implementation of the Directive on cross-border services. These two examples demonstrate the failure of Polish health care system in terms of refinancing services.
[90] *Shomodi*, p. 25.
[91] Art. 4 of the PL-UA agreement on LBT.
[92] Art. 1 par. 5 of the HU-UA agreement on LBT.
[93] Art. 4 of the SK-UA agreement on LBT.
[94] Art. 5 of the regulation No 1931/2006.
[95] The legal basis of LBT Regulation is (already historic) art. 62 par. 2 let. a) of the EC Treaty. According to that article, the Council had the competence to adopt measures concerning

lel internal and external competences[96], if the EU can shape legislative acts in the field of visa and border policy, it is also entitled to conclude international agreements in this area. As it follows from the ERTA case (which is the basis for the adoption of the principle of parallel powers), whenever EU establishes "common principle", it is also followed by the transfer of power to conclude international agreements in that area. Referring to the indicated decision, the European Commission emphasized in the first report that the Union "following the adoption of legislation in the specific field, acquires exclusive external competence in the field covered by this legislation. In this regard Member States lose the right to negotiate agreements with third countries in the field covered by this legislation".[97] At the same time the EC has stressed that "it is possible to derogate from this rule if the act of Community law under which it acquires exclusive external competence, expressly authorizes MS to conclude such agreements. Such authorization operates as a re-delegation of powers, essentially lost to the Community, and as such must be narrowly interpreted."[98]

The European Union has given, or handed back to the MS the powers that have been conferred upon it within the framework of the delegation of powers. It was made, however, within certain limits, as defined in the LBT Regulation. Because of the function it carries, LBT Regulation differs from the classical pattern of regulations. On the one hand, it is directed only to the

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standards and procedures to be followed by Member States when controlling persons at the external borders. According to the TL-enabled tables equivalent to that article is Art. 77 TFEU. According to art. 77 par. 1 let. b) TFEU, the Union shall develop a policy aimed at carrying out checks on persons and efficient monitoring of the crossing of external borders. For the purpose of stated aim it shall adopt measures concerning the common policy on visas and other short-stay residence permits; the checks to which persons crossing external borders are subject; the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period (Art. 77 par. 2 let. a) to c) of the TFEU).

[96] K. Miaskowska-Daszkiewicz, *Tworzenie prawa Unii Europejskiej*, [in:] A. Kuś (ed.), P*rawo instytucjonalne Unii Europejskiej w zarysie*, Lublin 2012, p. 294. The principle of parallel internal and external competences in the EC's reports appears as the ERTA doctrine. The doctrine also uses the term parallelism, see: M. Niedźwiedź, Artykuł 216, [in:] A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz LEX.* Tom II, Warsaw 2012, p. 1568.

[97] First report, p. 2.

[98] Ibidem.

Member States[99] and seems that it is not directly enforceable towards individuals. On the other hand, is it more a tool of harmonization of national law and not its unification. It contains minimum-, maximum- and frame norms. For example, apart from indicating just a maximum length of uninterrupted stay in the border area it also indicates the minimum number of elements[100], which the permit should include; frames period of validity of the permit[101]; the maximum fee for issuing a permit or the possibility of exemption from the fee[102], and the minimum period of residence in the border area[103]. In this way the LBT Regulation gives Member States flexibility to shape bilateral agreements. According to the opinion of the Advocate General (presented in the *Shomodi* case), this freedom is sufficient for exerting real impact on the content of the agreement[104].

However it should be considered whether transfer of power to conclude agreements on LBT and to freely shape its content is not too narrow, since the analysis of the three agreements has shown that Member States shape the LBT regime in pretty much the same way. Going deeper, the question arises, whether the transfer of competence to conclude agreements on LBT to Member States was necessary? In the absence of such a transfer, the European Union could conclude agreements on LBT in the same way as it does with a simplified visa regime or visa-free movement. For the transfer of competence to conclude agreements on LBT certainly speaks principle of subsidiarity. As well as the Commission rightly emphasizes, the creation of content of the agreements by MS allows to take into consideration the specific needs in relations with individual neighbors, “since the needs are different because of different local conditions, geography, social and economic situation”.[105] On the basis of these agreements, in particular preambles to agreements it can also be concluded, that the agreements themselves are used in two ways.

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[99] Art. 1 par. 1 of the regulation No 1931/2006.
[100] Art. 7 par. 3 of the regulation No 1931/2006.
[101] Art. 10 of the regulation No 1931/2006.
[102] Art. 11 of the regulation No 1931/2006.
[103] Art. 3 par. 6 of the regulation No 1931/2006.
[104] P. 29 of the opinion.
[105] First report, p. 3.

On the one hand, they pursue the policies of the Union; in particular we are talking about the Area of Freedom, Security and Justice, although MS also refer to the European Neighbourhood Policy. On the other hand, MS clearly treat concluded agreements as a way to strengthen bilateral cooperation; in particular they refer to the agreements on good neighborhood, friendly relations and cooperation while stressing the will to further deepen cooperation through signed agreements.

Despite the fact that LBT agreements are treated as an essential instrument of national external policy with neighbouring countries, these agreements can not be classified as classical international agreements concluded within the framework of *ius contrahendi* of Member States[106]. Agreement on LBT seem to be a specific legal instrument which, although it is implemented by Member States within their external policies in relations with other subjects of international law, is assessed in the light of EU law and should be compatible with it. The obligation to comply with the LBT Regulation results not only from the principle of loyalty, but also due to the nature of the prerogative of MS. For it seems that the competence to conclude agreements on LBT by the MS now has a derivative nature and is based on the delegation included in the Regulation. Finally, if the EU delegates competence to conclude agreements on LBT to the Member States, this delegation surely has a strictly defined framework.

CONCLUSION

The foregoing considerations allow us to draw some conclusions. Firstly, the local border traffic regime, in accordance with language and system interpretation, constitutes a development of the Schengen *acquis*. At the same time the LBT Regulation must be interpreted in isolation from the Schengen Borders Code, although indicated autonomy is not unlimited. According to the intention of the EU legislature, local border traffic regime is to serve the realization of the Area of Freedom, Security and Justice as EU policy. Judging from the proposed but unaccepted amendments, relationship between

[106] Cf. T. Molnár, op.cit., p. 451 and further.

the LBT and the European Neighbourhood Policy has more of a complementary nature rather than a primary one.

Secondly, the analyzed agreements are shaping the national regimes of LBT in a rather similar way. The provisions of the agreements are often in line with the Regulation on the definition of LBT, rules of crossing the external borders and conditions for derogation. Differences can however be pointed out in three main areas: territorial, subjective and temporal. In addition, the analysis shows that the agreements are used in two ways. On the one hand, they pursue the policies of the Union, in particular the Area of Freedom, Security and Justice, although MS shall also refer to the European Neighbourhood Policy. On the other hand, they implement the national policy as well.

Thirdly, because of the position in the national legal system and the relationship between EU law and LBT agreements, same agreements cannot be classified as classical international agreements concluded within the framework of *ius contrahendi* of Member States. Agreements on LBT are a specific legal instrument which is implemented by MS within the framework of their external policies and at the same time assessed in the light of EU law. Such an assessment is not based solely on the duty of sincere cooperation, but also due to the obligation to comply with the LBT Regulation. This position is based on the assumption that the competence to conclude agreements on Local border traffic are delegated to the MS by the Union, still the boundaries of the delegation are defined in the LBT Regulation. The delegating entity (EU) has the power to verify compliance of the delegation using both: measures arising from the content of the Regulation as well as those based on treaty instruments. Therefore, it is impossible to exclude potential litigation by the EC for not fulfilling treaty obligations[107], based on the fact that the content of the agreement would be incompatible with the LBT Regulation.

[107] Based on art. 258 TFEU

RETURN MIGRATION POLICY – A CASE STUDY OF IRELAND, THE UK AND DENMARK

JUSTYNA GILETA

The entry into force of the Lisbon Treaty has significant importance to EU immigration law. The so-called collapsing of the Pillars considerably simplified matters for the Area of Freedom, Security and Justice bringing immigration, asylum and borders into one camp together with judicial co-operation in criminal matters, policing, terrorism and other subject matters. Title V, chapter 2 of the Treaty on the Functioning of the European Union [1] sets out the competences of the European Union on border checks, asylum and immigration policy aimed at ensuring the 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 TFEU).

Specific reference has been made to fair treatment of third-country nationals legally residing in the EU. From this we see examples of secondary legislation that the EU has adopted in this field such as the Long Term EU Residents' Directive[2] or the Family Reunification Directive[3]. The third measure that has been adopted and provides long-stay immigration rights for third-country nationals is the so-called Blue Card Directive[4] and the

[1] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 of 26.10.2012 (later in the article cited as TFEU).

[2] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16 of 23.01. 2004.

[3] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251 of 3.10.2003

[4] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJ L 155 of 18.6.2009.

fourth is the Directive on admission of third-country nationals for the purpose of scientific research[5].

The purpose of this paper, however, is to focus on regulation of irregular migration in three unique Member States: UK, Ireland and Denmark. It is worth emphasizing that the EU has adopted several measures also in this area among which the Return Directive[6] is of paramount importance mainly due to the fact that it establishes common rules for the return of irregular immigrants to third countries. This article aims at analysing the realisation of certain EU measures in this field with reference to these Member States bearing in mind the special position of these three countries as regards the issues discussed.

The entry into force of the Lisbon Treaty[7] changed the institutional framework governing EU Justice and Home Affairs significantly. The basic rules governing JHA cooperation were now in Title V of Part Three of the Treaty on the Functioning of the European Union. Title V contains general provisions[8]; rules on immigration and asylum[9]; judicial co-operation in civil matters[10]; cooperation in the field of criminal law[11] and police cooperation[12]. The Treaty of Lisbon abolished the third pillar and applied standard EU rules on decision-making, legal instruments, and judicial control to all JHA matters[13]. Here the distinctions in the territorial scope of JHA measures appear. This is the only issue that in a clear way differentiates JHA measures from the rest of EU law. Several Member States due to different reasons do not participate fully in EU

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[5] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research OJ L 289 of 3.11.2005.

[6] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348 of 24.12.2008 (later cited as Return Directive).

[7] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ C 306 of 17.12.2007.

[8] Chapter 1 of Title V (Arts 67-76 TFEU).

[9] Chapter 2 of Title V (Arts 77-80 TFEU).

[10] Chapter 3 of Title V (Art. 81 TFEU).

[11] Chapter 4 of Title V (Arts 82-86 TFEU).

[12] Chapter 5 of Title V (Arts 87- 89 TFEU).

[13] S. Peers, *EU Justice and Home Affairs Law,* Oxford 2011, p. 73.

integration in the abovementioned areas. What is more, not all Member States apply the Schengen *acquis* fully as well, hence the specific position of such countries as the UK, Ireland and Denmark.

One of the most important impacts that the EU has had on Member State's approach to irregular migration is the creation of the common Schengen area, which created the concepts of 'internal' and 'external' borders.

The UK and Ireland are covered by a specific protocol on border controls, a special protocol providing the possibility of opting in to any Title IV (EC Treaty now Title V TFEU) measure and are also bound by specific rules when it comes to the Schengen *acquis*. The United Kingdom and Ireland were the only European Union Member States that, prior to the 2004 enlargement, had not signed the Schengen Agreement. Both countries have agreements between themselves regulating the movement of persons between their territories – the Common Travel Area with passport free travel for their citizens between them and the three British Dependencies[14]. The UK's not taking part in the adoption of the Schengen Agreement is justified by its special island status. One of the House of Commons Parliamentary Debates provides the following explanation: for an island, frontier controls are definitely a better and less intrusive way to prevent illegal immigration than such measures as identity cards, residence permits or registration with the police, which are very much appropriate for "partners with extensive and permeable land borders"[15]. As read in a separate protocol annexed first by the Treaty of Amsterdam and then by the Lisbon Treaty, the United Kingdom is entitled to conduct controls on persons at its frontiers firstly, to verify if such a person who purportedly has the right to enter the United Kingdom in fact has such a right and secondly, to determine whether or not to grant other persons permission to enter the country[16]. An exceptional

[14] The Area's internal borders are subject to minimal or non-existent border controls and can normally be crossed by British and Irish citizens with only minimal identity documents, however, the use of a passport is required by the airline Ryanair.

[15] Parliamentary Debates (Hansard) (the United Kingdom: House of Commons), 12 December 1996, columns 433-434. Available at: http://www.publications.parliament.uk/pa/cm199697/cmhansrd/vo961212/debtext/61212-13.htm.

[16] Protocol No. 20, 2012, O J C326/293 on the application of certain aspects of Article 26 on the treaty of the Functioning of the European Union to the United Kingdom and to Ireland.

position of the United Kingdom and Ireland in respect of the Schengen *acquis* is regulated in a separate Protocol annexed to the TEU and TFEU[17]. In accordance with the Schengen Protocol, Ireland and the United Kingdom may at any time request to take part in either some or all of the provisions of the Schengen arrangements on condition that the Schengen Member States together with the representative of the Government of the country in question vote unanimously in favour within the Council[18]. These Member States are entitled to participate in the adoption of measures that build upon the Schengen *acquis* if they notify the Council in writing within a reasonable period of time that they wish to do so[19]. It should be emphasized that, as was clarified by the Court of Justice, such a right only exists for measures building on provisions of the Schengen *acquis* that the Member State under consideration has already accepted[20]. Hence, in order to take part in the creation of any new measures, at first those two countries must adopt the particular area of Schengen regulations in which a new measure is created. It serves as a good tool preventing the UK and Ireland from choosing selectively just some EU policies.

The UK's request to participate in certain Schengen *acquis* regulations was formally approved[21] by the Council in May 2000 and the parallel[22] Irish one in 2002. Both Member States participate or will participate in almost all of the criminal law and policing Schengen provisions together with the provisions on control of irregular migration. They do not however participate in any of the rules on visas, border controls, or freedom to travel. Having considered the abovementioned fact, they will participate in the SIS only to

[17] Protocol No. 19, 2012, O J C326/290 on the Schengen acquis integrated into the framework of the European Union.
[18] Protocol No. 19, art. 4.
[19] Protocol No. 19, art. 5.
[20] K. Lenaerts, P. Van Nuffel, European Union Law, London 2011, pp. 723-726.
[21] Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis OJ L 131/43 of 01.06.2000.
[22] Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis OJ L 64/20 of 7.3.2002.

the extent that it applies to policing and judicial cooperation, but not as it applies to immigration[23].

The United Kingdom has also negotiated opt-outs in the Area of freedom, security and justice, to be more precise, it does not participate in the decision-making proceedings concerning the adoption of measures under Title V Part Three of the TFEU, it is not bound by them and it does not bear the financial consequences of these measures[24]. Before the Treaty of Lisbon entered into force, that arrangement only concerned measures adopted in the field of asylum, visa, immigration and judicial cooperation in civil matters, since then, however, it covers the whole Area of freedom, security and justice along with police and judicial cooperation in criminal matters.

Denmark as well, does not participate in JHA. It is worth mentioning that Denmark did not object to JHA matters in principle, but more precisely, to the idea that JHA cooperation should take place within the framework of supranational EU law. Denmark's exemption from JHA supranational cooperation has been governed by a special protocol, the Danish Protocol[25]. It focuses on Denmark's status as regards measures concerning immigration, asylum, and judicial cooperation in civil matters (the former Title IV EC). There are also special rules set out for Denmark in relation to the integration of the Schengen *acquis* into the EU legal order[26]. The Danish Protocol was extended in scope by the Treaty of Lisbon. It exempts Denmark from policing cooperation and criminal law measures which were adopted after entry into force of the Treaty. Third pillar acts adopted before the entry into force of the Lisbon Treaty "which are amended shall continue to be binding upon and applicable to Denmark unchanged"[27]. It is worth underlining that according to the Treaty of Lisbon as for measures building upon the Schengen

[23] S. Peers, op. cit., p. 80.
[24] Protocol No. 21, OJ C 326/295, art. 1, 2 and 5 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice of 26.10.2012.
[25] Protocol No. 22 on the position of Denmark, OJ C 326/299 of 26.10.2012 (later cited as Danish Protocol).
[26] Protocol No. 19, art. 3.
[27] Danish Protocol Art. 2, final sentence.

acquis and those measures which fall within the scope of Title V TFEU, Denmark has six months to decide whether to apply each such measure within its national law[28]. If Denmark does so then its decision creates an obligation under national law between Denmark and other Member States participating in this measure. If Denmark does not apply such a measure "Member States and Denmark will consider appropriate measures to be taken"[29]. In practice however, Denmark has consistently opted into all such measures building upon the Schengen *acquis*. Denmark does not have the ability to opt in to specific JHA measures, like the UK and Ireland do so.

When it comes to irregular migration, the UK and Ireland are covered by the measures considered in previous Title IV Part Three of the TEC, except for: the Directive on trafficking victims, the Decision on financing expulsions[30]; the 2003 Directive on transit and expulsion; the Returns Directive; the Directive on sanctions for employers of irregular migrants; the Decision on the system for exchange of operational information[31]; and EU readmission treaties[32]. They also opted into to Article 26 and 27 of the Schengen Convention[33].

As for Denmark, its position concerning measures adopted before the entry into force of the Lisbon Treaty follows the scope of the previous Title IV EC and the Schengen *acquis*. It is covered by the Framework Decisions on trafficking in persons and facilitation of irregular entry. It applied in full or in part the Decision on the system for exchange of operational information, the Decision on financing of expulsion decisions, and the Directives on mutual recognition of expulsion measures and transit for expulsion, to the extent that they built on the Schengen *acquis*[34]. It could not participate in the readmission treaties, however, a Joint Declaration to each readmis-

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[28] Danish Protocol, Art. 5.
[29] Danish Protocol, Art. 5 (2).
[30] The UK is covered in part, Ireland is not covered at all.
[31] It covers the UK fully, but Ireland only to the extent that it builds on the Schengen acquis.
[32] The UK has opted into all of them, Ireland has only opted in to the treaty with Hong Kong.
[33] S. Peers, op.cit., p.512.
[34] Council docs 14261/01, 23 November 2001; 9963/02, 20 June 2002; 10661/04, 18 June 2004;12195/04, 10 September 2004; and 12907/04, 29 September 2004.

sion agreeement encourages the EU's contracting partners to negotiate them separately with Denmark.

The United Kingdom has opted in to some of the EU measures which aim to combat illegal immigration, including the Carriers Sanctions Directive[35] and Human Trafficking Directive[36]. However, the British have not opted in to Employer Sanctions Directive[37] and the Return Directive on common standards and procedures in Member States for returning illegally staying third-country nationals[38]. This controversial EU measure obliges removal of illegal immigrants and sets time limits for pre-deportation detention. The UK's position on the directive was set out by former Labour immigration minister Phil Woolas: "The UK has not participated in and has no plans to implement the EU Returns Directive 2008/115/EC. We agree that a collective approach to removal can have advantages. However, we are not persuaded that this Directive delivers the strong returns regime that is required for dealing with irregular migration. Our current practices on the return of illegal third country nationals are broadly in line with the terms of the Directive, but we prefer to formulate our own policy, in line with our stated position on retaining control over conditions of entry and stay".[39] The UK government argued that the directive makes returning illegally staying third-country nationals more difficult and more bureaucratic. Although the directive was supposed to 'encourage the voluntary return of illegal immigrants but otherwise lay down mini-

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[35] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 OJ L 187/45 of 10.07.2001 (known as Carriers Sanctions Directive).

[36] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101 of 15.4.2011.

[37] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168 of 30.6.2009.

[38] Return Directive.

[39] Phil Woolas, *Statement to Parliament*, Hansard, 2 November 2009, quoted in C. Costello, E. Hancox, *The UK, the Common European Asylum System and EU Immigration Law*, Oxford 2014.

mum standards for their treatment'[40], there has been heated debate over its success in establishing these standards. Concerns have been raised over certain provisions of the Directive: for example, it allows migrants to be detained for up to eighteen months[41], which is substantially longer than many previous maximum limits in Member States[42]. In the UK there is also no maximum limit to lengths of detention, however, people are detained for less than a year on average. The UK could still stand to reduce the use and duration of detention, but signing the Directive would not ensure that. The Directive also allows for the possibility of a five-year re-entry ban – applying even to asylum seekers – and for the detention and return of unaccompanied minors. As a result, the Directive has received a considerable amount of criticism from NGOs, the UNCHR and other international organizations[43].

Various sources provide different estimates of the number of irregular migrants in the UK, which proves how little is actually known about the scale of the problem. Whatever the actual numbers are, irregular migration is one of the major political problems in the UK. Managing migration flows and enforcing immigration rules – these are the major ways of the government to demonstrate their competence and credibility to the public, so against this backdrop the return of irregular migrants has become an imperative.

Irregular migrants can be categorized into one of the three groups. The first comprises of irregular entries of people who either evade formal migration controls or people who present false papers[44]. The second category is

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[40] Press release of the European Parliament, Parliament adopts directive on return of illegal immigrantsImmigration – 18.06.2008 Plenary sessions available at: http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20080616IPR31785.

[41] A maximum period of custody of six months, which can be extended by a further 12 months. Returns Directive, art. 15 (5) and (6).

[42] In the UK, for instance in 2011, about 60 per cent of total immigration detainees were held for less than two months [in:] S. J. Silverman, R. Hajela *Briefing Immigration Detention in the UK*, Oxford 2013, available at: http://www.migrationobservatory.ox.ac.uk.

[43] M. Cherti, M. Szilard, *Returning Irregular Migrants: How effective is the EU's Response?,* London 2013, p. 4.

[44] M. Cherti and B. Balaram, *Returning irregular migrants: Is deportation the UK's only option?*, London 2013, p. 7.

comprised of migrants who were at one time given permission to be present, but have exceeded the agreed period of residence or breached the terms of their visas[45]. They can be further identified as: failed asylum seekers who stayed on despite the fact that they have been refused the right to remain; overstayers whose right to reside has expired without renewal; and finally those who have a restricted right to reside but at the same time are violating their conditions of stay. Children born to irregular migrants in the UK – this is the third category. Breaking these categories down further seems impossible because much of the data on the grounds for removal is missing.

Types of return can be grouped as voluntary and involuntary but there are grounds for further distinctions: assisted voluntary return – where financial assistance is provided; notified voluntary departure – where a person notifies the Home Office that they have departed; other confirmed voluntary departure – where a person has been identified as leaving when they no longer have the right to remain in the UK, either as a result of embarkation controls or by subsequent data matching on Home Office systems[46]. Voluntary return can be facilitated through the use of an assisted voluntary return programme (AVR) but whether such a choice was made freely or under compulsion will depend on the individual. Voluntary return is preferred by governments due to the fact that it is cheaper and not that much cumbersome as forced deportation. Additionally, the last mentioned may attract negative attention from the media and public opinion in general. What is more, forced return often involves periods in detention and supervision on the plane home, which generates additional costs. Two forms of return, however, share the same aim, which is returning migrants without

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[45] Ibidem, p. 7.

[46] Home Office National Statistics, available at: https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2014/immigration-statistics-january-to-march-2014 The figures quoted relate to numbers of people, including dependants, leaving the UK either voluntarily when they no longer had a right to stay in the UK or where the Home Office has sought to remove them. While individuals removed at a port of entry have not necessarily entered the country, their removal requires action by the UK Border Force and Home Office, such as being placed on a return flight. The figures discussed cover the same period of time that is the year ending March 2014.

irregular status or those who have already exhausted their asylum claims[47]. Voluntary return, in particular AVR, has great potential to bring far more sustainable outcomes than involuntary or enforced return because it allows for certain measures to be taken to prepare migrants for reintegration in their home countries. The overarching goal of all reintegration policies is to ensure that the resettlement is stress-free. The migrant is provided with a package of support. This might include financial help, but help in this case means preparing the migrant to depart and get in touch with their family or local organizations that can help them in the first phase of the reintegration process. In particular caseworkers in the UK can: contact family and friends in the returnee's home country; plan how the returnee will get from the airport to their destination; find local healthcare and education where the returnee will be living; contact local organizations able to provide help and advice upon arrival, etc.[48]

The UK uses three methods of enforced return: the removal of irregular migrants at the border, administrative removal or deportation. The choice of the method depends on the situation of the migrant. Irregular entrants these are persons who enter the country without permission or by deception, these are also foreigners for whom there is no evidence of lawful entry and these who enter in breach of a deportation order[49]. Individuals who overstay, work in breach of their conditions of entry and have gained permission to remain through deception are served with administrative removal. To those who have refused a lawful order to leave the country, committed criminal offence deportation applies. In the case of administrative removal, migrants are served with an order for removal together with a notification of any appeal rights. Such persons are provided with directions and details for their removal, at the government's expense. At this stage, migrants can choose to depart voluntarily on their own or through the AVR programme.

Analysing the figures it can be observed that enforced removals from the UK decreased by 12% to 12,621 in the year ending March 2014 com-

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[47] M. Cherti and B. Balaram, op. cit. p. 9.
[48] Ibidem, p. 9.
[49] Ibidem, p. 11.

pared with the previous 12 months (14,283)[50]. The number of passengers who were refused entry at port and who subsequently departed has increased by 3%, however, the long-term trends show levels decreasing since 2004. At the same time, there was an increase of 25% in total voluntary departures, to 37,227, compared with the previous year (29,883). It should be also mentioned that this category has represented the largest proportion of those departing from the UK since the end of 2009. Of the total voluntary departures in the year ending March 2014, 63% of those departing were categorised as other confirmed voluntary departures, 25% as notified voluntary departures and 12% as Assisted Voluntary Returns (AVRs). The largest category, other confirmed voluntary departures, these are cases where a person has been identified as leaving when they no longer had the right to remain in the UK, the reasons may be different, either as a result of embarkation controls or by subsequent data matching on Home Office systems. This category has been the largest within total voluntary departures since 2007 when it surpassed AVRs. Other confirmed voluntary departures increased from 6,883 in 2007 to 24,994 in 2013.

The number of people refused entry at port and subsequently departed has decreased. The 42% decrease from the third quarter of 2009 (7,751) to the second quarter of 2010 (4,520) has no identified single cause, although 26% of the decrease was due to a fall in the number of nationals of Afghanistan being refused entry and subsequently removed. The overall decreases are the result of a combination of many factors such as tighter screening of passengers prior to travel and changes in visa processes and regimes; for instance, South African nationals have been required to have a visa for any length or type of visit to the UK since July 2009. The figure for the first quarter of 2014 has decreased by 23% compared with the fourth quarter of 2013 and 6% compared with the first quarter of 2013. The long-term trend in voluntary departures increased steadily to the first quarter of 2010, but quarterly figures since 2010 have shown signs of a more gradual upward trend. The long-term increase coincides with the Home Office improving

[50] Home Office National Statistics, available at: https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2014/immigration-statistics-january-to-march-2014.

its contact management with migrants and its ability to track those who are leaving the UK. It should be underlined that the figures include individuals who have been identified by administrative exercises as those who have overstayed their leave, and then subsequently left the UK without informing the Home Office. This identification process allows the Home Office to focus its resources on persons who remain in the UK.

The number of enforced removals has steadily declined over time, although this has been more gradual in recent years. The latest annual figure (2013; 13,051) represents the lowest level since 2004. The highest number of enforced removals in the period under consideration were for nationals of Pakistan and India. Whereas the highest number of passengers who were refused entry at port and were subsequently departed involved nationals of the United States. The second and third highest involved nationals of Albania and Brazil. Nationals of the United States and Brazil who are not coming to the UK for work or for six months or more do not need to apply for a visa prior to arrival. The first time that they can be refused entry will therefore be on arrival in the UK.

In recent years, the UK has tried its best to accelerate the process of removing irregular migrants so as not to undermine the credibility of the immigration system because of the belief that those who have no right to remain in the UK should not live and work here. The UK has limited rights of appeal for refused asylum seekers and is still working towards reducing the scope for judicial review of decisions to remove. Another way in which the UK attempts to speed up return is through the use of the Detained Fast Track system. Migrants who undergo this system are immediately directed from port of entry into the detention cwntre where they are then processed within one to three weeks with minimal legal support[51]. AVR programmes are definitely less expensive and more beneficial to migrants than deportation but on the other hand it can be a difficult sell because of public opinion considering AVR scheme to be "bribing" irregular migrants to return home. Currently there are three AVR programmes in operation run by NGO Refugee Action and funded by the Home Office and the European Return Fund.

[51]M. Cherti and B. Balaram, op. cit., p.11.

Assisted Voluntary Return for Irregular Migrants (AVRIM) assists illegal entrants, trafficked persons, smuggled people and those whose leave has expired of any nationality (apart from UK, European Economic Area (EEA) or Swiss nationals) to return to their country of origin. It is not open to people who have been in the asylum system. Assistance includes help and funds in acquiring travel documentation to return as a normal passenger, support and advice to prepare for return, paid flight and onward domestic transport, airport assistance in the UK and also at the airport a person returns to or onward transport from the airport. No reintegration package is provided. A caseworker may: support a person to build a new life once they have returned home, contact friends and family in a person's country before they leave, plan the way back from the airport to a final destination, find out about healthcare and education near where such a person will be living, etc.[52]

Voluntary Assisted Return and Reintegration Programme(VARRP) is open to certain categories of irregular migrants: asylum seekers, refused asylum seekers and persons with discretionary leave to remain. VARRP helps with: travel documentation, arranging a flight to one's country of return or assistance at the airport in the UK. A person may be able to access help at the airport they return to, onward transport from the airport to their destination and finally they could receive up to £1500 to help them settle back in their country. This is called 'Reintegration Support' and may be used for: excess baggage and immediate needs on arrival, training and education, help setting up a business including buying equipment and materials, travel to find employment, housing, medical needs or mentoring opportunities[53]. The precise nature of support is agreed with the applicant prior to their departure from the UK. The abovementioned elements of support are an added incentive for individuals to take advantage of voluntary returns and may also improve the sustainability of reintegration.

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[52] Refugee Action Choices Service, available at: http://www.choices-avr.org.uk/assets/0000/1664/C2._AVRIM_Reintegration_Support_Client_Leaflet_-_English.pdf.

[53] Refugee Action Choices Service, available at: http://www.choices-avr.org.uk/assets/0000/1640/C1._VARRP_Reintegration_Support_Client_Leaflet_-_English.pdf.

Assisted Voluntary Return for Families and Children (AVRFC) is the programme established in April 2010. It applies to asylum seekers, refused asylum seekers, persons who have discretionary leave to remain or no legal status in the UK and are under eighteen or have a child under the age of eighteen who will be returning home with such a person. AVRFC helps with travel documentation, arranging a flight to the country of return, provides assistance at the airport in the UK, possibly access to help at the airport in the country of return, onward transport from the airport to the destination place and money help up to 2000 GBP per family member to settle back in the home country[54].

Many migrants are completely unaware that they are eligible for AVR schemes or that such schemes exist. To encourage adoption of AVR programmes it might be advantageous to grant reintegration assistance for example to people who fall into irregularity and volunteer their presence to authorities. AVRIM, for instance, is a programme which provides no reintegration help failing to address a major concern of many migrants – smooth transition back to their home country. The person does not receive payment of any kind and cannot access reintegration support even if they want to leave the country voluntarily. These migrants will have to independently seek out organizations in their home country that may help them in the process of reintegration. Only migrants who participate in VAARP and AVFRC are provided with some reintegration assistance. Another way to encourage more irregular migrants to take advantage of AVR schemes is to simplify the application process and involve relevant NGOs and community groups to inform and give advice about these schemes. These actors are considered more trusted by potential returnees than government officials. It might also be worth considering to introduce a gateway process to AVR for detainees, so that they can choose to return voluntarily as soon as they are detained rather that remain in further detention only to face eventual deportation.

To conclude, irregular migration is a serious concern in the UK. Governments have the right to control their own borders and decide on their

[54] Refugee Action Choices Service, available at: http://www.choices-avr.org.uk/assets/0000/1645/C3._AVRFC_Reintegration_Support_Client_Leaflet_-_English.pdf.

own immigration laws. Migrants are right to challenge the UK government if it takes enforcement actions is violation of migrant's rights. However, the UK may not be managing the return of irregular migrants as efficiently as it could. As has been discussed above, there is scope for increasing returns thanks to AVR programmes, consistent with the best practices in the European Union. Introducing changes to increase the success of AVR programmes, for instance: through amending criteria for eligibility, the UK has the potential to improve its ability to return irregular migrants.

Ireland similarly to the UK and Denmark view return as an integral part of policy on irregular migration. In Ireland many irregular migrants are over-stayers entering legally but remaining illegally, they are also unsuccessful asylum applicants with deportation orders or persons who enter the country illegally. In particular, large scale removals generate high costs and as some believe, are socially and economically disruptive. What is more, there is a risk of returning individuals to a precarious situation especially for those seeking asylum[55]. This phenomenon also affects migrants who are moved by smugglers and who may return to their countries of origin in debt. In recent years also in Ireland more attention has been paid to the extent to which assisted voluntary return schemes might be a more effective way to promote returns. But it can be observed that one of the main reasons migrants with an irregular status do not want to return home is related to their financial commitments. Unfortunately, many of the participants have paid large fees to agencies and intermediaries to come to Ireland. In majority of these cases the money is borrowed from family and friends on the understanding that the worker will send money home to repay the debt. Hence, even if they find themselves without a work permit and with an irregular status they still are obligated to repay the debts incurred. Such a situation definitely increases the pressure on the individual to stay working even if they find themselves working in exploitative conditions[56]. Additionally, many participants are supporting families in their countries of origin. They

[55] M. Robinson, *Life in the Shadows: An Exploration of Irregular Migration in Ireland*, Dublin 2007, p. 23 available at: http://mrci.ie/wp-content/uploads/2012/10/Life-in-the-Shadows_an-Exploration-of-Irregular-Migration-in-Ireland.pdf.
[56] M. Robinson, op. cit., p. 31.

make regular financial remittances back home, mostly to support partners and children or to educate younger members of their families. For each individual with an irregular status staying in Ireland there might be a number of dependants elsewhere being supported by his or her work activities. It is also worth pointing out that migrants with an irregular status in Ireland are more willing to endure extreme hardship rather than face the shame of returning homes as a 'failure' or still in debt.

Denmark, similarly to the UK and Ireland has not opted into the Return Directive. This decision is considered a political matter because Denmark has a reservation in the legal field. The reservation means that Denmark can pursue an independent immigration policy, regardless of the law adopted by the EU in AFSJ. But the Danish immigration policy cannot interfere with other EU rules. For instance, the EU Citizenship Directive 2004/38 reaffirms the fundamental right of free movement[57]. As a citizen of the EU a person has the right to reside in another EU Member State, as long as they are employed, study or otherwise have enough money to live without being a burden to the country's social system and are covered by medical insurance. National legislation cannot bypass this Directive.

As in the countries discussed above, also in Denmark there have been repatriation programmes addressed to asylum seekers and rejected asylum seekers.The Parliament Finance Committee adopted on 18 December 2012 a temporary support program for asylum seekers (particularly rejected asylum seekers) who cooperate on voluntary return. The target group included all asylum seekers who entered the country before 18 December 2012 and registered as asylum seekers before 1 July 2013. The economic incentive for voluntary return was up to 20 000 DKK per adult and up to 10 000 DKK per child.

To join the program the asylum seeker had to register with the Danish Immigration Service no later than 1 July 2013. The Danish state would also cover the cost of travel and the transportation of personal belongings. Further, the Danish state would fund the purchase of commercial equipment

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[57] See, A. Guild, S. Peers & J. Tomkin, *The EU Citizenship Directive. A commentary*, Oxford 2014.

up to 10 000 DKK per adult. On 1 July 2013 the program was extended to 31 December 2013. But, it has not been extended any further. This was a result of a political agreement from 19 September 2012 between the government and two political parties, The Unity List and The Liberal Alliance, on increased focus on departure and new possibilities for asylum seekers.

In addition to this, a counseling service was established in a separate programme, so-called Reinforced counseling of rejected asylum seekers. It was aimed to facilitate the voluntary return of rejected asylum seekers.

The temporary support program for asylum seekers and rejected asylum seekers was deemed a success. In total, until 31 December 2013, 603 persons, 504 adults and 99 children, applied for support, 418 were approved (347 adults and 71 children) and 234 persons returned[58].

According to EU law there are some limits for the freedom of movement. Even a EU citizen can end up in a situation where the citizen is residing illegally in another EU country and the citizen can be expelled. For instance, if a EU citizen has not registered as a job seeker three months after entering another EU country, including Denmark or Ireland, the person will formally be illegal in that country. After six months the person must be employed or have the necessary (documented) means to sustain himself.

In case of illegal residence the EU citizen is a Police matter. The Police will expel the person. The Police will submit a petition to The Danish Immigration Service to deport the person. The Danish Immigration Service has the task of assessing the legal grounds for administrative expulsions (for minor offenses). The Police, to be more precise the attorney general and the Danish courts have the competence to decide in matters of expulsion in cases of more severe offenses. In practice, the Police will escort the EU citizen to the train or airplane.

Denmark has seen some problems with Romanian citizens in the past years during summer where they camp in public parks in big numbers and harass pedestrians in the center of Copenhagen, begging for money etc. In the summer of 2010 Denmark – The Danish Immigration Service – granted the expulsion of a large number of Romanians. Apparently this

[58] Data come from Danish Immigration Service.

was not in accordance with EU regulations and the EU Citizenship Directive. In 2011 the Supreme Court and the Ministry of Justice established a new limit of offenses for which expulsion can be imposed on EU citizens. A number of minor offenses – like begging – will require more than one, first time offense in order to expel. Thus, in the summer of 2013 the Police adopted a new tactic where the Police recorded all minor, first time offenses of this nature in order to document the important second offense which indeed could include expulsion.

Today it is harder to expel a EU citizen than in 2010 but it is still an option in certain circumstances – regardless of the Danish reservation in the legal field[59].

Summing up, the three countries considered - the UK, Ireland and Denmark - have a special status due to the fact that they do not participate fully in EU integration and they also do not apply the Schengen *acquis* fully. They provide different reasons for not being involved in the above-mentioned matters.

British selective approach towards EU policy on asylum and immigration was once characterized by Tony Blair as giving it "the best of two worlds". On the one hand, as Blair underlined, the UK secured the right to opt in to any provisions concerning the asylum and immigration that it wanted, "unless we opt in, we are not affected by it", on the other, Britain was for opting in to measures so as to make sure that "there are proper restrictions on some of the European borders that end up affecting our country"[60]. Geddes concluded that the UK's 'selective use of the EU as an alternative, cooperative venue for migration policy management actually reinforces rather than overturns established patterns [in domestic policy].'[61] Some scholars have observed that Britain is more prone to participate in coercive measures limiting the ability of migrants to enter the EU more willingly, however, opting out of protective measures which give migrants and third-country nationals

[59] This part of article includes helpful comments of Nils Bak, Head of Press Relations in the Danish Immigration Service.
[60] Tony Blair, *25 October 2004, quoted in A. Geddes, Getting the Best of Both Worlds? Britain, the EU and Migration Policy*, London 2005, p. 723.
[61] A. Geddes, op. cit. p. 723.

some rights. This tendency seems to continue as the UK recently decided not to opt in to a draft EU Directive on Human Trafficking, while opting in to negotiations for international sharing of Passenger Name Records[62]. It can be concluded that the UK's selective approach may bring various disadvantages. The UK may find itself excluded from EU policies it wishes to engage in, as for example: the rulings on Frontex, biometric passports or data from the visa information system. As C. Costello underlines, the new government's reluctance to engage with the reforms to EU asylum measures may also undermine its position when seeking to use the Dublin system[63]. The failure to opt in to EU measures clearly diminishes migrants' rights in the UK, it especially affects their rights to move freely within the EU. Furthermore, some EU measures attempt to balance migration control and migrants' rights. For instance, the EU attitude to employment of irregular migrants aims both to prevent their employment, and decrease demand by ensuring that at least some labor rights of irregular migrants are protected.

[62] C. Costello, E. Hancox, *The UK, the Common European Asylum System and EU Immigration Law*, Oxford 2014, p. 8.
[63] Ibidem, p. 8.

THE CONCEPT OF A SAFE EUROPEAN COUNTRY AND ITS IMPACT ON THIRD COUNTRY NATIONALS FUNDAMENTAL RIGHTS PROTECTION

ANNA KOSIŃSKA

INTRODUCTORY REMARKS[1]

The concept of a European safe third country was used in Directive 2005/85 on minimum standards on procedures for granting and withdrawing refugee status in Member States[2].

This article assumes to fulfill legal material analysis in relation to asylum procedures (as well as refoulement procedures in the case of implementation standards of the Regulation Dublin II), conduct analysis of the case law in order to present a profound definition of 'safe state', yet also to explore a possibility of this very definition usage in repatriation procedures and guarantees deriving from Art. 19 of the Charter of Fundamental Rights of the European Union (CFR). The problem of migrant refoulement under Dublin II Regulation applies to a particular group of foreigners who applied for refugee status in a European country, while in a second country they applied a second time. Residence of such people remains to be of an irregular nature, despite the fact it differs from the one provided in the return directive.

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[1] Law in the article as of April 30, 2015.

[2] Art. 36 Council Directive 2005/85/WE 1 of December, 2005 on minimum standards for procedures for granting and withdrawing refugee status, OJ L 326, 13.12.2005.

1. PROTECTION OF THE FUNDAMENTAL RIGHTS OF MIGRANTS

Protection of migrants' rights in international law has its origins in the United Nations system. Currently, migrants' rights are also protected in the European system under the auspices of Council of Europe and the European Union, having complementary character towards each other. It is worth emphasizing that systems of protection of migrants, and especially refugees, which were created in the framework of the United Nations, the Council of Europe and the European Union mutually intertwine. An example of commonly recognized principles of international law is the principle of non-refoulement, under which no one is allowed to turn back a person seeking protection to the territory where his life or freedom is endangered[3]. While analyzing foreigners' rights protection systems, one shouldn't strictly divide those rights into three traditionally distinguished groups (refugees, irregular migrants, regular migrants), for this sort of division is highly technical, yet all the rights are complementary to each other. Hence system of rights that are serving refugees also affects the rights guaranteed to other groups of third-country nationals.

MIGRANTS' PROTECTION SYSTEMS IN INTERNATIONAL LAW - EUROPEAN UNION AND THE COUNCIL OF EUROPE

International instruments of protection of migrants' and refugees' rights have been adopted by the United Nations and have given rise to complex interests of the international community about this particular group of people. Already the Universal Declaration of Human Rights[4], although not being a legally binding document, contains an article on the right to the freedom

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[3] S. Lauterpacht, D. Betlehem, *The scope and content of the principle of non – refoulment: Opinion* [in:] *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge 2003, p. 88.

[4] Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948 [in:] R. Kuzniar, *Human Rights. The law, institutions, international relations*, Warsaw 2008, p. 407.

of movement (Art. 13) and the right to asylum (Art. 14)[5]. The following step was the establishment of the office of the United Nations High Commissioner for Refugees (UNHCR) via Resolution of General Assembly as of December 3, 1949[6]. The Statute of the High Commissioner came into being on December 14, 1950[7]. Headquarters of the Commissioner's Office is in Geneva, while the agency itself is managed by the Economic and Social Council (ECOSOC)[8].

The next step in providing comprehensive protection to refugees was the adoption of the Geneva Convention as legally binding for all countries of the European Union as an international act[9], amended further on by the New York Protocol[10]. In the context of this particular article adoption of regulations on the prohibition of refoulement of foreigners applying for protection was important[11]. Definitions and the solution adopted in the Con-

[5] In accordance with the art. 14 para. 1: "Everyone has the right to seek asylum and to make use of it in a different country in case of persecution".

[6] Resolution 319 (IV), of 3 December 1949, the United Nations General Assembly. In accordance with the resolution of the Commissioner it was to begin operations on 1 January 1951., available at www.refworld.org.

[7] Statute of the Office of the United Nations High Commissioner for Refugees, General assembly resolution 428 (V) of 14 December 1950, available at www.unhcr.org.

[8] Information on the actions taken by the UNHCR can be found at the official website: www.unhcr.org. Member States recognize the special role of the UNHCR in the refugee procedure, allowing under Art. 21 Directive 2005/85 for access of applicants for asylum, as well as giving by UNHCR opinions in relation to individual applications. On the mandate of the High Commissioner: S. Kneebone, *Refugees and displaced persons: the refugee definition and humanitarian protection* [in] the S. Joseph, Beth A. (ed.) *Research Handbook on International Human Rights Law*, Edgar Elgar 2010, p. 223.

[9] Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, OJ 1991.119.515.

[10] Protocol relating to the Status of Refugees, signed in New York on 31.01.1967, OJ 1991 119 517 and 518.

[11] Prohibition of expulsion was established in Articles 32 and 33 of the Convention. In accordance with Art. 32 '1. The Contracting States shall not expel a refugee, lawfully residing on its' territory for reasons other than safety of state or public order ", yet in accordance with Art. 33 '1. No Contracting State shall not expel or return a refugee in any sort or manner to the frontiers of its' territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political belief".

vention were later used in the creation of the Area of Freedom, Security and Justice as well as the Common European System of Asylum[12].

In the area of the international arena particularly important was the adoption of the International Covenants, which was a process of codification of rights of first and second generation. And although the International Covenant on Civil and Political Rights does not regulate directly the right to asylum, yet guarantees of respect for freedom and security (Art. 9) of each person, prohibition of inhuman treatment (art. 7), as well as the right to freedom of movement (Article 12) were established there[13]. Protection of the rights of migrants in the framework of the United Nations was strengthened via creation of the International Organization for Migration[14].

In the initial phase of integration European Communities within the framework of their competences did not deal with issues of human rights protection[15]. In the European system a leading role in this field has been held by the Council of Europe. Adopted in 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms in its original version did not include any guarantees to protect the rights of migrants[16], yet the ECJ based in such situations its' decisions on other provisions of the ECHR, such as those guaranteeing the right to life (Art. 2) or the prohibition of inhuman treatment (Art. 3)[17]. Migrants' rights were guaranteed only in the additional protocols: Protocol 4 as of 1963 (on Prohibition of collective

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[12] See Common Position as of 4 March, 1996 determined by the Council pursuant to art. K.3 of the Treaty of European Union on the harmonized application of the definition of refugee in Art. 1 of the Geneva Convention as of 28 July, 1951, relating to the Status of Refugees, Eurlex 31996F0196.

[13] International Covenant on Civil and Political Rights opened for signature in New York on December 19, 1966, OJ 1977.38.167 – est.

[14] More about the organization's activities, available at www.iom.int.

[15] T. Sieniow, *Protection of the rights and freedoms of individuals in the European Union* [w:] A. Kuś (ed.), *Introduction to European Union Law*, Lublin 2013, p. 339.

[16] B. Rainey, *Human Rights Law*, Oxford 2012, p. 22. Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, OJ 1993. 61284 with amendments.

[17] Violation of Art. 3 have been identified inter alia in the judgment *M.S.S. v Belgium*. More about the judgment: W. Moreno-Lax, *Dismantling the Dublin system: MSS v Belgium and Greece*, European Journal of Migration and Law, No. 1 (14) / 2012, p. 30.

expulsion of foreigners)[18], and Protocol 7 as of 1984 (on the Procedural guarantees during the expulsion of foreigners)[19].

As it was noted by V. Matsokin "There is no doubt that the ECHR has had a particular impact on Community law. Means of protection of human rights, which was layered by the ECHR (...) decisively influenced the work of the European Court of Justice in Luxembourg"[20]. Currently the Union's accession to the Convention is guaranteed in art. 6 of the Treaty on European Union[21]. Negotiations regarding signing of the accession agreement began in May 2010, on April 5, 2013 final text of the agreement was approved, on which the opinion of the ECJ must be given[22].

PROTECTION OF MIGRANTS' RIGHTS IN THE EUROPEAN UNION

The protection of migrants' rights in the EU was mainly influenced by the creation of the Area of Freedom, Security and Justice. Legislation in this area was introduced by virtue of the Amsterdam Treaty[23]. The treaty established common norms inter alia in the realm of migration policy, asylum and border controls. Due to the incorporation of these policies into the scope of activities of the European Union, they became also of interest to EU institutions and bodies responsible for protection of fundamental rights[24].

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[18] OJ 1995.36.175 with amendments.

[19] OJ 2003.42.364.

[20] V. Matsokina, *Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms* [in:] A. Wróbel (ed.), *Charter of Fundamental Rights of the European and national legal order,* Warsaw 2009, p. 193.

[21] In accordance with Art. 6 para. 2 "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms". Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to the Polish and the United Kingdom to the Treaty on Functioning of the European Union Official Journal. OJ C 326/313 of 12.10.2012.

[22] www.hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention. Already after finishing publication ECJ issued a negative opinion on the agreement.

[23] E. Guild, S. Carrera, *The European Union's Area of Freedom, Security and Justice ten years on* [in:] E. Guild, S. Carrera, A. Eggenschwiles (ed.), *The European Union's Area of Freedom, Security and Justice ten years on. Successes and future challenges under the Stockholm Programme,* Brussels 2010, p. 1.

[24] First of all one should mention European Union Fundamental Rights Agency, as well as the activities of the European Asylum Support Office, Frontex (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union).

The Charter of Fundamental Rights (CFR) became a valid source of law together with entry into force of the Lisbon Treaty[25]. Despite that already since 2006 the European Court of Justice has ruled on its basis[26]. The Charter, according to the Preamble, does not create new rights but merely repeats the rights guaranteed in the system of international law, in the constitutional traditions of Member States and rulings of the ECJ[27].

Poland has adopted the Charter accompanied by the Treaty of Lisbon and the British Protocol[28]. The provisions of the Protocol argue that interpretation that declares contradiction between national legislation and the provisions of Charter is excluded[29], besides the Charter does not confer new powers neither to the ECJ nor to state courts[30]. Furthermore, according to the art. 1 para. 2 direct affect of rights of the Charter under Title IV is excluded. In the most profound way on application of the Charter in regard to Poland and the UK the ECJ has ruled in the judgment N.S. [31].

In accordance with art. 18 of the Charter "The right to asylum is guaranteed with respect for the rules of the Geneva Convention as of July 28, 1951 and the Protocol as of January 31, 1967 relating to the status of refu-

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[25] Charter of Fundamental Rights of the European Union, OJ C 326/02, 26.10.2012.

[26] D. Chalmers, G. Davies, G. Monti, *European Union Law,* Cambridge 2011, p. 238.

[27] The preamble to the Charter of Fundamental Rights of the European Union.

[28] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to the Polish and the United Kingdom to the Treaty on the Functioning of the European Union, OJ C 326/313 of 12.10.2012. More [in:] K. Kowalik-Bańczyk, C*onsequences of the adoption of Polish-British protocol on the application of the Charter of Fundamental Rights* [in:] A. Wróbel (ed.), *The Charter of Fundamental Rights of the European and national legal,* Warsaw 2009, p. 131.

[29] J. Gileta, *Charter of Fundamental Rights - British protocol and Polish opt-out* [in:] A. Kuś, A. Szachoń-Pszenny (ed.) *The effect of the acquis communautaire and the Schengen acquis on Polish law - experiences and perspectives.* Volume II - 15 years Schengen acquis in EU law, Lublin, 2014, p. 82.

[30] J. Gileta, op. cit., p. 83. As the author notes, this is the first of the proposed interpretation of the Charter, while the second proposed interpretation is based on the assumption that when Charter with its protection will reach further than the current protection of fundamental rights of the European Union, recognized as general principles of law, the provisions of the Protocol would exclude the ability to use the Charter in a broader realm than the one adopted by the Polish and British courts, resulting from general principles.

[31] *N.S. v Secretary of State for Home Department*, C - 411/10 and C - 493/10.

gees and in accordance with the Treaty on European Union and the Treaty on the Functioning of European Union (hereinafter referred to as «the Treaties»)". The protection foreseen in the Charter derives both from public international law, as well as from regulations of the TFEU that deal with functioning of the Area of Freedom, Security and Justice[32]. Protection of the rights of irregular migrants is provided in art. 19 of the Charter[33].

2. EUROPEAN ASYLUM SYSTEM

THE CREATION OF ASYLUM SYSTEM

Interest of the European Community in a harmonized asylum system dates back to the 80s' of the XX century[34], yet legal basis for the Common European Asylum System appeared only in the Amsterdam Treaty[35], currently regulated in the Treaty on the Functioning of the European Union. The aim of the CEAS was to harmonize Member States' asylum systems and to share the burden of adoption of new refugees[36]. Effectiveness of the implementation of this system was heavily influenced by the creation of the European Refugee Fund and the European Asylum Support Office[37]. Currently basic acts that harmonize asylum system protection in the European

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[32] According to the explanations of art. 18 Charter of Fundamental Rights "The text of the article was based on Art. 63 of the TEU, now replaced by Art. 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention relating to the Status of Refugees".

[33] According to Art. 19 of the Charter: "1. Collective expulsions are prohibited. 2. Nobody may be removed from the territory of the country, expelled or extradited to a state, where there is a serious risk that a person can be subjected to the death penalty, torture or other inhuman or humiliating treatment or punishment".

[34] A. Florczak, *Protection of Refugees in the system of Community law* [in:] A. Florczak (ed.), *Protection of fundamental rights in the European Union. Selected issues*, Warsaw 2009, p. 212.

[35] Amsterdam Treaty, OJ EU C 340, 10.11.1997.

[36] J. Balicki, *Immigrants and Refugees in the European Union. Humanization of immigration and asylum policy*, Warsaw 2012, p. 166.

[37] European Asylum Support Office was established by the Regulation of the European Parliament and of the Council (EU) No 439/2010 of May 19, 2010, on the establishment of the European Asylum Support, OJ L 132/11, 29.05.2010.

Union are the Directive on asylum procedures[38], Directive on reception conditions (i.e. Reception directive)[39], Qualification Directive[40], Dublin II Regulation[41] (in a modified version a so-called Dublin III Regulation) and Regulation Eurodac[42].

THE CONCEPT OF A SAFE COUNTRY

The concept of a safe country was included in the legal framework of the Council Directive 2005/85. This Directive lays down minimum norms for the

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[38] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status in Member States (*OJ L 326, 13.12.2005*) on July 21, 2015 will be replaced by Directive of the EP and of the Council 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (*OJ L 180, 29.6.2013)*.

[39] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (*OJ L 31, 6.2.2003)*.

[40] Directive of the EP and of the Council 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and the protection granted (recast), (*OJ L 337/9, 20.12.2011*), applicable from 21 December 2013, has replaced Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004).

[41] Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (*OJ L 50, 25.2.2003)*, replaced by Regulation (EU) No 604/2013 of the EP and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (*OJ L 180/31, 06.29.2013*).

[42] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (*OJ L 316/1, 11.12.2011*) will be replaced on 20 July 2015 by Regulation of the European Parliament and of the Council (EU) No 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (*OJ L 180/1, 29.6.2013*)..

standards of refugee procedures in the Member States. Already in the Preamble of the Directive there was a reference to fundamental rights. These references primarily confirm that the legal act does not violate fundamental rights and observes the principles recognized in the Charter of Fundamental Rights[43]. Moreover, Member States in the realm of implementation of the Directive are also related to the obligations of the international agreements that prohibit discrimination[44]. Finally, during the procedure, special care should be given to unaccompanied minors, interests of a child is to be taken into account (principle of the best interests of the child)[45]. The very concept of safe country was introduced into Community legislation already in the 90s'[46]. In the Directive the concept of safe country was used with regard to a safe third country[47] (also known as the country of origin[48]) and safe European third country[49].

As a safe third country can be considered only a state, for which there is certainty that a person seeking asylum will be treated in accordance with the standards set out in Art. 27 of the Directive. These standards include: lack of threat to life and freedom for reason of race, religion, nationality, membership of a social group or political opinion, adherence to the principle of non-refoulement (if it is contradicting to freedom from torture or inhuman treatment) as well as the ability to apply for and to be granted a refugee status in accordance with the Geneva Convention. Member States have a duty to inform the Commission periodically about the countries to which this concept has been applied[50].

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43 Recital 8 of Directive 2005/85.
44 Recital 9.
45 Recital 14.
46 European Union: Council of the European Union, Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ("London Resolution"), 30 November 1992. Document available at: www.refworld.org/docid/3f86c3094.html (viewed: 19.03.2014).
47 Art. 27.
48 In accordance with art. 31: "A third country defined as a safe country of origin under art. 29 or art. 30 can, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if: a) he has the nationality of that country; or b) is a stateless person and was formerly habitually resided in that country.
49 Art. 36.
50 Art. 27 para. 5.

Furthermore, the Council on a proposal from the Commission[51] and after consultations with the European Parliament forms a minimum common list of third countries recognized as safe countries of origin – requirements for the recognition of the state as a safe one are included in Annex II to the Directive[52]. Member States have also been given the opportunity of designating on the national level third countries as safe countries of origin[53]. Member States should make sure that in this third country person will not be subjected to persecution and torture or inhuman behavior[54].

The preamble to the Directive states that the concept of safe country of origin "cannot constitute an absolute guarantee of safety for nationals of that country"[55]. Determination of the country as a safe one derives from the

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[51] Art. 29.

[52] According to Annex II of the Directive: "A country is considered as a safe country of origin when based on legal situation, the application of the law within a democratic system and the general political circumstances, can be shown that there is consistently no persecution as defined in Art. 9 of Directive 2004/83/EC; it does not apply torture or inhuman or humiliating treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict". Moreover, when assessing, the following is taken into consideration: the extent to which protection against persecution or mistreatment is provided by: a) the relevant laws and regulations of the country and the manner in which they are applied; b) respect for the rights and freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights, and the Convention against Torture, in particular for the rights from which no derogations are permitted according to the Art. 15 para. 2 of the European Convention; c) respect for the principle of non-refoulement in accordance with the Geneva Convention; d) establishment of an effective system of remedies against violations of these rights and freedoms. The Council has the ability under Art. 29 para. 2 to introduce amendments to the list. Requests for amendments are examined by the Commission, yet Member States and the Council can apply with amendments. The Commission may use the information provided by the UNHCR, the Council of Europe and other international organizations. On the time of examination of an application for recognition of a country as a dangerous one, liabilities of the applicant shall be suspended with regard to this member state for a maximum period of 3 months. At that time, the Commission has a chance to present a proposal to remove the state from the minimum common list.

[53] Art. 30.

[54] Art. 30 para. 2 in assessing the situation in the country, one should, in accordance with art. 30 para. 4, take into account the legal situation, application of the law and the general political situation in the that country. The assessment should rest upon diverse sources of information (Art. 30, para. 5), i.e. on the information from the UNHCR, other Member States and international organizations.

[55] Recital 21 and continues: "Estimation that decide about that qualification, due to its nature, can only take into account the general civil, legal and political circumstances in that country, as

overall assessment of the situation, if, however, the applicant demonstrates the existence of a real threat for him in that country, in this particular situation this country should not be considered as a safe one.

The concept of European safe third countries was adopted under Art. 36 of the Directive. According to which a state can be recognized as safe if it has ratified the Geneva Convention and abides by its provisions without any territorial limitations, has established in accordance with the law of asylum procedures, ratified the ECHR and abides its provisions (including regulations relating to effective remedies) and has been identified as a safe one by the Council[56]. It should also be noted that the concept of safe countries also included Member States under Protocol 24 to the Treaty of Lisbon[57]. The adoption of the protocol is to prevent the use of the right to asylum with full respect for the provisions of the Geneva Convention. In accordance with the provisions of the Protocol: "Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, the Member States shall be regarded as safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters." Therefore, asylum applications submitted by the citizens of the EU can be considered with in the Member States only in exceptional cases[58].

In the literature, the concept of safe country has been subjected to criticism. Thus, A. Potyrała rightly notes that this concept is incompatible with the Geneva Convention. On the one hand, it deprives some ethnic groups of the opportunity to apply for asylum on the basis of the adopted legal fiction

well as whether the person in that state shall be exposed to persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice".

[56] Art. 36 para. 1. In accordance with para. 3 The Council shall adopt and amend a common list of safe third countries.

[57] Protocol (No 24) on asylum for nationals of Member States of the European Union 26.10.2012 C 326/305.

[58] Art. 1.This is the case if a Member State does not comply with the provisions of the ECHR, the proceedings against the Member State was initiated as of Article 7 TEU or the decision has been taken against a Member State under the procedure provided by the Article. 7 TEU, or if the state decides unilaterally to examine such a request, informing the Council about it ("the application shall be considered on the basis of the presumption that it is completely unfounded, without infringing in any way the decision-making power of the Member State.

that the situation in those countries deemed safe will remain unchanged[59]. Meanwhile, in the case of politically unstable territories, the situation in the realm of human rights may suddenly change and until the next verification of the list situation in this country will be considered as safe. Secondly, "the concept of safe countries undermines the most important achievement of the creators of the Convention (Geneva), which is the individualistic nature of the right to asylum)". Finally, A. Potyrała quite boldly states that the concept of safe countries contradicts the principle of equality and non-discrimination enshrined in the Charter of Fundamental Rights of the European Union, because "they prohibit the use of the criterion of nationality in determining the extent of entitlements of a fundamental nature"[60].

In the new directive adopted on 26 June 2013 the safe third country concept has been regulated in art. 38[61]. Under that provision, the state is a safe country, where life and freedom of a person are not threatened, there is no risk of suffering serious harm[62], the principle of non-refoulement and established in international law prohibition of removal are respected, and there is a possibility of applying for the refugee status. Safe third European country can be considered a state that has ratified the Geneva Convention and the European Convention on Human Rights, as well as has asylum procedures prescribed by law[63]. The concept adopted by the Member States is rebuttable - in accordance with art. 39 para. 3: "Applicants shall be allowed to challenge the application of the concept of European

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[59] A. Potyrała, *Commentary on Art. 18 of the Charter of Fundamental Rights* [in:] A. Wróbel (ed.), *The Charter of Fundamental Rights of the European Union. Commentary,* Warsaw 2013, p. 666.

[60] Ibidem, p. 667.

[61] Directive of the European Parliament and of the Council 2013/32 / EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60, 29.06.2013.

[62] Directive of the European Parliament and of the Council 2011/95 / EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, a uniform status for refugees or for persons eligible for subsidiary protection, and the granted protection (recast version), OJ L 337/9, 20.12.2011, (applicable from 21 December 2013).

[63] Art. 39.

safe third country on the grounds that this third country is not safe for him due to their particular situation".

DUBLIN II AND DUBLIN III REGULATION - BASIC PROVISIONS

The so-called Dublin II regulation established criteria for determining the Member State responsible for examining an application for refugee status, so that the procedures in relation to one person were not initiated or conducted simultaneously in several Member States. This regulation has been transformed on 26 June 2013 and to 1 January 2014 obliges as Regulation No 604/2013 (as so called Dublin III Regulation). For the purposes of this article the provisions of both regulations will be discussed, because judgments which until now were made in connection with the concept of a safe country, were related to the previous regulation (i.e. Dublin II). Firstly we will characterize the existing provisions of the Dublin II Regulation, and further on discuss changes made in the recast version of Regulation.

According to the Preamble of the Dublin II Regulation, Member States were obliged to comply with binding international agreements (primarily with the Geneva Convention and adherence to the principle of non-refoulement)[64], further regulation respects the rights confirmed in the Charter of Fundamental Rights, especially in Art. 18 (right to asylum)[65.]

The principles for establishing the state responsible for examining an application has been laid down in Section III of the Dublin II Regulation. According to the principle, the state responsible for examining the application should be the state that was first entered by the third country resident[66].

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[64] Recital 12 of the Preamble.

[65] Recital 14 of the Preamble.

[66] Art. 5 et seq. Other criteria are specified in a hierarchical order of application and refer to inter alia the unaccompanied minors or persons who have a family member in another Member State. In case when a person illegally entered the territory of a Member State from the territory of a third country, the State is responsible for examining an asylum application (Art. 10). Such liability shall expire after 12 months. Moreover, the person who has illegally entered territory of the MS and previously lived in another MS continuously for at least 5 months, then the latter MS of residence is responsible for examining an asylum application. Finally, in accordance with the humanitarian clause of the art. 15 "Any Member State, even if it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other relatives who are dependents, on humanitarian grounds based in particular on family or cultural considera-

However, in accordance with art. 3. para.2 "Notwithstanding para. 1, any Member State may consider an application for asylum submitted by a third country resident, even if such examination is not within the realm of its' responsibility under the criteria laid down in this Regulation". In addition, each Member State preserves the right to send back asylum seekers to a third country, in accordance with the provisions of the Geneva Convention[67].

The rules taking charge and taking back asylum-seekers, for which there is a suspicion that another country is responsible for examining its' application, have been dealt with in the V chapter of the Regulation. If a Member State acknowledges that another Member State is responsible for examining the application, it may urge this MS to take over the person applying for protection (within 3 months from the date of application)[68]. The Member State to which the request is directed shall take a decision within two months from the date of receipt of the proposal[69] - if it shall agree to take this person over, at that moment the person is turned to the Member State responsible for the application submitting (usually it is a country of first entry).

Dublin III Regulation, i.e. Regulation of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection submitted in one of the Member States by a third country national or a stateless person shall apply from 1 January 2014.

In accordance with art. 3. para. 2 the Member State responsible for examining the application of status is the first Member State in which the application has been made, as long as one cannot, on the basis of the Regulation criteria, appoint a responsible state[70]. Among the general

tions. In this case that Member State, at the request of another Member State, shall examine the application for asylum of the person concerned. The persons concerned must give their consent.

[67] Art. 3 para. 3.

[68] Art. 17 para. 1 of the Dublin II Regulation.

[69] Art. 18.

[70] Regulation 604/2013 (Dublin III). However, according to Article 3, para. 2 "If the transfer of the applicant to the Member State originally designated as the responsible state is not possible, because there are compelling reasons to believe that in the asylum procedure and reception conditions of applicants in that Member State are defects in the system, causing the appearance of a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter

rules in the Regulation the right to information is guaranteed[71]. According to which, immediately after the submission of an asylum application, the applicant is informed of, among others, the purposes of Dublin III Regulation, criteria for determining the Member State responsible and the possibility of an appeal decision. Another instrument introduced by the regulation is a so-called individual conversation, which is carried out by the authorities of a Member State with the applicant in order to determine the responsible state[72].

Chapter III of the Regulation concerns the criteria for determining the responsible Member State in accordance with art. 7 para. 2 "Member State responsible in accordance with the criteria set out in this section shall be determined on the basis of the existing situation when the applicant submitted for the first time an application for international protection in a Member State". Yet specific criteria have been provided in relation to minors their families[73]. Take over proceedings are handled in Chapter VI of the Regulation[74].

3. EUROPEAN COURT OF JUSTICE RULINGS

The ECJ most fully expressed its' position on the concept of safe country in the judgment N.S. v Home Secretary State in Joined Cases C-411/10

of Fundamental Rights of the European Union, the Member State which is to determine the responsible Member State continues the assessment of criteria set up in Chapter III in order to determine whether another Member State may be designated as a responsible one. If under this paragraph one cannot perform transfer to any of the Member States, designated on the basis of criteria set out in Chapter III or to the first Member State in which the application was submitted, the responsible Member State becomes a Member State conducting proceedings for determination of the responsible Member State".

[71] Art. 4 of the Dublin III Regulation. Furthermore, in accordance with para. 2 of this article, "The Commission adopt via implementing acts a common leaflet - and a special leaflet for unaccompanied minors – that contain at least the information referred to in para. 1 of this Article".

[72] Art. 5.

[73] Art. 8 et seq. of the Regulation.

[74] In accordance with art. 22, the requested State shall decide on the takeover of an applicant for asylum within 2 months from the date of receipt of the request from another Member State. No action on the part of the requested Member State is deemed as acceptance of the application and result in the obligation of takeover. In accordance with art. 27 applicant has the right to lodge an appeal against the transfer decision. The transfer takes place in accordance with art. 29 "at the latest within six months from the consent made by another Member State requested to take over".

and C-493/101[75]. It is worth underlining that the instrument of turning and the need to respect the principle of non-refoulement applies to both asylum seekers who submitted an application in another Member State (and thus their stay on the territory of the applicant for the transfer of a Member State is irregular), as well as to the typical irregular migrants, who are awaiting expulsion to the third country. Thus, as has been noted, standards applied in Dublin proceedings and the concept of safe country can have a significant impact on the fundamental rights of irregular migrants in situations of return. These are the issues that seem to be important from the point of view of two groups of migrants (asylum seekers and persons residing illegally on the territory of a Member State).

Judgment in Joined Cases *N.S.* was a consequence of the ECHR judgment on the *MSS v Belgium and Greece*, concerning the return to Greece of an asylum applicant. The ECHR stated the violation by Greece of art. 3 of the Convention, (prohibition of inhuman or degrading treatment or punishment), was due to the breach of standards of fundamental rights protection in the asylum procedure[76]. The Court emphasized that the reference state should make sure that the host country - Greece - is in a position to consider an application for asylum in accordance with accepted standards[77]. It is worth mentioning that in proceedings concerning the issue of expulsion the ECHR has examined the possibility of expulsions in the context of fundamental rights' protection, recognizing repeatedly that expulsion to their country of origin will be a threat to life or interests of the migrant[78].

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[75] *N.S. v Secretary of State for Home Department*, C - 411/10 and C – 493/10.

[76] It should be emphasized that in previous cases of this type relating to the Dublin II Regulation (*T.I. v the United Kingdom*, decision of 03.07.2000), *K.R.S. v. the United Kingdom* (decisions of 12.02.2008), the Court declared complaints inadmissible.

[77] H. Lambert, *"Safe third country" in the European Union: An evolving concept in international law and implications for the UK*, Journal of Immigration, Asylum and Nationality Law, 26(4)/2012, p. 328.

[78] That is how E Ct HR ruled on Hyrsi Jamaa and Others v. Italy, judgment of 23.12.2012 (violation of Art. 1 of the Convention in connection with the return of Somali migrants back to Libya), Saadi v. Italy, judgment of 28.02.2008 (The Court held that deportation to Turkey violates Art. 3 of the Convention) or the Sufi and Elmi v. the United Kingdom, judgment of 28.06.2011 (8319/07 and 11449/07) – violation of the Art. 3 of the Convention in case of expulsion to Somalia.

In Case C-411/10 the applicant in the proceedings N.S. entered the United Kingdom through the territory of Greece, which has been declared as a state responsible for examining an asylum application. N.S. raised, however, that in case of return to Greece there was a risk of violation of rights guaranteed by ECHR [79]. Case C-493/10 concerned 5 people who have entered Greece illegally, later on moved to Ireland, where they submitted applications to obtain refugee status. Both national proceedings have been suspended in order to direct preliminary ruling to the ECJ. The Court considered them as joined cases.

Concepts of a safe country and standards of the protection of fundamental rights in the host country were related to the second, third, fourth, and sixth questions in Case C-411/10 (they were reformulated by the ECJ). Thus, national court firstly asked about an obligation of fulfilling assessment on state compliance with EU fundamental rights, asylum directives and the Dublin II Regulation. Secondly he asked if one is able to use a conclusive presumption that the host country respects fundamental rights of asylum. In addition, national court asked whether, in case of non-compliance with fundamental rights by the host country taking over, a state that is conducting transfer is required to examine the asylum application under art. 3 of the Regulation. The last question was related to the compliance with art. 47 of the Charter of Fundamental Rights in categorizing a country to which a transfer is to be performed, as a country safe under national law. ECJ decided to examine all the questions together, analyzing the concept of a safe European country.

The ECJ noted that Member States must interpret national law in conformity with European Union law as well as ensure compliance with the process of applying the law of the fundamental rights protected by the legal order of the EU[80]. It is a consequence of the adoption of a Common European Asylum System by the Member States, and its' implementation leads to the presumption of compliance with the membership rights of Convention

[79] Secretary of State in domestic proceedings rejected that argument, noting that Greece is on the list of those countries recognized as safe (para. 40 of the judgment).
[80] Paragraph 77 of the judgment.

rights (both the Geneva Convention and the ECHR). The Court also ruled that it cannot be concluded that "any violation of a fundamental right by the responsible Member State will affect the obligation to comply with the provisions of Regulation 343/2003 by the of the Member States"[81]. In order to determine the non-compliance of transfer with the Regulation, in the Member State systemic irregularities must come into being[82].

The governments intervening in the proceedings (including the Polish government) have argued that they do not have adequate resources in order to investigate violations of fundamental rights issues in other European countries. The ECJ referred in its judgment in relation to the above mentioned objection to the MSS ruling, noting that the ECHR judgment relied both on the reports of international organizations, the UNHCR, as well as the reports of the Commission itself. Therefore, Member States had in their disposal extensive data on the situation in Greece. The Court also emphasized that asylum policy is based on the principle of solidarity and fair sharing of responsibility between Member States[83]. Greece yet is located in an unfavorable geopolitical situation, being the country of first entry to an enormous amount of migrants[84].

Specifying the duties of a Member State, the ECJ stated that a Member State is obliged not to conduct transfer to a Member State if it is impossible to ignore the fact of systemic deficiencies existing in the asylum procedure and reception conditions for the people applying for protection, and if the situation in this country is proved to be so serious that it poses a risk of breach of the Art. 4 of the Charter of Fundamental Rights (risk of inhuman or degrading treatment)[85]. Besides, the Court noticed that a Member State has also a responsibility to ensure that there is no breach of fundamen-

[81] Paragraph 82 of the judgment.
[82] Paragraph 86 of the judgment.
[83] Paragraph 93 of the judgment.
[84]More on the situation of Greece can be found in the report "Fundamental Rights at Europe's southern sea borders", the European Union Agency for Fundamental Rights, 2013, p. 9 et seq.
[85] Paragraph 94.

tal rights in connection with the protracted determining of the responsible Member State[86].

The Court was also of the opinion that the adoption of a conclusive presumption that the responsible Member State respects fundamental rights, is in contradiction with the acquis communautaire[87]. The Court emphasized above all the fact that the ratification of the Geneva Convention and the ECHR may not cause conclusive presumption that the state adheres to these Conventions[88]. Thus, the presumption is rebuttable. Therefore, in the judgment the N.S. Court very comprehensively addressed the issues of a safe state and the obligation to respect fundamental rights in the application of the Dublin II Regulation. Assuming that the systems of protection of migrants in European Union law (both regular as well as irregular and asylum seekers) is complementary, one can try a similar application developed by ECJ rules in relation to irregular migration. In subsequent to rulings on the Dublin II Regulation, the Court examined the issue of fundamental rights respect in the process of transferring third-country nationals to the responsible Member State.

Case C-179/11 concerned a preliminary ruling made by the French court[89]. In the national courts' proceedings organizations acting in favor of migrants *CIMADE* and *GISTI*[90] demanded recognition as invalid circular, that refused to provide a temporary waiting allowance (i.e. ATA - l'allocation temporaire d'attente) to asylum seekers if their cases there was a pending investigation of the transfer under the Dublin II Regulation, i.e. in case of

[86] Paragraph 98.
[87] Moreover, in the opinion Advocate General Verica Trstenjak pointed out that "From all the foregoing, as the Advocate General in paragraph 131 of his Opinion in Case C-411/10, the application of Regulation No 343/2003 on the basis of conclusive presumption that the basic rights of a person seeking for asylum will be respected in the Member State which is essentially appropriate to consider the request of that person, is incompatible with the obligation of the Member States concerning the interpretation and application of Regulation no 343/2003 in a consistent with fundamental rights manner".
[88] Paragraph 103 of the judgment.
[89] ECJ judgment of 29 September 2012, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11.
[90] *La Cimade* i GISTI (Groupe d'information et de soutien des immigrés) is a French non-governmental organizations dealing with the rights of victims and migrants: www.gisti.org, www.lacimade.org.

whom France asked another state for recognition of its' responsibility for examining the application. The claimant considered that France with this behavior does not implement fully the Directive 2005/85 and does not provide adequate standards for the reception of people who are applying for international protection. The ECJ agreed with the claimant, emphasizing mainly that in many cases the transfer procedure may end in failure, therefore, France is obliged to consider the request. But according to art. 1 CFF human dignity must be protected and respected[91], while a Member State is obliged to ensure the adoption of minimum standards laid down in Directive 2005/85 - this responsibility ceases only when the actual transfer of a person to a responsible country[92].

Another ECJ decision relating to the judgment in *N.S.* case was issued on 30 May 2013 on *Halaf* case[93]. A preliminary ruling was submitted by a Bulgarian court and concerned an Iraqi citizen who has submitted an asylum application in Greece, and later in Bulgaria. The decision has been issued to transfer him to Greece, but as a result of the foreigner's appeal (Halaf sought the annulment of the decision, due to the fact that the UNHCR called on European countries to stop transferring asylum seekers to Greece) the national court decided to adjourn proceedings and initially addressed the ECJ with six preliminary rulings. As a result of the judgment submitted by the Registrar of the Court in the *N.S.*, the national court withdrew two of its requests [94.]

First of the requests concerned the interpretation of art. 3. para. 2 of the Dublin II Regulation, namely the possibility of a Member State to examine an application for asylum in case when there is no opportunity of using the humanitarian clause in Art. 15 of the Regulation, yet the responsible State (in this case, Greece) did not respond to the call of taking back a third country national. The Court in response to that request stressed that the use of

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[91] Paragraph 56 of the judgment.
[92] Operative part of the judgment.
[93] ECJ judgment of 30 May 2013, *Zuheyr Frayeh Halaf v Darzhavna agentsia for bezhantsite pri Ministerskia savet*, C-528/11.
[94] Paragraphs 26 et seq. of the judgment. Government of the United Kingdom, in its capacity as intervener in this case, raised an objection of inadmissibility of questions, claiming that the questions are of a theoretical nature.

Art. 3. para. 2 is not dependent on any particular condition[95]. In the second request, the national court asked for interpretation of the right to asylum under Art. 18 CFR. On this question the national court took a view that the application of Art. 3. 2 of the Regulation is only possible when the right to asylum of Art. 18 is not respected in the country of first application. The ECJ pointed out that since the application of Art. 3 para. 2 is independent of any conditions, there is no need to reply to this request[96].

Further on the national court asked whether it had to (in the process of determining the Member State responsible) request an opinion from the UNHCR in a situation, when deriving from the High Commissioner's documentation, in a responsible country the violations of the Union law in regard to persons seeking international protection takes place. The ECJ emphasized the role of UNHCR documents for determining the situation in the responsible country in the realm of respect to the asylum law, relying on the ruling in of *N.S.* case[97.] Hence, in the directives within the framework of a Common European Asylum System various forms of cooperation with the UNHCR have been established. This does not mean, however, that the Member State is obliged to request the High Commissioner to issue an opinion[98].

The interpretation of art. 3 section 2 of the Dublin II Regulation concerned the ECJ judgment of 14 November 2013[99]. The case concerned an Iranian citizen who illegally entered Greece, later on headed to Germany, where he applied for refugee status. German court gave its ruling, on the basis of which K. Puid was expelled to Greece. Puid appealed against the ruling of the German court, claiming that the Germans were responsible for examining his refugee status application, as confirmed by the court of

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[95] Paragraph 37 of the judgment. The Court relied on the Commission's proposal which led to the adoption of the Regulation, according to which "the rule contained in Art. 3. 2 of the Regulation was introduced in order to allow each Member State to take a sovereign decision for political, humanitarian or practical reasons, on giving consent to the processing of the asylum application, even if it is not responsible for this on the basis of the criteria laid down in the Regulation".
[96] Paragraph 42 of the judgment.
[97] Paragraph 44 of the judgment.
[98] In giving a negative answer to the Question 3, ECJ held therefore that there is no obligation to reply to Question 4 (paragraph 47).
[99] ECJ judgment of 14 November 2013. Bundesrepublik Deutschland v Kavehowi Puidowi, C 4/11.

second instance, ruling that expulsion to Greece was incompatible with EU law[100]. The basis for the state liability of Germany was Art. 3. para. 2 of the Regulation in relation to the prevailing reception conditions in Greece. The Republic of Germany appealed against this judgment to the Hessischer Verwaltungsgerichtshof. The national court decided to adjourn the proceedings and to address a preliminary ruling to the ECJ, ultimately the lower court had agreed to review Puid's request and gave him the status of a refugee[101].

Registrar of the Court sent the ruling on the N.S. case to the national court, as a consequence, the national court withdrew three questions, leaving to settle before the ECJ only a matter of whether "an obligation of a Member State to exercise its' right provided in Art. 3. para. 2 of Regulation No 343/2003 creates on the side of an applicant for asylum possible subjective right to demand a takeover by the Member State, responsible for examining an application for asylum?"[102].

The Court then reformed request and decided to examine the question of whether an asylum seeker in the main proceedings may on the basis of the art. 3. 2 of the Regulation request consideration of its proposal, if the situation in the responsible country threaten its' fundamental rights. Responding to the question, the ECJ relied on the reasoning of the judgment in N.S., stating that "the Member States are required not to return the asylum seeker (...) if the state cannot ignore the fact that the systematic irregularities in the asylum procedure and conditions for the reception of asylum seekers in that Member State constitutes serious and proven reasons to believe that the applicant will encounter a real danger of being subjected to inhuman or degrading treatment in the meaning of Art. 4 of the Charter of Fundamental Rights of the European Union"[103].

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[100] Paragraph 17 of the judgment. The court pointed out in the explanatory memorandum that "the Federal Republic of Germany was required to assume responsibility on the basis of Art. 3. paragraph 2 of the Regulation due to the conditions of reception of asylum seekers and the procedures for examining applications for asylum in Greece".

[101] Paragraph 20 of the judgment. Questions have been maintained because of the need to settle a compensation for Puid due to placing him in detention.

[102] Paragraph 24 of the judgment.

[103] Paragraph 30 of the judgment. In accordance with paragraph 35, that Member States should ensure that the situation of a foreigner in the realm of protection of his fundamental rights

The ECJ emphasized that the referring court should examine whether such systemic irregularities existed at the moment of Puid's return to Greece. A Member State if it considers that there are systemic violations in the responsible country, it is obliged not to return such a person, but it should then consider other criteria of Chapter III of the Regulation in order to examine whether it is impossible to establish another Member State responsible for acceptance[104]. Therefore, in conclusion, the ECJ held that "Member States acceding to determine the responsible Member State is obliged to consider himself an application for asylum on the basis of Art. 3. para. 2 of the Regulation"[105].

Another ruling on the determination of the state responsible for examining an asylum application was the case of *S. Abdullahi v. Bundesasylamt*[106]. Mrs S. Abdullahi, a citizen of Somalia arrived illegally by sea from Turkey to Greece. Then the journey continued, among others through Hungary, entering Austria, where she applied for the status of refugee. By determining a responsible Member State Austria decided to transfer Abdullahi to Hungary. Abdulllahi repeatedly appealed against the decision to be transferred to Hungary and, finally, argued that the state responsible for examining her asylum application should be Greece. Therefore, the court suspended the proceedings and decided to refer three questions to the ECJ.

Firstly, the national court asked whether Article 19 para. 2 of the Dublin II Regulation obliges Member States to ensure that an asylum seeker has a right to lodge an appeal against a transfer decision. According to the applicant S. Abdullahi determination of criteria in the Regulation of a responsible state creates individual rights of asylum seekers, which is in accordance with Article 47 of the Charter of Fundamental Rights (right to an effective rem-

doesn't become exacerbated by the protracted process of transfer.

104 The opinion of the Ombudsman. Paragraph 67. Ombudsman Opinion in this case stated that "(...) in a unique situation on the Member State in which the application for asylum was submitted, there is no unconditional obligation to independently examine the application. It may within a reasonable time make an effort to find another Member State responsible for examining the application. Yet, if it shall not do so, the Member State will be required to independently examine the application".

105 Operative part of the judgment, the last sentence.

106 ECJ Judgment of 10 December 2013., *Shamso Abdullahi v. Bundesasylamt*, C-394/12.

edy and to a fair trial). The ECJ has therefore decided to investigate whether Chapter III of the Regulation acknowledges the rights of persons seeking asylum, which are to be protected by the national courts[107].

The ECJ noted that in the national proceedings when determining the responsible Member State, Hungary recognized its responsibility. Complainant was entitled to appeal from that decision, but according to the ECJ "a person applying for asylum may undermine the choice of that criterion relying exceptionally on the existence of systemic irregularities with regard to the asylum procedure and asylum seekers reception conditions in that Member State, in which these irregularities pose a serious and proven reasons to believe that the person will encounter real danger of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights"[108].

The documentation of the main proceedings was not clear whether there were systemic deficiencies in the asylum procedure in Hungary. Therefore, the ECJ acknowledged a right to appeal from the decision of transfer only in the case of such irregularities in the responsible country, therefore concluded that there is no need to give an answer on the rest of the preliminary ruling requests. From the above-mentioned rulings derives an obligation of Member States to continuous monitoring of the situation in other Member States in case of determining the responsible Member State. This situation, according to the practice, is usually the most difficult in the countries that are on the external borders of the EU, those countries carry the heaviest burdened of migrants influx[109].

CONCLUSIONS AND RECOMMENDATIONS

As is clear from the cited case law and secondary law, the area of the common asylum policy is now subject of a thorough monitoring for compliance with and implementation of the standards of fundamental rights.

[107] Paragraph 49 of the judgment.
[108] Paragraph 60 of the judgment.
[109] Number of illegal crossings at the southern borders has been described, among others, in a study prepared by the FRA "Fundamental Rights at Europe's southern sea borders", p. 9. The report is available on the website www.fra.europa.eu.

A significant impact on shaping the asylum policy was made by the Charter of Fundamental Rights that was granted the power of a treaty, revision of the majority of asylum directives made in 2013 must serve the same purpose.

According to the argument that was stated at the beginning of the article, the standards of proceedings in regard to the persons seeking protection can and should be alternatively used in proceedings of irregular migrants. This is from one hand due to the complementarity of the guaranteed rights of migrants, from the other due to a special legal position (which cannot be classified as a regular one), in which remain the applicants for international protection which are sent to the responsible Member State under the provisions of the Dublin Regulation.

Thus, based on quoted doctrine and case law, the issue of safe third country concept usage remains debatable. According to the author it is to be used as an auxiliary tool. On the one hand, it may reduce the possibility of obtaining protection due to the lack of individual optics and very generalized criteria for recognizing a state as secure ones[110]. On the other hand, as interpreted by the ECJ in the *N.S.* case, this concept is mutable and its' application requires caution[111].

Certainly a useful tool in protecting rights of irregular migrants would be to construct at the EU level a list of countries considered to be dangerous, to which foreigners cannot be expelled. However, the adoption of such a list might be a risky political move that could lead to the stigmatization of certain countries on the international arena. Moreover, as in the case of the list of safe countries, in many cases the situation in third countries is so dynamic that fixed definition as a safe or unsafe is impossible.

Standards of proceedings developed in the jurisprudence of the ECJ relating to Dublin matters and the concept of a safe country can be alternatively used in cases of irregular migrants. These standards can include principles to ensure respect for fundamental rights in the process of EU law application, as resulting from the adoption of a common asylum system[112].

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[110] A. Potyrała, Op. cit., pp. 666-667.
[111] See footnote 91.
[112] See footnote 83.

Moreover, in determining the situation in the migrants' home countries, Member States should use both the data provided by the UNHCR, as well as by international organizations, and NGO's – requirement of a thorough examination of the situation in the countries of origin should concern both cases by unregulated situation of migrants as well as asylum seekers. Also, guidelines of the ECJ (as defined in the N.S. case) addressed to the Member States that, during the protracted proceedings there had been no violation of fundamental rights of migrants, should be applied to migrants in the return procedure[113].

While summarizing the above mentioned considerations one should pay attention to the growing role of ECJ case-law in the cases of foreigners and reference in these rulings not only to secondary law, yet also to the Charter of Fundamental Rights. Also, modified version (2013) of asylum law puts special emphasis on the protection of fundamental rights of third country nationals, on the assessment of the revised Dublin Regulation, as well as procedural directive that will come into force in 2017 (2016 in the case of Dublin III), when the Commission will submit a report on the application of new legislation.

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[113] In analogy to the *N.S.* case the Court ruled on the case of *Puid* – see footnote 106.

SELECTED ISSUES RELATING TO EXPULSION OF FOREIGNERS IN THE JUDGMENTS OF POLISH AND EUROPEAN UNION COURTS

ARTUR KUŚ

INTRODUCTION

This article attempts to analyze the selected judgments of Polish and EU courts in cases on expulsion of foreigners from the territory of the country (European Union). The term "expulsion of foreigners" in the literature is referred to interchangeably as "deportation" or "obligation to leave the territory". In the article these concepts are used interchangeably and are treated as synonyms. A stay of a foreigner being in Poland without documents authorizing his/her legal stay in the country is considered as "unregulated". Such a foreigner may be required to leave Polish territory or be expelled by an authorized state authority (primarily the police, Border Guards or Voivode). In addition, he/she may receive a temporary ban to enter the territory of Poland and other Schengen countries. The same penalty may also apply to a foreigner performing work or running a business in violation of Polish law. The article deliberately omits procedural issues and general principles related to the expulsion of foreigners as well as does not present the full catalog of legal basis for expulsion. These issues, due to the degree of detail, require a separate, broader study.

Matters having a direct impact on the protection against expulsion of foreigners from the territory of the Member States are often subjects of questions to the Court of Justice of the European Union. Expulsion of any third country national staying illegally on the territory of the Union is a priority matter for Member States, in accordance with the Directive 2008/115

(the so-called Return Directive)[1]. The directive applies only to the return of third-country nationals residing illegally in a Member State, so it does not aim at full harmonization of national law on the stay of foreigners. As a result, the Return Directive does not preclude that the law of a Member State treats illegal stay as an offense and provides criminal sanctions in order to discourage or prevent committing such violations of national regulations in the matters of stay in the national territory[2]. Such cases are thus settled at the level of administrative authorities and national courts of specific Member States. Clearly, however, the EU case law has an inspiring and substantial influence on national case law.

In the Polish legal system, generally speaking, the legal problems connected with the broadly understood range of issues relating to foreigners are generally of an administrative nature, except for typical criminal or civil cases or explicit exclusions contained in specific acts[3]. Competent and adequately braced administrative authorities issue in this regard individual administrative decisions. In Poland such competences has, among other, a Voivode (e.g. temporary residence permit), consul (e.g. the decision to refuse to issue the temporary Polish travel document for a foreigner), Head of the Office for Foreigners within the meaning of the Code of Administrative Procedure[4] (is a higher level authority in relation to the Voivode) or Border Guard officer (e.g. the decision to refuse entry to the territory of the Republic of Poland). Administrative affairs in the matters of foreigners are dealt with by the administrative courts – in the first instance by the Regional Administrative Courts and in the second instance by the Supreme

[1] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, p.98).
[2] Cf. judgment of 6 December 2011, Case C 329/11 Achughbabian.
[3] Eg. the transit of an foreigner by air via Polish territory is not regulated by the Code of Administrative Procedure and the Act of 30 August 2002 – Law on proceedings before administrative courts (JL of 2012, it. 270, 1101 and 1529) – see art. 371 of the Act on Foreigners of 2013.
[4] The Act of 14 June 1960 Code of Administrative Procedure (JL of 2013, it. 267); further referred to as CAP.

Administrative Court. The old Act on Foreigners[5] of 2003 coincided with the Polish accession to the European Union structures. In turn, the entry into force of the new Act on Foreigners[6] (1 May 2014) can be a kind of an impulse giving the opportunity to make summaries resulting from the implementation of the previous Act in courts. The decade of functioning of the Act on Foreigners is a good time to make summaries. The article, due to the extensive database of case-law, is limited only to selected examples of decisions of Polish administrative courts and the Court of Justice. These rulings were presented in the context of the expulsion of foreigners. Selected rulings are to identify the judicial line of Polish and European courts in this regard. They can also be relevant in interpreting the provisions of the new Polish Act on Foreigners.

1. THE NEW POLISH ACT ON FOREIGNERS

On 1 May 2014 a new law on foreigners came into force. It is a legal act which replaced the 10 year old Law of 13 June 2003. Polish legislators therefore decided not to introduce another amendment to the existing law, but to introduce a totally new legal act. The previous Act on Foreigners was amended many times, which often resulted in decreased readability of the provisions and deepened the casuistic character of these provisions. As a consequence, this created interpretation in applying it in practice. Therefore, the main objective of the Law can be regarded as regulating the matter concerning foreigners, to the extent already regulated by currently existing regulations, but in a way as to make these issues more coherent and transparent. Whether and to what extent this task succeeded can only be assessed after several years of practical application of the Act by the competent in this area authorities and courts. This may be quite difficult because the new law contains over 500 articles and is a legal act almost two times longer than the previous one.

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[5] The Act of 13 June 2003 on Foreigners (JL of 2011, No. 264, it. 1573, as amended); further referred to as the Act of 2003.

[6] The Act of 12 December 2013 no Foreigners (JL of 2013, it. 1650); further referred to as the Act of 2013.

The new law on foreigners[7] is primarily to determine the terms and conditions for entry of foreigners on Polish territory, transit of foreigners through the Polish territory, stay and departure of foreigners from Poland, as well as the procedure and the competent authorities within the given framework. The law shall further implement a series of EU directives[8] and

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[7] Cf. Justification to the Act of 12 December 2013 on Foreigners (Polish Sejm of VII term, printing No. 1526).

[8] The Act implements the provisions of: 1) Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 149, 02.06.2001, p. 34; OJ Polish Special Edition, Chapter 19, Volume 4, p. 107); 2) Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of art. 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187, 10.07.2001, p. 45; OJ Polish Special Edition, Chapter 19, Volume 4, p. 160); 3) Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 03.10.2003, p. 12, as amended); 4) Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air (OJ L 321, 06.12.2003, p. 26, as amended); 5) Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.01.2004, p. 44, as amended); 6) Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261, 06.08.2004, p. 19, as amended); 7) Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ L 375, 23.12.2004, p. 12, as amended); 8) Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ L 289, 03.11.2005, p. 15, as amended); 9) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98); 10) Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ L 155, 18.06.2009, p. 17); 11) Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168, 30.06.2009, p. 24, as amended); 12) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.04.2011, p.1, as amended); 13) Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (Text with EEA relevance) (OJ L 132, 19.05.2011, p.1); 14) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, a uniform status for refugees or persons eligible for subsidiary protection and the scope of granted protection (OJ L 337, 20.12.2011, p. 9); 15) Directive 2011/98/UE of the European Parliament

adjusts the Polish law to EU regulations governing the matter directly concerning the rules of entry and residence of foreigners on the territory of the European Union. The Act is applicable to all foreigners not being nationals of the Member States of the European Union, Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation.

Generally, one can point to several new or significantly modified solutions of the Act of 2013 on Foreigners, compared to those contained in previously applicable regulations. Briefly and with some simplification they can be presented in the following way:

a) changed the rules governing a temporary residence permit for foreigners; previous residence permit for a fixed period of time were replaced by a new institution of a temporary residence permit, introducing general provisions and specifying types of temporary residence permits[9];
b) introduced changes in submitting applications for visas and temporary residence permits[10];
c) introduced changes in the rules for granting temporary residence permits for foreigners studying at Polish universities[11];
d) granted the possibility of obtaining a single permit for both residence and work[12];

and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ L 343, 23.12.2011, p.1, as amended).

[9] The Act increases maximum period for which foreigners may be granted a temporary residence permit from 2 to 3 years.

[10] A foreigner will be able to submit an application even on the last day of his/her legal residence. Previously, it had to be at least 45 days before current visa or residence permit expires.

[11] These changes, among others, are extending the duration period of stay of the first permit of 12 to 15 months, and introduce the principle that the next permits are granted on a general basis – for a period of three years.

[12] This means that the foreigner who works in Poland will be able to apply for a residence permit and work permit in a single procedure. So far, the employer who wanted to hire a foreigner in Poland had to apply for a work permit for him, and after obtaining it a foreigner could apply for a residence permit. The employer will still have the opportunity to obtain a work permit, which, among others, will entitle a foreigner willing to work in Poland to apply for a visa.

e) changes have been made in determining the criteria for testing compliance with the conditions allowing to obtain a temporary residence permit in order to conduct business (by simplifying and objectifying them);
f) greatly simplified the procedures for granting temporary and permanent residence for victims of human trafficking;
g) changed the procedure for receiving a permanent residence permit[13];
h) introduced the institution of permit for tolerated stay and permission to stay in Poland for humanitarian reasons[14];
i) replaced two separate decisions on expulsion from Polish territory and the obligation to leave the territory of Poland by a decision obliging the foreigner to return, while harmonizing the procedure by stating that the bodies issuing this decision will only be indicated in the Act Border Guard units; the Act also introduces a regulation, according to which the decision obliging the foreigner to return will contain a re-entry ban into the territory of Poland (or Poland and other Schengen states) mentioning the specific period of the ban; also introduced the possibility of participation by representatives of non-governmental organizations providing assistance to aliens in the transactions relating to expulsion of a foreigner from Poland.

[13] The existing permit to settle was replaced by a new institution of a permanent residence permit. Also introduced a new condition for granting a permanent residence permit for an indefinite period for people with Polish origin, who intend to settle permanently in Poland. The Act also introduced a new condition for granting a permanent residence permit for an indefinite period for persons holding a valid Pole's Card and intending to settle permanently in Poland. The Act also introduced a regulation concerning the conditions for examination while granting a permit by the competent authority whether a marriage of a foreigner and a Polish citizen has not been concluded in order to circumvent the law.

[14] The institution of tolerated stay permit has so far was regulated by the Act on granting protection to aliens within the territory of the Republic of Poland (it was decided that due to some systematic reasons it should currently appear in the Act on Foreigners), while the institution of permission to stay in Poland for humanitarian reasons is a new legal institution.

2. CASE LAW PROBLEMS CONNECTED WITH THE EXPULSION OF FOREIGNERS

Among the cases dealt with by the Polish administrative courts on the basis of the Act on Aliens of 2003[15] most concerned obligation to leave the territory of Poland by foreigners who unlawfully crossed or attempted to cross the state border[16]. One can agree with the conclusion of one of the[17], judgments that the decision on expulsion of a foreigner from the Polish territory has a character of a so-called related decision. The administrative authority therefore has no freedom to shape the content of the decision. When it establishes the state of facts filling the disposition of the Act on Foreigners, it is obliged to issue a decision obliging a foreigner to leave the country. The legal basis in this case is formulated so that in the specific state of facts the administrative authority has no action options to choose from. It is not therefore a discretionary decision, which allows an administrative authority (at the same state of facts) to choose from two or more equal decisions.

The Administrative Court also assessed the possibility to expel (obligation to leave the territory of Poland) an alien who has entered the Polish territory in accordance with the rules and lawfully resided in that territory (based on a valid visa or other document) for the sole reason that during previous visits to Poland he/she crossed or attempted to unlawfully cross the border. The Court correctly stated that a decision on obligation to leave Polish territory may take place only in a situation where the irregular crossing or attempting to cross the border occurred during last entry and residence of the alien in Poland[18]. Therefore, there is no basis for the claim that a person can be sanctioned because of previous (even illegal) acts connected with widely understood "border regulations".

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[15] In accordance with art. 88 para. 1 or art. 97 para. 1 of The Act on Aliens of 13 June 2003 (JL of 2011 No. 264, it. 1573), further referred to as Act on Aliens.

[16] I.e. the Polish border within the meaning of art. 1-3 of the Act of 12 October 1990 on the protection of state border (JL of 2009 No. 12, it. 67, as amended).

[17] The judgment of the Voivodeship Administrative Court in Rzeszow of 3 December 2010, ref. act II SA/Rz 960/10.

[18] Cf. the judgments of the Supreme Administrative Court of 26 January 2012, ref. act II OSK 304/11, II OSK 421/11, II OSK 571/11.

In the case of expulsion of a foreigner staying in Poland without a valid document authorizing him to enter/stay was settled a dispute concerning the method of calculating time for the foreigner's stay on Polish territory. The Supreme Administrative Court[19] decided, that the period specified in the visa starts from the date of first entry of a foreigner into the Schengen area, and not from the day following it. Thirty-day period of stay on the basis of short-term visa allows an alien to enter and remain in the territory covered by the visa in the course of thirty calendar days, falling in the period of its validity[20].

Expulsion of a foreigner may also occur as a result of his/her work in violation of the Act of 20 April 2004 on employment promotion and labor market institutions[21]. The administrative court[22] found it reasonable to issue such a decision[23] in the case of performance of work by a foreigner on the basis of a statement of intention to entrust him/her a job issued by the entity in which the job was never undertaken, and also in case of working for a different employer than the one registering a statement of intention to entrust a job to a foreigner[24]. The new Act replaces a premise of performing work by a foreigner in violation of the Act of 20 April 2004 on employment promotion and labor market institutions with the following premise: a foreigner performs or performed work without the required work permit or registered in the district labor office employer's statement of intention to entrust him/her a job, was fined for illegally performing work or took the economic activity with violation of the Polish law. From the justification for the Act follows, that the aim is to reduce the possibility of issuing a decision obliging the foreigner to return because of the unlawful job performance, e.g. in a situation when a foreigner was unaware that he/she performs work illegally, due to the failure

[19] Cf. art. 88 para. 1 p. 1 of the Law on Foreigners.
[20] In the judgment of 15 March 2012, ref. act. II OSK 1005/11.
[21] The Act of 20 April 2004 on employment promotion and labor market institutions (JL No. 99, it. 1001).
[22] In the judgment of 29 May 2012, ref. Act II OSK 1288/11.
[23] Pursuant to art. 97 para. 1 in conjunction with art. 88 para. 1 p. 2 of the Act.
[24] See § 2 p. 27 of the Regulation of the Minister of Labor and Social Policy of 30 August 2006 on the performance of work by foreigners without a work permit (JL No. 156, it. 1116 as amended 123).

of certain formalities by the employer. It is also important that the employer who hires a foreigner or entity entrusting foreigner performance of work, may be party to the proceeding for the expulsion of a foreigner from Polish territory[25]. A party to administrative proceedings therefore may be anyone whose legal interest or obligation concerned or who demands actions of an organ due to his legal interest or obligation[26].

In one of the judgments the Supreme Administrative Court has interpreted the term "non-compliance with fiscal obligations to the State Treasury" in the context of the conditions for expulsion of a foreigner from Polish territory. According to the court the concept of "tax liability" is not synonymous with the term "tax obligation". The mere fact of the tax obligation is not sufficient evidence to demonstrate non-compliance by a foreigner with fiscal obligations to the State Treasury justifying a decision on expulsion. The statement of non-compliance with tax obligations can only be made in the course of proceedings conducted by the competent tax authority, which confirmed that the taxpayer failed to comply with statutory activities. Such an assessment is associated with the tax authority's decision determining the amount of tax liability in the tax or determining the amount of liabilities other than paid or resulting from the declaration. It is not until a final decision of the competent tax authority concerning the tax obligations of the party to the State Treasury may constitute a basis to make the arrangements necessary to issue a decision on expulsion. The new law on foreigners of 2013 adopted a solution according to which, the refusal to issue a temporary residence permit occurs if the foreigner is in arrears with payment of taxes or fees[27]. Such clarification of terminology can be accepted with approval. Additionally, the obligation is imposed on foreigners to notify the public administration body about the termination of the reason for which he was granted a temporary residence permit. Failure to comply with this obligation may constitute a basis for refusal to provide a foreigner with a residence

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[25] SAC judgment of 20 April 2011, ref. act II OSK 936/10; ONSAiWSA 2012/1/8, OSP 2012/6/57.
[26] Cf. art. 28 and 29 CAP.
[27] With exception to situation where he/she obtained a dismissal, deferral, division of overdue payments or suspension of decision of the competent authority.

permit next time. This solution was not provided for in the previous legislation. This provision is intended to restrict the use of the granted temporary residence permit for purposes other than those for which it was granted.

In the opinion of the Supreme Administrative Court[28] expulsion of a foreigner from the Polish territory cannot take place in a situation where the potential risks arising from the stay of a foreigner on the Polish territory have not been validated and are based exclusively on the findings relating to the suspected offense. The mere suspicion of having committed a crime is not a "proving" of crime. A foreigner should therefore use the classic principle of the presumption of innocence. Any expulsion of an alien would be all the more unjustified and unreasonable, after the verdict acquitting him/her from committing the alleged actions.

In this context, some doubts may raise a judgment of the Voivodeship Administrative Court in Warsaw, which concluded that the expulsion of a foreigner considered to be dangerous without giving him/her access to the files of his/her case is lawful[29]. According to recital 23 of the Directive 2004/38 expulsion of EU citizens and their family members on grounds of public policy or public security is a measure that could lead to serious harm to people who using the advantage of the rights and freedoms conferred on them by the Treaty, actually integrated into the host Member State. The scope of such measures should therefore be limited in accordance with the principle of proportionality, to take into account the degree of integration of such a person, the length of his/her stay in the host Member State, their age, health condition, family and economic situation and the links with its country of origin. The administrative court considered the complaint of a citizen of Azerbaijan on the proceedings and the decision of the voivode of Małopolska and the Office for Foreigners to expel him from the territory of Poland and refusal to grant him a residence permit. The authorities considered (on the basis of classified documents prepared by the Internal Security Agency) that the foreigner's stay in Poland constitutes a threat to national security. During the proceedings they refused to allow the foreigner to see the file of the case and have not prepared

[28] SAC judgment of 30 November 2006, ref. act II OSK 1475-1405.
[29] Judgment of the HAC in Warsaw of 15 May 2014, ref. No. IV SA/Wa 253/14.

justifications for these decisions. The Administrative Court found that the proceedings before the ISA were correct. In this case, the alien is not entitled to the guarantees contained in the Convention for the Protection of Human Rights and the Charter of Fundamental Rights of the European Union. In this way the applicant had no information on the reasons for the decisions. He had, therefore, no possibility of undermining the claims of the authorities and to present his own arguments against recognizing him as a danger to state security. The administrative authorities have recognized that the foreigner poses a threat to state security and at the same time suppressed case files and have not prepared justifications for this decision.

According to settled case-law of the Court of Justice, effective judicial remedy guaranteed by art. 47 of the Charter of Fundamental Rights of the European Union requires that the person concerned had the opportunity to know the reasons for a decision in relation to him/her, whether it is through the reading of the decision itself, or through informing of the reasons on his/her request, without prejudice to the powers of the court to require giving these reasons by the competent authority[30], which will allow to defend his/her rights in the best possible way and on a fully informed decision whether it is appropriate to bring the case to a competent court, and the court will fully be able to assess the legality of the decision of the national court[31]. The competent national court has the task, first, of ensuring that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, of drawing the appropriate conclusions from any failure to comply with that obligation to inform him. EU law[32] requires the national court to ensure that the non-disclosure

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[30] Judgments of 17 March 2011 in the joined cases C 372/09 and C 373/09 *Peñarroja Fa*, *and of* 17 November 2011 case C 430/10 *Gaydarow*.

[31] See similar judgments of 15 October 1987 on case 222/86 *Heylens and others*, and of 3 September 2008 in the joined cases C 402/05 P and C 415/05 *P Kadi and Al Barakaat International Foundation v. Council and Commission.*

[32] Art. 30 para. 2 and art. 31 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of EU citizens and their family members to move and reside within the territory of the Member States in the light of art. 47 of the Charter of Fundamental Rights of the European Union.

to the person concerned of a precise and full grounds which constitute the basis of a decision, as well as the relevant evidence was limited to a strict necessity, and to ensure that in any case the person concerned was informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence[33].

In two other judgments of the beginning of 2014, the Court of Justice referred to the principles of referring to and calculation of the periods of imprisonment of a foreigner, which affects the protection against expulsion from the territory of the Member States of the European Union. The first of the cases concerned a citizen of Nigeria, who married a citizen of Ireland[34]. The married couple and their children lived in the UK. A citizen of Nigeria had therefore the status of a "family member" and received in 2000 a residence permit for a 5 year period. At that time he was repeatedly convicted and sentenced to imprisonment. The UK authorities have twice demanded the expulsion of the Nigerian. In both cases the invalidity of the decision was stated because he held the status of a "family member of an EU citizen". In 2010 the British authorities once again ordered his expulsion on grounds of public policy. At this time the foreigner submitted an application for the permanent residence card. On the basis of EU legislation the grounds for obtaining such a permit is a legal and uninterrupted stay of a person on the territory of specific state[35]. The national court asked the Court of Justice for a preliminary ruling on the legality of stay of a foreigner in the situation following his imprisonment and the way of calculating the required legal 5-year period of residence by such person in the United Kingdom. In the Court's opinion, periods of imprisonment of a foreigner may not be taken into account when calculating the required period of residence by him in the territory of a Member State for the purposes of the acquisition of a right of permanent residence. The Court finds that the continuity of residence of five years is interrupted by periods of imprisonment. The Court's position on this matter is logical

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[33] The judgment of 4 June 2013 C 300/11 on *ZZ v. Secretary of State for the Home Department.*
[34] Case C 378/12 *Onuekwere* of 16 January 2014.
[35] Cf. art. 16 para. 1 of the Directive 2004/38.

and most appropriate. A similar position was taken by the Court in another judgment[36], stating that the period of imprisonment by a person concerned interrupts the continuity of residence required to obtain rights of residence.

In one of the cases an administrative court[37], annulled the contested decision requiring a foreigner to leave the Polish territory and stated, that significant from the point of view of realization of the right to free movement and residence within the territory of a Member State is the mere fact of possession of a valid document authorizing him/her to enter and stay in the territory of the Member State. In the court's opinion, the request of BG officers of EU countries at its internal borders to show e.g. passport is to confirm the rights of Union citizen (including family members of a citizen of the European Union) to move freely on its territory. The court stressed that the right to cross internal borders of the European Union at any point without border checks[38] does not exempt from the duty to carry a document allowing to cross these borders while using this right. Not having such a document with you does not mean a lack of possessing the rights to move freely within the European Union and therefore is a basis for issuing an obligation to leave the territory of the Republic of Poland[39]. If, despite the impossibility to present an identity card or passport a person concerned is able to prove his/her nationality by other means, the host country must not undermine the right of residence on the sole ground that he/she did not provide one of the above documents[40].

One of the reasons for the expulsion constitutes the presence of a foreigner on the list of foreigners whose stay on Polish territory is undesirable. The list of foreigners whose stay on Polish territory is undesirable leads the Head of the Office for Foreigners. In defining the scope of the administrative procedure for the removal of a foreigner's data from this

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[36] Case C 400/12 *M. G.* of 16 January 2014.

[37] The HAC ruling in Gorzow Wielkopolski of 20 November 2011, ref. act II SA/Go 614/11.

[38] Pursuant to Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Border Code).

[39] Pursuant to art. 97 para. 1 of the Act of 13 June 2003 on Aliens.

[40] In the context of third-country nationals see judgment of the Court of Justice of 25 July 2002 in Case C 459/99 MRAX.

list due to the fact that they were included by mistake, the court stated that in such proceedings the assessment shall be the substantive conditions for the entry. In such proceedings must therefore be examined whether an alien fits any circumstances specified in the law, justifying the entry in this register[41].

The Supreme Administrative Court formed the view that the obligation to leave the Polish territory does not deprive the alien's right to education within the meaning of art. 2 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and at the same time does not justify the granting foreigner a protection against expulsion[42]. According to the Polish Constitution[43], everyone has the right to education. It should be noted that the wording used in the Constitution "everyone" refers also to foreigners residing on Polish territory. According to the Act on the education system[44], the right to use the nursery belongs to all children aged 3-6, including those who do not have Polish citizenship. As in the case of kindergartens, the right to free education in primary and secondary schools is available to any child-foreigner, who resides on the territory of Poland regardless of whether lawfully or not. In addition, it should be noted that

[41] Cf. judgment of the Supreme Administrative Court of 14 December 2011, ref. act II OSK 1938/10; the data on foreigner is placed and stored on the list, if at least one of the following reasons occur: 1) the foreigner has been issued a decision obliging him to return accompanied by an entry ban on Polish territory or the territory of the Republic of Polish and other countries of the Schengen area; 2) a foreigner has been convicted: a) on the territory of Poland – for an intentional crime or tax offense and sentenced to a fine or imprisonment or b) by a country other than the Schengen area – for an offense constituting a crime under Polish law, or c) on the territory of Poland or another Schengen State – for an offense to an imprisonment for a term exceeding one year; 3) The alien's entry or stay on Polish territory is undesirable because of the obligations arising from treaties and international agreements binding the Republic of Poland; 4) required for reasons of national defense or national security or the protection of public safety and order or the interests of the Republic of Poland; 5) the alien after his arrest in connection with the crossing of the border in violation of the law has been passed to a third country under an international agreement for the transfer and reception of foreigners – cf. art. 435 of the Act on Foreigners of 2013.

[42] SAC judgment of 30 August 2005, ref. act II OSK 656/05.

[43] Art. 70 para. 1 of the Constitution.

[44] Art. 94a para. 1 of the Act of 7 September 1991on the education system (JL of 2004 No. 256, it. 2572, as amended).

other regulations[45] lay down the conditions and procedure for the adoption of foreign children in public schools. Similarly, in cases relating to expulsion of so-called second-generation immigrants, their right to reside in Poland is evaluated in the context of the right to respect for private life protected by art. 8 of the European Convention on Human Rights. The obstacle to expulsion was not a lack of treatment possibility in the country of origin in conditions comparable to those existing in the country of residence.

3. INFORMING FOREIGNERS IN A LANGUAGE THEY CAN UNDERSTAND

As a rule, the body that conducts the proceeding on the issue of the decision on imposing the return obligation shall provide an opportunity for the interpreter's assistance to foreigners who do not have adequate knowledge of the Polish language. The authority that issued the decision on imposing the return obligation on a foreigner shall provide an understandable interpretation or translation of the legal basis of the decision, the ruling and the instruction about whether and how an appeal against their decision may be filed[46]. Still it should be emphasized that neither the Code of Administrative Procedure applicable here, nor the Act on Foreigners of 2013 have established a requirement to use services of a sworn translator during the examination of a foreigner. The functions of the interpreter can therefore be exercised by someone who speaks any foreign language understandable to a foreigner. The key here is, therefore, to transfer important thoughts and expressions so that the foreigner would without any doubt understood the essence of actions and decisions undertaken towards him.

According to the Supreme Administrative Court the authority issuing the decision in proceedings for granting refugee status shall inform the applicant in writing, in language he can understand, about the outcome

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[45] Regulation of the Minister of National Education of 1 April 2010 on the admission of persons who are not Polish citizens to public kindergartens, schools, teacher training institutions and organization additional Polish language courses, extra-up courses and learning the language and culture of the country of origin (JL No. 57, it. 361).
[46] Art. 327 of the Act on Foreigners of 2013.

of the proceedings and the procedure and deadline for lodging appeals[47] also covers proceedings concerning the refusal to suspend execution of the decision on granting refugee status[48]. In the new law on foreigners of 2013 the obligation to inform foreigners in a language they understand is contained in several provisions. The authority instituting checks in relation to a foreigner shall instruct the foreigner in writing in a language understandable to him/her about the procedure and its principles, as well as about the rights granted to him/her and obligations imposed on him/her[49]. Such an obligation has also the authority competent for conducting proceedings related to the criminal offence[50]. The authority that issued the decision obliging the foreigner to return, must inform in writing a foreigner of the legal basis of the content of the settlement and the briefing whether and how an appeal against the decision can be made. The authority that issued the decision on imposing the return obligation on a foreigner using a form shall inform a foreigner in writing in a language he/she understands about the legal basis, about the contents of the decision and about the instruction about whether and how an appeal against their decision may be filed[51]. The authority competent to issue a decision on imposing the return obligation on a foreigner shall instruct a foreigner holding a residence permit or another permit authorizing him/her to stay granted by another Schengen country about the obligation to immediately leave for the territory of that State. This instruction shall be made in writing in a language understandable for the foreigner[52]. When issuing a decision on placing a foreigner in a guarded centre or in a detention centre for foreigners a court shall notify the foreigner in a language that he/she understands of the taken measures and the issued orders and the rights available to a foreigner in the proceedings before a court of law[53]. A foreigner received at a guarded centre or

[47] Art. 50 of the Act on granting protection to foreigners within the territory of the Republic of Poland.
[48] In the judgment of 31 October 2012, II OSK 2441/11.
[49] Art. 7 para. 1 p. 2 of the Act on Foreigners of 2013.
[50] Art. 173 of the Act on Foreigners of 2013.
[51] Art. 311 para. 2 of the Act on Foreigners of 2013.
[52] Art. 314 of the Act on Foreigners of 2013.
[53] Art. 402 of the Act on Foreigners of 2013.

a detention centre for foreigners shall be instructed in a language he/she understands about his/her rights and obligations and shall get acquainted with the rules governing the stay in a guarded centre or a detention centre for foreigners. The fact that the foreigner has read the instruction shall be confirmed with his/her signature[54], which may be an additional proof of the full awareness of the legal situation of a foreigner.

In a situation where during the administrative procedure has been issued a decision to extend the detention in violation of the right to be heard, the national court, whose task is to assess the compatibility of that decision with the law, may waive application of detention only when it considers, in the light of all the facts and legislation in each individual case, that such an infringement actually deprived a person who is sought, the possibility of a better presentation of his/her line of defense to such an extent that pending administrative proceedings could have led to a different result[55].

SUMMARY

In the analyzed issues both legislation and case law of the EU and national courts complement each other. In terms of immigration policy, therefore, very clearly can be seen the necessity of concomitant use of regulations from two legislative centers – the European Union and individual Member States. The common EU immigration policy[56] must therefore have a flexible framework for addressing the specific situations of EU Member States. It is delivered in partnership between the Member States and EU institutions. The common immigration policy should be based on clear, transparent and fair basis, and promote legal immigration. Therefore, third-country nationals should have the necessary information concerning legal entry and residence in the Member States of the European Union. It is also important to

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[54] Art. 411 of the Act on Foreigners of 2013.

[55] Judgment of 10 September 2013 on case C 383/13 *M.G., N.R. v. Staatssecretaris van Veiligheid en Justitie.*

[56] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 June 2008 – A common immigration policy for Europe: Principles, actions and tools [COM (2008) 359 final – not published in the Official Journal].

adopt a coherent and reasonably uniform policy on fighting illegal immigration and to introduce measures to combat all forms of undeclared work and illegal employment. The primary objective of the European Union is to carry out a modern and comprehensive migration policy based on the solidarity principle. Migration policy is aimed at ensuring a balanced approach to both legal and illegal immigration. Legal and institutional solutions adopted in the new law on foreigners of 2013 are part of the foundation of Polish migration policy as set out in the document "Migration policy of Poland – the current state of play and the further actions", adopted by the Council of Ministers on 31 July 2012. The Act also adjusts Polish national law in this regard to the acquis communautaire.

Presented in the article review of selected rulings of Polish and EU courts leads to the conclusion that the presented issue is extremely complicated and relating to specific factual situations. On the one hand, one must take into account the general principles of respect for human rights and the principles relating to the free movement of persons in the European Union, while on the other hand, the objectives of EU immigration policy and related sanctions – including the possibility of expulsion of foreigners. The free movement of persons is one of the fundamental freedoms guaranteed by European Union law. Nevertheless, freedom of movement of persons cannot be implemented unconditionally. In fact, its implementation is conditional upon the existence of an adequate level of protection taking into account external threats. In particular it refers to cross-border crime and illegal migration. Designed for this purpose mechanisms, such as enhanced control of external borders and a common visa policy for third country nationals are to ensure adequate security of the European Union. Polish and EU courts can also contribute to achieve this objective by adjudicating and interpreting legislation underlying the EU's immigration policy.

THE NATURE OF RESIDENCE RIGHTS OF THIRD-COUNTRY NATIONALS WHO ARE FAMILY MEMBERS OF UNION CITIZENS IN THE CASE-LAW OF THE ECJ

EDYTA KRZYSZTOFIK

GENERAL REMARKS

The Republic of Poland became one of the Member States of the European Union (hereafter referred to as the EU) in May 2004[1]. As a consequence Polish citizens get EU citizenship and became subjects of EU law. However it should be kept in mind that in certain circumstances they can acquire specific rights for members of their families, even if those people have citizenship of a third country and they are not EU citizens. In this context it is worth to give attention to the number of marriages contracted between Polish and Ukrainian citizens. Data provided by the Central Statistical Office indicate that in the period 2009 - 2012, Polish citizens frequently enter into marriages with third-country nationals[2]. These data indicate that

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[1] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Greek Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Polish Republic, the Republic of Slovenia, the Slovak Republic concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Polish Republic, the Republic of Slovenia and the Slovak Republic to the European Union, signed in Athens on 16 April 2003., OJ of 2004, No. 90, it. 864.

[2] Demographic Yearbooks of: 2010, 2011, 2012, 2013. Available at website: http://stat.gov.pl/obszary -tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-demograficzny-2013,3,7.html

Polish-Ukrainian marriages are a significant group within the total number of marriages contracted in Poland. Taking into account the high scale of migration of Polish families (in the period discussed 77 038 Polish citizens with a permanent right of residence left abroad, including 63 428 to other EU countries) it is worth to take a look at the position of a third-country national who is a family member of a migrant worker.

1. THE FREE MOVEMENT OF PERSONS

The European Union is a special kind of international organization which as one of its fundamental objectives assumes the implementation of internal market freedoms including the free movement of persons[3]. Originally this freedom was limited in the subjective way and concerned only migrant workers but after the establishment of EU citizenship it covered all EU citizens[4]. Consequently, in accordance with the provisions of the founding Treaties, every EU citizen can leave freely the territory of the country of origin, then enter the territory of the host country and reside freely within the territory of the chosen host EU country[5]. In addition, every citizen can enjoy the right of residence in the territory of the host country by choosing one of the statuses: migrant worker[6], individual conducting economic activity[7] or providing services[8].

The right to migrate has a significantly wider meaning than the privileges mentioned above. As the Court of Justice[9] emphasized repeatedly, the right to free movement, as a civil right, includes not only the right of residence, but provides also a migrant worker with the possibility of integra-

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[3] Art. 3 consolidated version of the Treaty on European Union OJ C 326 of 2012, p. 1 (hereafter TEU).
[4] Art. 20 consolidated version of the Treaty on the Functioning of the European Union OJ C 326 of 2012 p.1 (hereafter TFEU).
[5] Art. 21 TFEU.
[6] Art. 45 TFEU.
[7] Art. 49 TFEU.
[8] Art. 56 TFEU.
[9] In the title of hereby article definition of the Court of Justice of the European Union was used. It is a collective term introduced to TFEU by the Treaty of Lisbon, which includes: the Court of Justice, the General Court and specialized courts. Due to the fact that in the text only case-law of the Court of Justice will be recalled and consistently this term be used.

ting into the host country while preserving their own values and traditions. There should be mentioned the right to use the official language of the country of origin in contact with the authorities of the host country[10], as well as the right to give children a surname in accordance with the rules of the country of origin[11]. Next to residence rights a migrant worker is entitled to a number of powers that allow effective exercise of freedom. Their range depends on the status of the migrating person within the territory of the host country[12].

Every citizen of the European Union deciding to stay in a EU Member State other than the country of origin for a period longer than three months, should determine their status[13]. In accordance with the provisions of Directive 2004/38[14] such status can be defined as: migrant worker, self-employed person, or a student[15]. There is no doubt that the EU citizen is entitled to reside in another EU Member State, even without determination of its status, however, such person is not a burden on the social assistance system and is covered by the medical insurance[16].The residential rights mentioned above

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[10] Judgment of the Court of Justice of 24 November, 1998 concerning the case C 274/96 *Criminal proceedings against Horst Otto Bickel.*

[11] Judgment of the Court of Justice of 2 October, 2003 concerning the case C 148/02 *Garcia Avello.*

[12] A full analysis of claims of the European Union citizen exceeds the scope of this article. For more see eg.: A. Czaplińska, *Zakres przedmiotowy swobodnego przepływu pracowników,* J. Barcz, *Prawo gospodarcze Unii Europejskiej*, Warsaw 2011, p. II 58 – II 70, A. Cieśliński, W*spólnotowe prawo gospodarcze*, *T. I, Swobody rynku wewnętrznego,* p. 168 – 277, G. Druesne, P*rawo materialne i polityki Wspólnot i Unii Europejskiej*, Warszawa 1996 r., p. 93 – 169.

[13] In accordance with the provisions of Directive 2004/38, a citizen of the European Union may stay in the territory without any requirement if the length of stay does not exceed three months. Then is distinguished a long-stay exceeding three months. In such case, it is required to possess the right of residence granted by the authorities of the host country. The last kind is the right of permanent residence which citizen receives after 5 years of continuous stay within the territory of the host country. For more see: T. Sieniow, *Swoboda przepływu osób*, A. Kuś, *Prawo materialne Unii Europejskiej*, Lublin 2011, p. 63 – 118.

[14] European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158 of 30.04.2014 p.77 (later in the article cited as Directive 2004/38).

[15] Art. 7 par. 1 Directive 2004/38.

[16] Art. 7 par. 1 point b Directive 2004/38.

cover the EU citizen and a member of their family: the spouse, the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner of the Union citizen.[17] It should be emphasized that the fact of having EU citizenship is the basis for the exercise of the freedom of movement of persons. This requirement, however, does not apply to the aforementioned family members of EU citizens[18]. The powers of that category are dependent on the EU citizen's rights. From the perspective of a third-country national it is essential to prove family connections with a Union citizen, then such person enjoys the same status as the EU citizen on the territory of the host country. The problem of the residence rights of family members of a migrant worker have been a subject of judgments of the Court of Justice repeatedly[19]. However, the purpose of this article is to determine the nature of the residence rights of family members of a migrant worker (especially a spouse) and the conditions for their exercise.

2. THE RIGHT OF RESIDENCE OF A FAMILY MEMBER OF THE EU CITIZEN AS A DERIVATIVE RIGHT OF A MIGRANT WORKER

The first issue noted by the Court of Justice was the problem of the acquisition of rights of residence by family members of a migrant worker who are third-country nationals. This right is always derivative of a status of migrant worker as highlighted above[20]. Directive 2004/38 clearly states that this right concerns accompanying or joining members of a migrant's workers family[21]. In order to obtain a residence card in the territory of the host country such person is obligated to present a valid passport, a document

[17] Art. 2 par. 2 Directive2004/38.

[18] Art. 7 par. 2 Directive2004/38.

[19] Fox example: R. Skubisz (ed.), *Orzecznictwo Europejskiego Trybunału Sprawiedliwości,* Warsaw 2003, p. 114 -134.

[20] Case C131/85 *Gül*, ECR 1986, p. 1573.

[21] Art. 7 par. 1 p. d Directive 2004/38.

attesting to the existence of a family relationship with a migrant worker, certificates of registration or other residence permit of an employee[22].

In the case-law two situations have been distinguished. The first one is when an employee moves together with family or a foreigner joins an employee who is already a member of his/her family. The second more problematic situation relates to the creation of family ties after the fact of having become a migrant worker in the territory of the host country. In both cases, an interested person can prove the existence of family connections, but the moment of their creation is a crucial one. Namely, whether it was created before or after becoming a migrant worker in the territory of the host country.

In the initial period, the Court of Justice has been analyzing the situation of a migrant worker's spouse without reference to the moment when marriage was contracted, but to the cessation of family connections. As stressed repeatedly, the employee's spouse can enjoy the discussed status, as long as the marriage exists formally. The decision concerning the existence or cessation of a marriage is the decision of the appropriate state body. Spouses, however, are not obligated to conduct a common household[23]. The Court of Justice has referred in different ways to migrant workers being in an informal relationship with a third-county national. In the *Reed* case the Court had answered a question about the position of a person who is cohabitating with the EU citizen, conducting a common household and staying on the territory of a Member State other than the country of origin of the migrant worker[24]. In this case interpretation of the term „spouse" was done. Court emphasized the need of examination of this term with regard to the evolution of society and experience of the entire Community (EU), not only in the light of social changes characteristic of one Member State. This term concerns the relations between parties to the marriage. At the

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[22] C 267/83 *Aissatou Diatta*. Proceedings before the Court of Justice concerns Diatta - citizen of Senegal, who together with her husband - a French citizen, lived in Germany. The spouses were separated. In this situation, the authorities refused to extend her right of residence due to the loss of the status of a migrant worker's family member.
[23] Judgment of 17 April 1986 concerning the case 59/85 *Reed*.
[24] Ibid.

same time the Court has rejected the possibility of identifying the position of a spouse with a cohabitant[25].

However, in this case Dutch regulations allow, under certain conditions (common household, a free status of both persons, means of subsistence and appropriate housing conditions) treatment of a cohabitant of a foreigner who is a national worker in a manner comparable to a spouse. This solution was a social privilege granted to national workers. The Court states that it is within the concept of social privilege based on the meaning of Regulation No 1612/68, therefore, should be available under the same conditions for the migrant worker. The Court states also that "*article 7 of the Treaty, in conjunction with article 48 of the treaty and article 7 (2) of regulation no 1612/68 , must be interpreted as meaning that a member state which permits the unmarried companions of its nationals , who are not themselves nationals of that Member State , to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other Member States*"[26].

The second problem emphasized by the Court of Justice is the acquisition of the status of a family member of a migrant worker where family ties are created after acquiring the status of migrant worker in the territory of the host country. The *Metock* case[27] constitutes an example from case-law concerning such situations. The issue that was the subject of the judgment concerned residence rights of four third-country nationals who have come to Ireland, where they applied for asylum. Their pplications were denied, however, during the proceedings they entered into a marriage with EU nationals legally staying in the territory of Ireland. The Court of Justice in this judgment interpreted the concept of a family member who is "joining or accompanying" a migrant worker.

According to the Court's position this term "*must be interpreted as referring both to the family members of a Union citizen who entered the host Mem-*

[25] "Art. 10 par. 1 of Regulation No 1612/68 cannot be interpreted as ordering under certain conditions, identification of "spouse" which refers to this provision, the cohabitant living in a permanent relationship with an employee who is a national of a Member State and is employed in the territory of another Member State." Case 59/85 *Reed*, p. 16.
[26] Case 59/85 *Reed*, p. 30.
[27] Judgment of the Court of Justice of 25 July 2008 in case C 127/08 *Metock and the others.*

ber State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members"[28].

Therefore the fact that marriage was contracted is the most crucial factor, while the time, place of marriage or the moment when the family member joined the Union citizen are not important. Hence, the Court of Justice has modified its view expressed in earlier judgments by repealing the requirement of common cohabitation in the territory of another Member State at the moment of moving into a host country.

A similar position was taken by the Court of Justice in the *Sahiz* case[29]. It concerned a third-country national who during the time of exercising his right to temporary residence on the territory of Austria married a German citizen. The Court of Justice emphasized, as in the *Metock* case, that the status of a family member of a migrant worker covers those*"family members who arrived in the host Member State independently of the Union citizen and acquired the status of family member or started to lead a family life with that Union citizen only after arriving in that State. In that regard, the fact that, at the time the family member acquires that status or starts to lead a family life, he resides temporarily in the host Member State pursuant to that State's asylum laws has no bearing"*[30].

3. THE TERRITORIAL SCOPE OF RESIDENCE RIGHTS OF A FAMILY MEMBER OF A UNION CITIZEN

Exercising the internal market freedoms including freedom of movement, is dependent on the fulfillment of cross-border conditions. Referring to the subject article, it means that an individual acquires the status of a migrant worker under the condition of moving within the Union in order to take up employment[31].

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[28] C-127/08 *Metock and the others*, p. 93.

[29] Judgment of the Court of Justice of 19 December 2008 in case C 551/07 *Sahiz.*

[30] C 551/07 *Sahiz*, p. 33.

[31] A. Kuś, *Podstawowe założenia rynku wewnętrznego Unii Europejskiej,* in A. Kuś (ed.), *Prawo materialne Unii Europejskiej*, Lublin 2011, p. 39.

The analysis of residence rights of a family member of migrant workers may thus be possible if first the basic status as worker, service provider or individual conducting an economic activity in the territory of the host State, is possessed. The simplest situation means that a worker moves in order to take up an employment in the territory of another Member State than the country of origin and member of his family joins him. In practice, however, different situations can occur. The first concerns the possibility of exercising the rights of a family member in the territory of the country of origin of a migrant worker while he/she has employment on the territory of the host country. The second variant refers to situations where a worker who returns to the territory of the country of origin, previously has been enjoying the status of a migrant worker in another Member State. In this case, however, it can be referred to the situation when a family member moves together with a worker or joins him/her in the territory of the country of origin, but family relationship has existed before.

For the first time the Court of Justice refers to the above-mentioned problems in a judgment in the case of *Mattern*[32]. It concerns the third-country national H. Cikoti who is the spouse of the citizen of Luxembourg living together in Belgium, who intended to take up employment in Luxembourg on the basis of the status of the EU citizen's family member. The Court of Justice emphasized, however, in such situations, he is not entitled to enjoy this status. The Court stressed also that the reference to the status of a family member of a migrant worker is possible only in the country where an employee conducts economic activity or is self-employed[33]. In addition, the Advocate General pointed out that the provisions of aricle 11 of Regulation 1612/68 does not grant a separate right to free movement to a family member of migrant worker. That is the right of a migrant worker aims to *„remove all obstacles to the mobility of migrant workers in particular with regard to his right to family reunification and the conditions of its integration into the host*

[32] Judgment of the Court of Justice of 30 March 2006 in case C 10/05 *Cynthia Mattern, Hajrudin Cikotic p. Minister du Travail et de l'Emploi.*

[33] C 10/05 *Mattern*, p. 24,.

country" [34]. These considerations suggest that a family member of a migrant worker or self-employed EU citizen, may exercise the rights arising from its status only on the territory of the country in which reside the individual having the original rights.

Another judgment in the case *Sing* concerned the rights of a family member of a migrant worker returning to his/her country of origin[35]. The national of the United Kingdom married a citizen of India. Then they both went to Germany, where Mrs. Singh has been enjoying the status of a migrant worker. After two years, they returned to the United Kingdom. Mr. Sing has been granted a temporary residence permit as the husband of British citizen. Then, in connection with the judgment of divorce, the British authorities have shortened his right and issued a negative decision concerning the right of permanent residence. In this judgment the Court of Justice referred primarily to the position of worker returning to the territory of the country of origin, planning to conduct economic activity, and consequently the rights of the migrant worker's spouse. The Court emphasized that the EU citizen being in the situation mentioned above should have the right to be accompanied by their spouse (third-country national), under the same conditions as if he was entering the territory of the host country[36]. The Court answering the question, states that *"art. 52 of the Treaty and Directive 73/ 148 should be interpreted as obliging Member States to grant a permit to enter and reside in its territory to the spouse, irrespective of nationality, of the citizen of that State, who went with the spouse to another Member State in order to take up an employment, within the meaning of art. 48 of the Treaty, and returns with the purpose to settle, within the meaning of art. 52 of the Treaty, on the territory of the country of origin. The spouse must enjoy at least the same rights as would be granted by Community law if entered and remained on the territory of another Member State"*. Therefore, it should be assumed that a national of a Member State returning to the country of origin continues to enjoy the benefits of EU

[34] Opinion of the Advocate General Juliane Kokott of 16 December 2005 concerning the case C 10/05.
[35] Judgment of the Court of Justice of 7 July 1992 in case C 370/90 *Sing*.
[36] C 370/90 *Sing*, p. 21.

law, under condition that has left the country of origin with the spouse, then at the territory of the host country enjoyed the status of a migrant worker and after returning to the country of origin remains professionally active, in this particular case self-employed. The Court of Justice clarified this thesis in judgment concerning the case of *Akrich*[37].

The factual status was similar to the case discussed above. However, in this case a third-country national before the exit from the spouse's country of origin who is a citizen of the Union, did not have the right to stay legally. In addition, according to the British authorities, spouses have gone with the purpose to rely on EU legislation after returning to the territory of the country of origin. The Court has reinforced previous arguments, by stressing that *"in a situation where a national of a Member State married to a national of a non-Member State with whom he/she is living in another Member State returns to the Member State of which he/she is a national in order to work there as an employed person and, at the time of his/her return, his/her spouse does not enjoy the rights provided for in Article 10 of Regulation No 1612/68 because she/he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the Convention, provided that the marriage is genuine"*[38].

The analysis of both cases brings a conclusion to be assumed that the earlier status of third-country national married to a citizen of the European Union, enjoying the free movement of persons does not affect the future possibility to enjoy the status of migrant worker. Here the issue of continuation of economic activity after returning to the country of origin plays a crucial role. It should be noted that the Court of Justice by the case *Akrich* has introduced additional protections granted to migrant workers, namely the right to family integrity[39].

[37] Judgment of the Court of Justice of 23 September 2003 in case C 109/01 *Hacen Akrich*.
[38] C 109/01 *Akrich*, p. 61,.
[39] The protection of the integrity of the family is one of the reasons exempting the application of restrictions on residence rights of EU citizens and their family members. For more

In this context, the judgment in the case *RNG Eind* must be quoted[40], where the Court of Justice have referred again to the issue of professional activity after the return in the territory of the country of origin. A Dutch citizen who worked in the United Kingdom had brought his daughter, who did not have EU citizenship. He received a residence card for her. Then he returned to the Netherlands, where authorities refused her the right of residence because her father was professionally inactive. The Court ruled, that "*a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Article 10(1)(a) of Regulation No 1612/68, which applies by analogy, to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State*"[41]. In this judgment the Court of Justice stressed also that the country of origin is not obliged to grant a residence card in such situation as discussed, but refusal of residence permit cannot be based solely on the lack of economic activity. It is worth also to note that the opinion of the Advocate General issued concerning this case, which also referred to the protection of the family life as a fundamental right protected under EU law. The Advocate General relied on the Convention on the protection of Rights of the Child, which specifically guarantees the right to family life. It states that all applications submitted by a child or parents concerning entry or leave the country for the purpose of family reunification should be examined by the State in a favourable and humane way with a due diligence[42].

see: E. Krzysztofik, *Ochrona integralności rodziny w postanowieniach normujących swobodny przepływ osób w Unii Europejskiej*, [in:] P. Czarnek, M. Dobrowolski (ed.), *Rodzina, jako podmiot prawa*, Zamość 2012, p. 83 – 100.

[40] Judgment of the Court of Justice of 11 December 2007 in case C 291/05 *R.N.G. Eind*.

[41] C 291/05 *R.N.G. Eind,* p. 45,.

[42] Opinion of the Advocate General Paol Mengozz concerning the case C 291/05.

Another judgment worth mentioning is the case of *Carpenter*[43] concerning a theoretically internal situation. The dispute has been connected with the decision to expel the spouse of a EU citizen who does not have EU citizenship, while Union citizen has been enjoying the status of a service provider. The facts in that case have a special character due to the fact that Mr. Carpenter as a British citizen relied on the need to protect the rights under EU law before the national authorities. The dispute was the decision to expel addressed to wife of Mr. Carpenter – a citizen of the Philippines. In the submitted appeal she relied on the status of family member of a citizen enjoying the free movement of services. Basically, the case has a purely internal nature. Analysis of this judgment requires the repetition of arguments already mentioned by the Court of Justice. Right of residence of a family member of a Union citizen is derived from the fundamental right, which is freedom of movement as a migrant worker or self-employed person. In this particular case Mr Carpenter had run a business in the United Kingdom, the country of his origin. However, according to arguments of the parties in case, his activity was extended to other Member States, thus fulfilling the conditions for free movement of services.

Theoretically, his spouse could enjoy the right to reside in the territory where he has been staying as a service provider. However, the place of residing and conducting an activity was the territory of the country of origin of a Union citizen. Therefore the family member is not the direct beneficiary of the right because it is granted in order to support the migrant citizen. In such circumstance, arises a question concerning the possibility to grant the right of residence to Mrs Carpenter, a third-country national whose main duties are housekeeping and taking care of children of an EU citizen? Another problem in this case is the right to family integrity. The expulsion decision of Mrs Carpenter violates strongly the basic right of a Union citizen. The Court recalled earlier arguments and emphasized that "*A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide ser-*

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[43] Judgment of the Court of Justice of 11 July 2002 in case C 60/00 *Carpenter*.

vices only if that measure is compatible with the fundamental rights whose observance the Court ensures"[44].

Consequently, the connection between the ability of providing services by a Union citizen in accordance with the principle of free movement of services and the protection of family integrity the Court of Justice stated that "*Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding a refusal by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country*"[45].

The next two judgments do not concern the spouse of a Union citizen, but refer to the specific situation, namely the residence rights of parents of a Union citizen who are nationals of a third country. These are the cases *Zhu and Chen*[46] and *Zambrano*[47]. Both cases constitute a new approach of the Court of Justice to the problem of derived residence rights of third-country nationals who are family members of a migrant worker. So far indicated decisions referred to the EU citizen's spouse mostly. The essential condition for granting residence rights was to enable performing one of the freedoms of the internal market and to meet the conditions for cross-border. On the other hand, these two judgments concerning mainly the rights of the child who is a Union citizen to stay together with the biological parents in the territory of the Union.

The first of these cases concerns a child of Chinese citizens, who acquired citizenship of the Union by the fact of being born in Ireland (Belfast). At the time of the birth the Republic of Ireland has applied the *ius soli* and granted citizenship to all born on the entire island of Ireland, if a baby has not acquired another nationality. After the birth, the family moved to the United Kingdom, where parents had applied to grant them a right of residence as the EU citizen's legal guardians. It must be noted that before the baby's birth parents resided in the UK and went to Northern Ireland im-

[44] C 60/00 *Carpenter*, p. 40.

[45] P. 46, C 60/00.

[46] Judgment of the Court of Justice of 19 October 2004 in case C 200/02 *Zhu and Chen.*

[47] C 34/09 *Zambrano*.

mediately before the birth of their daughter. The reason for departure was the acquisition of a Union citizenship by child. The essence of the discussed situation is the concept of citizenship and the rights of the EU citizen to free movement within the Union. According to the Court of Justice there is no doubt that the child of a citizen of the Union who has acquired the citizenship of a Member State in accordance with the national provisions enjoys the benefits of EU law, regardless of the possible circumvention of the law. None of the Member States, with the exception of a state granting citizenship[48], can restrict the effects and scope of the rights deriving from national citizenship, and thus the Union one[49]. In this judgment the Court of Justice has emphasized that *„in this situation the answer is connected with the circumstances like those of the main proceedings, Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State"*[50]*.* Thus, the right of residence of the parents of a minor citizen of the Union who are third-country nationals derives from a Union citizens right to the freedom of movement.

The second case *Zambrano* is substantially similar to the previously discussed because it also concerns the rights of parents of a minor citizen of the Union. In this case, however, it is a purely internal matter because the child has the nationality of the State of residence. It concerns the rights of the citizens of Colombia, whose child was born in Belgium and had been granted the citizenship of this country[51]. This time again the Court of Justice has focused on the meaning of Union citizenship. As the Court has stated several times *"citizenship of the Union is intended to*

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[48] Judgment of the Court of Justice of 20 February 2001 March 2006 in case C 192/99 *Manjit Kaur.*

[49] In particular: Judgment of the Court of Justice of 07 July 1992 February 2001 March 2006 in case C 369/90 *Micheletti i in*., point 10, Judgment of the Court of Justice of 02 October 2003 in case C 148/02 *Garcia Avello*, point 28.

[50] C 2000/02 *Zhu and Chen*, p. 41.

[51] Judgment of the Court of Justice of 08 March 2011 in case C 34/09 *Zambrano*.

be the fundamental status of nationals of the Member State"[52]. A refusal to grant a right of residence and a work permit to third-country nationals being legal guardians of a minor Union citizen deprive such children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen. Therefore the Court stated that *"Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen*"[53].

Special attention is to be paid on the concept of "*the essence of the right*", which has been stressed repeatedly by the Court of Justice in judgments discussed above. It is especially important in the context of the *Zambrano* case. Analysis of the facts indicates a purely internal nature. On the other hand, as outlined above, the creation of the rights within the scope of derivative rights of family members of Union citizens who are third-country nationals requires the cross-border condition to be met. Therefore the question concerning the departure from the application of this requirements has arisen.

As a consequence, the reference to the essence of the right of residence is needed. As pointed out by the Court of Justice in the judgments cited above, the right of residence is a derivative of the migrant worker rights and it aims to facilitate the assimilation of a worker with the host country. In other words, the host country is obliged to grant the right of residence to family members because in this way worker can fully enjoy the freedom and provide employment or services on the territory of the host country. In the Zambrano case a refusal to grant rights of residence to third-country nationals who are parents of minor children, could deprive the possibility of exercising the right of residence and result in an obligation to leave the territory of the Union. As emphasized by the Court of Justice that " *Article 21 TFEU*

[52] C 34/09 *Zambrano*, p. 41.
[53] C 34/09 *Zambrano*, p. 45.

is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States"[54]. It brings a conclusion that the cross-border requirement is not an absolute condition. Therefore the possibility of exercising the essence of the right is of major importance.

FINAL REMARKS

Analysis of judgments of the Court of Justice that has been made in this article sought to clarify the nature of the rights of residence of a family member of a Union citizen. The first and basic issue, which has been indicated, is the derivative nature of the rights of a family member of a Union citizen. Analysis of the Court arguments indicates that the most important issue in determining the rights of such persons is to define the status of citizen of the Union.

Firstly, it must be proved that a certain person has citizenship of the European Union and consequently is an entity of EU law. Secondly, the status of the entity is clarifying whether it is a migrant worker or self-employed person. Thirdly, the place where the employment is provided. Summing up the conditions laid down in the case-law it should be stressed that citizenship is granted by the Member States, which also has the exclusive right to determine: who, under what circumstances and to what extent receives citizenship. The acquisition of national citizenship is strictly connected with the automatic acquisition of a citizenship of the Union. One of the civil rights is the freedom of movement and residence within the territory of another Member State. Union citizens may move together with a certain group of entities, where the host country is obliged to grant the right of residence[55] or

[54] Judgment of the Court of Justice of 5 May 2011 in case C434/09 *Shirley McCarthy*, p. 56.
[55] Art. 3 paragraph 1 of Directive 2004/38.

is required to facilitate the obtaining of residence in its territory[56]. Persons belonging to the categories given above, obtain the right to stay in the territory of the host country. This right is dependent on the existence of specific family connections with the EU citizen. Its purpose is to allow a Union citizen to exercise one of civil rights. Thus, nationals of third countries enjoy certain benefits under the EU law only because it facilitates a Union citizen to exercise a fundamental right. The position of the Court of Justice in case *Yosahikazu Iida* is to be mentioned. The Court emphasized again that *"any rights granted to third-country nationals by the Treaty provisions on citizenship of the Union are not their own rights of these citizens, but derived rights arising from the exercise of freedom of movement of a Union citizen"*[57].

The second issue concerns the problem that state address in a request to grant the right of residence to a third-country national who is a member of the family of a migrant worker. Analysis of indicated judgments refers to two situations. Firstly, it is the host country on whose territory the Union citizen exercises civil rights. The second one, concerns the situation where a citizen has been exercising rights in another Member State and returns to the country of origin. The initial judgments of the Court introduced at this point the requirement of professional activity within its territory. However, in the *Eind* case, the Court recognized the right of a migrant worker, who returned to the country of origin and did not take employment on the grounds of health to obtain legal residence for his daughter who is a third-country national.

The third issue is the concept of the essence of a Union citizen. A full understanding of the nature of the rights of residence of a third-country national who is a family member of a Union citizen comes to clarify the essence of his/her rights. As indicated above, these rights have a derivative nature in relation to the rights of a Union citizen. The fundamental purpose of these rights is to allow (eg. *Zhu and Chen, Zambrano*) or facilitate (eg. *Carpenter*) exercise of the freedoms of the EU. Moreover, the essence of the

[56] Art. 3 paragraph 2 of Directive 2004/38. See also the judgment of the Court of Justice of 5 September 2012 in case C 83/11 *Muhammad Sazzadur Rahman.*

[57] Judgment of the Court of Justice of 8 November 2012 in case C 40/11 *Yosahikazu Iida*, p. 67.

right is to prevent discouragement of a Union citizen towards the exercise of the freedoms of the EU, in case where a citizen fears the possible consequences of movement within the Union for the status of his and his family members (eg. *Eind*).

The last important aspect, that repeatedly appears in the arguments of the Court of Justice is the protection of family integrity. It should be emphasized that the protection of fundamental rights is one of the objectives of the European Union. The rights and freedoms protected by the European Union law have been cataloged in the Charter of Fundamental Rights[58]. Moreover, the protection of these rights is the general principles of EU law[59]. The Court of Justice recognizes the protection as the higher value in relation to the freedoms of the internal market (*Eind, Carpenter, Akrich, Zhu and Chen*) [60].

[58] Charter of Fundamental Rights, OJ C 326 of 2012, p.1.

[59] For more see: T. Sieniow, *Ochrona praw i wolności jednostek w Unii Europejskiej*, [in:] A. Kuś (ed.), *Prawo instytucjonalne Unii Europejskiej*, Lublin 2012, p. 393 – 419, E. Krzysztofik, *Ewolucja wspólnotowego systemu ochrony praw człowieka*, Studia Prawnicze 2 (34) 2008, p. 32 – 52.

[60] See also E. Krzysztofik, *Poszanowanie wartości narodowych przesłanką uzasadniającą ograniczenie swobód rynku wewnętrznego*, [in:] C. Mik (ed.), *Unia Europejska: zjednoczeni w różnorodności*, Warsaw 2012.

ANNEX

AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND UKRAINE ON THE READMISSION OF PERSONS

DRAFT IMPLEMENTING PROTOCOL BETWEEN THE GOVERNMENT OF THE REPUBLIC OF POLAND AND THE CABINET OF MINISTERS OF UKRAINE

AGREEMENT

between the European Community and Ukraine on the readmission of persons

THE EUROPEAN COMMUNITY,

hereinafter referred to as 'the Community',

and

UKRAINE,

hereinafter referred to as 'the Contracting Parties,',

DETERMINED to strengthen their cooperation in order to combat illegal immigration more effectively,

CONCERNED at the significant increase in the activities of organised criminal groups in the smuggling of migrants,

DESIRING to establish, by means of this Agreement and on the basis of reciprocity, rapid and effective procedures for the identification and safe and orderly return of persons who do not, or who do no longer, fulfil the conditions for entry to and stay on the territories of Ukraine or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation,

CONSIDERING that, in appropriate cases, Ukraine and the Member States of the European Union should make best efforts to send third-country nationals and stateless persons who illegally entered their respective territories, back to the States of origin or permanent residence,

ACKNOWLEDGING the necessity of observing human rights and freedoms, and emphasising that this Agreement shall be without prejudice to the rights and obligations of the Community, the Member States of the European Union and Ukraine arising from the Universal Declaration of Human Rights of 10 December 1948 and from international law, in particular, from the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, the Convention of 28 July 1951 and the Protocol of 31 January 1967 on the Status of Refugees, the international Covenant on Civil and Political Rights of 19 December 1966 and international instruments on extradition,

TAKING INTO ACCOUNT that cooperation between Ukraine and the Community in the fields of readmission and facilitation of mutual travel is of common interest,

CONSIDERING that the provisions of this Agreement, which falls within the scope of Title IV of the Treaty establishing the European Community, do not apply to the Kingdom of Denmark, in accordance with the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community,

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

For the purpose of this Agreement:

(a) 'Contracting Parties' shall mean Ukraine and the Community;

(b) 'Member State' shall mean any Member State of the European Union, with the exception of the Kingdom of Denmark and the Republic of Ireland;

(c) 'national of a Member State' shall mean any person who holds the nationality, as defined for Community purposes, of a Member State;

(d) 'national of Ukraine' shall mean any person who holds the nationality of Ukraine;

(e) 'third-country national' shall mean any person who holds a nationality other than that of Ukraine or one of the Member States;

(f) 'stateless person' shall mean any person who does not hold a nationality;

(g) 'residence authorisation' shall mean a certificate of any type issued by Ukraine or one of the Member States entitling a person to reside in its territory. This shall not include temporary permissions to stay in its territory in connection with the processing of an asylum application, an application for refugee status or an application for a residence authorisation;

(h) 'visa' shall mean an authorisation issued or a decision taken by Ukraine or one of the Member States which is required with a view to entry in, or transit through, its territory. This shall not include airport transit visa;

(i) 'requesting State' shall mean the State (Ukraine or one of the Member States) submitting the readmission application pursuant to Article 5 or a transit application pursuant to Article 11 of this Agreement;

(j) 'requested State' shall mean the State (Ukraine or one of the Member States) to which a readmission application pursuant to Article 5 or a transit application pursuant to Article 11 of this Agreement is addressed;

(k) 'competent Authority' shall mean any national authority of Ukraine or one of the Member States entrusted with the implementation of this Agreement in accordance with Article 16 thereof;

(l) 'border region' shall mean an area which extends up to 30 kilometres from the common land border between a Member State and Ukraine, as well as the territories of seaports including custom zones, and international airports of the Member States and Ukraine.

SECTION I

READMISSION OBLIGATIONS

Article 2

Readmission of own nationals

1. The requested State shall, upon application by the requesting State and without further formalities other than those provided for by this Agreement, readmit to its territory all persons who do not, or who no longer, fulfil the conditions in force for entry to or stay on the territory of the requesting State provided that evidence is furnished, in accordance with Article 6 of this Agreement, that they are nationals of the requested State.

The same shall apply to persons who, after entering the territory of the requesting State, have renounced the nationality of the requested State without acquiring the nationality of the requesting State.

2. The requested State shall, as necessary and without delay, issue the person whose readmission has been accepted with the travel document with a period of validity of at least six months; this is irrespective of the will of the person to be readmitted. If, for legal or factual reasons, the person concerned cannot be transferred within the period of validity of the travel document that was initially issued, the requested State shall, within 14 calendar days, extend the validity of the travel document or, where necessary, issue a new travel document with the same period of validity. If the requested State has not, within 14 calendar days, issued the travel document, extended its validity or, where necessary, renewed it, the requested State shall be deemed to accept the expired document.

Article 3

Readmission of third-country nationals and stateless persons

1. The requested State, upon application by the requesting State and without further formalities other than those provided for by this Agreement, shall readmit to its territory third-country nationals or stateless persons which do not, or no longer, fulfill the conditions in force for entry to or stay on the territory of the requesting State provided that evidence is furnished, in accordance with Article 7 of this Agreement, that such persons:

(a) illegally entered the territory of the Member States coming directly from the territory of Ukraine or illegally entered the territory of Ukraine coming directly from the territory of the Member States;

(b) at the time of entry held a valid residence authorisation issued by the requested State; or

(c) at the time of entry held a valid visa issued by the requested State and entered the territory of the requesting State coming directly from the territory of the requested State.

2. The readmission obligation in paragraph 1 shall not apply if:

(a) the third country national or stateless person has only been in airside transit via an international airport of the requested State;

(b) the requesting State has issued to the third country national or stateless person a visa or residence authorisation before or after entering its territory unless:

(i) that person is in possession of a visa or residence authorisation, issued by the requested State, which has a longer period of validity; or

(ii) the visa or residence authorisation issued by the requesting State has been obtained by using forged or falsified documents;

(c) the third country national or stateless person does not need a visa for entering the territory of the requesting State.

3. As far as Member States are concerned, the readmission obligation in paragraph 1(b) and/or (c) is for the Member State that issued a visa or residence authorisation. If two or more Member States issued a visa or residence authorisation, the readmission obligation in paragraph 1(b) and/or (c) is for the Member State that issued the document with a longer period of validity or, if one or several of them have already expired, the document that is still valid. If all of the documents have already expired, the readmission obligation in paragraph 1(b) and/or (c) is for the Member State that issued the document with the most recent expiry date. If no such documents can be presented, the readmission obligation in paragraph 1 is for the Member State of last exit.

4. After the requested State has given a positive reply to the readmission application, the requesting State issues the person whose readmission has been accepted a travel document recognised by the requested State. If the requesting State is an EU Member State this travel document is the EU standard travel document for expulsion purposes in line with the form set out in EU Council Recommendation of 30 November 1994 (Annex 7). If the requesting State is Ukraine this travel document is the Ukrainian return certificate (Annex 8).

Article 4

Readmission in error

The requesting State shall take back any person readmitted by the requested State if it is established, within a period of 3 months after the transfer of the person concerned, that the requirements laid down in Articles 2 or 3 of this Agreement are not met.

In such cases the procedural provisions of this Agreement shall apply *mutatis mutandis* and the requested State shall also communicate all available information relating to the actual identity and nationality of the person to be taken back.

SECTION II

READMISSION PROCEDURE

Article 5

Readmission application

1. Subject to paragraph 2, any transfer of a person to be readmitted on the basis of one of the obligations contained in Articles 2 and 3 shall require the submission of a readmission application to the competent authority of the requested State.

2. If the person to be readmitted is in possession of a valid travel document or identity card and, in the case of third country nationals or stateless persons, a valid visa or residence authorisation of the requested State, the transfer of such person can take place without the requesting State having to submit a readmission application or written communication to the competent authority of the requested State.

3. Without prejudice to paragraph 2, if a person has been apprehended in the border region of the requesting State within 48 hours from illegally crossing of the State border of that person (including seaports and airports) directly from the territory of the requested State, the requesting State may submit a readmission application within two days following this persons apprehension (accelerated procedure).

4. The readmission application shall contain the following information:

(a) all available particulars of the person to be readmitted (e.g. given names, surnames, date and place of birth, sex and the last place of residence);

(b) means of evidence regarding nationality, the conditions for the readmission of third-country nationals and stateless persons.

5. Where necessary, the readmission application should also contain the following information:

(a) a statement indicating that the person to be transferred may need help or care, provided the person concerned has explicitly consented to the statement;

(b) any other protection or security measure which may be necessary in the individual transfer case.

6. A common form to be used for readmission applications is attached as Annex 5 to this Agreement.

Article 6

Means of evidence regarding nationality

1. Nationality of the requested State pursuant to Article 2(1) of this Agreement may be:

(a) proven by any of the documents listed in Annex 1 to this Agreement even if their period of validity has expired. If such documents are presented, the requested State shall recognise the nationality without further investigation being required. Proof of nationality cannot be furnished through forged or falsified documents;

(b) established on the basis of any of the documents listed in Annex 2 to this Agreement even if their period of validity has expired. If such documents are presented, the requested State shall deem the nationality to be established, unless it can prove otherwise on the basic of an investigation with participation of the competent authorities of the requesting State. Nationality cannot be established through forged or falsified documents.

2. If none of the documents listed in Annexes 1 or 2 can be presented, the competent diplomatic representation of the requested State shall interview the person to be readmitted within a maximum of 10 calendar days, in order to establish his or her nationality. This time limit begins with the date of receipt of the readmission application.

Article 7

Means of evidence regarding third-country nationals and stateless persons

1. The conditions for the readmission of third-country nationals and stateless persons pursuant to Article 3(1)(a) of this Agreement may be:

(a) proven by any of the documents listed in Annex 3a to this Agreement. If such documents are presented, the requested State shall recognise the illegal entrance on the territory of the requesting State (or Member States if the requested State is Ukraine) from its territory;

(b) established on the basis of any of the documents listed in Annex 3b to this Agreement. If such documents are presented, the requested State shall carry out an investigation and shall give an answer within a maximum of 20 calendar days. In the event of a positive answer, or if no answer is given when the time limit has expired, the requested State shall recognise the illegal entrance on the territory of the requesting State (or Member States if the requested State is Ukraine) from its territory.

2. The unlawfulness of the entry to the territory of the requesting State pursuant to Article 3(1)(a) of this Agreement shall be established by means of the travel documents of the person concerned in which the necessary visa or other residence authorisation for the territory of the requesting State are missing. A duly motivated statement by the requesting State that the person concerned has been found not having the necessary travel documents, visa or residence authorisation shall likewise provide *prima facie* evidence of the unlawful entry, presence or residence.

3. The conditions for the readmission of third-country nationals and stateless persons pursuant to Article 3(1)(b) and (c) of this Agreement may be:

(a) proven by any of the documents listed in Annex 4a to this Agreement. If such documents are presented, the requested State shall recognise the residence of such persons in its territory without further investigation being required;

(b) established on the basis of any of the documents listed in Annex 4b to the present Agreement. If such documents are presented, the requested State shall carry out an investigation and shall give an answer within a maximum of 20 calendar days. In the event of a positive answer, or if not proven otherwise, or if no answer is given when the time limit has expired, the requested State shall recognise the stay of such persons in its territory.

4. Proof of the conditions for readmission of third-country nationals and stateless persons cannot be furnished through forged or falsified documents.

Article 8

Time limits

1. The application for readmission must be submitted to the competent authority of the requested State within a maximum of one year after the requesting State's competent authority has gained knowledge that a third-country national or a stateless person does not, or does no longer, fulfil the conditions in force for entry, presence or residence.

Readmission obligation shall not arise in case if the readmission application regarding such persons is submitted after the expiry of the mentioned term. Where there are legal or factual obstacles to the application being submitted in time, the time limit shall, upon request, be extended up to 30 calendar days.

2. With the exception of the time limits mentioned in Articles 7(1)(b) and 7(3)(b), a readmission application shall be replied to by the requested State without undue delay, and in any event within 14 calendar days after the date of receipt of such application. Where there are legal or factual obstacles to the application being replied to in time, the time limit shall, upon duly motivated request, be extended, in all cases, up to a maximum of 30 calendar days.

3. In the case of a readmission application submitted under the accelerated procedure (Article 5(3)), a reply has to be given within two working days after the date of receipt of such application. If necessary, upon duly motivated request by the requested State and after approval by the requesting State, the time limit for a reply to the application may be extended by one working day.

4. If there was no reply within the time limits referred to in paragraphs 2 and 3 of this Article, the transfer shall be deemed to have been agreed to.

5. Reasons for refusal of a readmission request shall be given to the requesting State.

6. After agreement has been given or, where applicable after expiry of the time limits laid down in paragraph 2, the person concerned shall be transferred without delay in the terms agreed upon by the competent authorities in accordance with Article 9(1) of this Agreement. Upon request of the requesting State, this time limit may be extended by the time taken to deal with legal or practical obstacles to the transfer.

Article 9

Transfer modalities and modes of transportation

1. Before the transfer of a person, the competent authorities of the requesting State and the requested State shall make arrangements in writing in advance regarding the transfer date, the point of entry, possible escorts and other information relevant to the transfer.

2. All means of transportation, whether by air, land or sea shall be allowed. Transfer by air shall not be restricted to the use of the national carriers of the requesting State or the requested State and may take place by using scheduled flights as well as charter flights. In case of need for escorts, such escorts shall not be restricted to authorised persons of the requesting State, provided that they are authorised persons from Ukraine or any Member State.

SECTION III

TRANSIT OPERATIONS

Article 10

Principles

1. The Member States and Ukraine should restrict the transit of third-country nationals or stateless persons to cases where such persons cannot be returned to the State of destination directly.

2. The requested State shall allow the transit of third-country nationals or stateless persons, if the further transportation of such persons in possible other States of transit and the readmission by the State of destination is guaranteed.

3. Transit of third-country nationals or stateless persons shall be carried out under escorts, if so requested by the requested State. The procedural details for escorted transit operations shall be laid down in the implementing protocols in accordance with Article 16.

4. Transit can be refused by the requested State:

(a) if the third-country national or the stateless person runs the real risk of being subjected to torture or to inhuman or degrading treatment or punishment or the death penalty or of persecution because of his race, religion, nationality, membership of a particular social group or political conviction in the State of destination or another State of transit;

(b) if the third-country national or the stateless person shall be subject to criminal prosecution or sanctions in the requested State or in another State of transit; or

(c) on grounds of public health, domestic security, public order or other national interests of the requested State.

5. The requested State may revoke any authorisation issued if circumstances referred to in paragraph 4 of this Article subsequently arise or come to light which stand in the way of the transit operation, or if the onward journey in possible States of transit or the readmission by the State of destination is no longer guaranteed.

Article 11

Transit procedure

1. An application for transit operations must be submitted to the competent authority of the requested State in writing and is to contain the following information:

(a) type of transit (by air, land or sea), route of transit, other States of transit, if any, and the State of final destination;

(b) the particulars of the person concerned (given name, surname, maiden name, other names used/by which known or aliases, date of birth, sex and where possible – place of birth, nationality, language, type and number of travel document);

(c) envisaged point of entry, time of transfer and possible use of escorts;

(d) a declaration that in the view of the requesting State the conditions pursuant to Article 10(2) are met, and that no reasons for a refusal pursuant to Article 10(4) are known of.

A common form to be used for transit applications is attached as Annex 6 to this Agreement.

2. The requested State shall, within 10 calendar days after receiving the application and in writing, inform the requesting State of its consent to the transit operation, confirming the point of entry and the envisaged time of admission, or inform it of the transit refusal and of the reasons for such refusal.

3. If the transit operation takes place by air, the person to be readmitted and possible escorts shall be exempted from having to obtain an airport transit visa.

4. The competent authorities of the requested State shall, subject to mutual consultations, assist in the transit operations, in particular through the surveillance of the persons in question and the provision of suitable amenities for that purpose.

SECTION IV

COSTS

Article 12

Transport and transit costs

All transport costs incurred in connection with readmission and transit operations pursuant to this Agreement as far as the border of the State of final destination shall be borne by the requesting State, as well as the transport and maintenance costs of the requested State relating to the return of persons in accordance with Article 4 of this Agreement. This shall be without prejudice to the right of the competent authorities of the Member States and Ukraine to recover such costs from the person concerned or third parties.

SECTION V

DATA PROTECTION AND NON-AFFECTION CLAUSE

Article 13

Data protection

1. The communication of personal data shall only take place if such communication is necessary for the implementation of this Agreement by the competent authorities of Ukraine or a Member State as the case may be. When communicating, processing or treating personal data in a particular case, the competent authorities of Ukraine shall abide by the relevant legislation of Ukraine, and the competent authorities of a Member State shall abide by the provisions of Directive 95/46/EC and by the national legislation of that Member State adopted pursuant to this Directive.

2. Additionally the following principles shall apply:

(a) personal data must be processed fairly and lawfully;

(b) personal data must be collected for the specified, explicit and legitimate purpose of implementing this Agreement and not further processed by the communicating authority nor by the receiving authority in a way incompatible with that purpose;

(c) personal data must be adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed; in particular, personal data communicated may concern only the following:

(i) the particulars of the person to be transferred (given names, surnames, other names used/by which known or aliases, sex, civil status, date and place of birth, current and any previous nationality);

(ii) passport, identity card or driving license and other identification or travel documents (number, period of validity, date of issue, issuing authority, place of issue);

(iii) stop-overs and itineraries;

(iv) other information needed to identify the person to be transferred or to examine the readmission requirements pursuant to this Agreement;

(d) personal data must be accurate and, where necessary, kept up to date;

(e) personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purpose for which the data were collected or for which they are further processed;

(f) both the communicating authority and the receiving authority shall take every reasonable step to ensure as appropriate the rectification, erasure or blocking of personal data where the processing does not comply with the provisions of this Article, in particular because that data are not adequate, relevant, accurate, or they are excessive in relation to the purpose of processing. This includes the notification of any rectification, erasure or blocking to the other Contracting Party;

(g) upon request, the receiving authority shall inform the communicating authority of the use of the communicated data and of the results obtained there from;

(h) personal data may only be communicated to the competent authorities. Further communication to other bodies requires the prior consent of the communicating authority;

(i) the communicating and the receiving authorities are under an obligation to make a written record of the communication and receipt of personal data.

Article 14

Non-affection clause

1. This Agreement shall be without prejudice to the rights, obligations and responsibilities of the Community, the Member States and Ukraine arising from International Law and, in particular, from any applicable International Convention or agreement to which they are Parties, including those referred to in the Preamble.

2. Nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements.

SECTION VI

IMPLEMENTATION AND APPLICATION

Article 15

Joint Readmission committee

1. The Contracting Parties shall provide each other with mutual assistance in the application and interpretation of this Agreement. To this end, they shall set up a joint readmission committee (hereinafter referred to as 'the Committee'), which shall have the following tasks and competencies:

(a) to monitor the application of this Agreement and have regular exchanges of information on the implementing Protocols drawn up by individual Member States and Ukraine pursuant to Article 16;

(b) to prepare proposals and make recommendations for amendments to this Agreement;

(c) to decide on implementing arrangements necessary for the uniform application of this Agreement.

2. The decisions of the Committee shall be binding on the Contracting Parties.

3. The Committee shall be composed by representatives of the Community and Ukraine; the Community shall be represented by the Commission, assisted by experts from Member States.

4. The Committee shall meet where necessary at the request of one of the Contracting Parties.

5. The Committee shall establish its rules of procedures.

Article 16

Implementing Protocols

1. Ukraine and a Member State may draw up implementing Protocols which shall cover rules on:

(a) designation of the competent authorities;

(b) border crossing points for the transfer of persons;

(c) mechanism of communication between the competent authorities;

(d) modalities for returns under the accelerated procedure;

(e) conditions for escorted returns of persons, including the transit of third-country nationals and stateless persons under escort;

(f) additional means and documents necessary to implement this Agreement;

(g) modes and procedures for recovering costs in connection with implementation of Article 12 of this Agreement.

2. The implementing Protocols referred to in paragraph 1 shall enter into force only after the Committee, referred to in Article 15, has been notified.

3. Ukraine agrees to apply any provision relating to paragraph 1(d), (e), (f) or (g) of an implementing Protocol drawn up with one Member State also in its relations with any other Member State upon request of the latter.

Article 17

Relation to bilateral readmission agreements of Member States

1. Subject to paragraph 2 of this Article, the provisions of this Agreement shall take precedence over the provisions of any bilateral agreement or other legally binding instrument on the readmission of persons which have been or may, under Article 16, be concluded between individual Member States and Ukraine, in so far as the provisions of the latter are incompatible with those of this Agreement.

2. The provisions on readmission of stateless persons and nationals from third countries contained in bilateral agreements or other legally binding instruments which have been concluded between individual Member States and Ukraine shall continue to apply during the two-year period referred to in Article 20(3).

SECTION VII

FINAL PROVISIONS

Article 18

Territorial application

1. Subject to paragraph 2 of this Article, this Agreement shall apply to the territory in which the Treaty establishing the European Communities is applicable and to the territory of Ukraine.

2. This Agreement shall not apply to the territory of the Kingdom of Denmark.

Article 19

Amendments to the Agreement

This Agreement may be amended and supplemented by mutual consent of the Contracting Parties. Amendments and supplements shall be drawn up in the form of separate protocols, which shall form an integral part of this Agreement, and enter into force in accordance with the procedure laid down in Article 20 of this Agreement.

Article 20

Entry into force, duration and termination

1. This Agreement shall be ratified or approved by the Contracting Parties in accordance with their respective procedures.

2. Subject to paragraph 3 of this Article, this Agreement shall enter into force on the first day of the second month following the date on which the Parties notify each other that the procedures referred to in the first paragraph have been completed.

3. The obligations set out in Article 3 of this Agreement shall only become applicable two years after the date referred to in paragraph 2 of this Article. During that two-year period, they shall only be applicable to stateless persons and nationals from third-countries with which the Ukraine has concluded bilateral treaties or arrangements on readmission. As set out in Article 17(2), the provisions on the readmission of stateless persons and nationals from third countries contained in bilateral agreements or other legally binding instruments which have been concluded between individual Member States and Ukraine shall continue to apply during this two-year period.

4. This Agreement is concluded for an unlimited period.

5. Each Party may denounce this Agreement by officially notifying the other Party. This Agreement shall be terminated six months after the date of such notification.

Article 21

Annexes

Annexes 1 to 8 shall form an integral part of this Agreement.

Done at Luxembourg on the eighteenth day of June in the year two thousand and seven in duplicate in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Ukrainian languages, each of these texts being equally authentic.

ANNEX 1

COMMON LIST OF DOCUMENTS REGARDING NATIONALITY

(Article 6(1)(a))

— passports of any kind (national passports, diplomatic passports, service passports, collective passports and surrogate passports including children's passports),

— national identity cards (including temporary and provisional ones),

— military service books and military identity cards,

— seaman's registration books, skippers' service cards and seaman's passports,

— citizenship certificates and other official documents that mention or indicate citizenship.

ANNEX 2

COMMON LIST OF DOCUMENTS REGARDING NATIONALITY

(Article 6(1)(b))

— photocopies of any of the documents listed in Annex 1 to this Agreement,

— driving licenses or photocopies thereof,

— birth certificates or photocopies thereof,

— company identity cards or photocopies thereof,

— statements by witnesses,

— statements made by the person concerned and language spoken by him or her, including the results of any official test conducted to establish the person's nationality. For the purpose of this Annex, the term 'official test' is defined as a test commissioned or conducted by the authorities of the requesting State and validated by the requested State

— any other document which may help to establish the nationality of the person concerned.

ANNEX 3

COMMON LIST OF DOCUMENTS REGARDING THIRD COUNTRY NATIONALS AND STATELESS PERSONS

(Article 7(1))

ANNEX 3A

— official statements made for the purpose of the accelerated procedure, in particular, by authorised border authority staff who can testify to the person concerned crossing the border from the requested State directly to the territory of the requesting State,

— named tickets of air, train, coach or boat passages, which testify to the presence and the itinerary of the person concerned from the territory of the requested State directly to the territory of the requesting State (or Member States if the requested State is Ukraine),

— passenger lists of air, train, coach or boat passages which testify to the presence and the itinerary of the person concerned from the territory of the requested State directly to the territory of the requesting State (or Member States if the requested State is Ukraine).

ANNEX 3B

— official statements made, in particular, by border authority staff of the Requesting State and other witnesses who can testify to the person concerned crossing the border,

— documents, certificates and bills of any kind (e.g. hotel bills, appointment cards for doctors/dentists, entry cards for public/private institutions, car rental agreements, credit card receipts, etc.) which clearly show that the person concerned stayed on the territory of the Requested State,

— information showing that the person concerned has used the services of a courier or travel agency,

— official statement by the person concerned in judicial or administrative proceedings.

ANNEX 4

COMMON LIST OF DOCUMENTS REGARDING THIRD-COUNTRY NATIONALS AND STATELESS PERSONS

(Article 7(2))

ANNEX 4A

— valid visa and/or residence authorisation issued by the Requested State,

— entry/departure stamps or similar endorsement in the travel document of the person concerned or other evidence of entry/departure.

ANNEX 4B

Photocopies of any of the documents listed in Part A.

DRAFT IMPLEMENTING PROTOCOL

between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine to the Agreement between the European Community and Ukraine on the readmission of the persons, done at Luxembourg on 18th June 2007

The Government of the Republic of Poland and the Cabinet of Ministers of Ukraine, hereinafter referred to as "the Parties",

desiring to define the principles of the implementation of the Agreement between the European Community and Ukraine on the readmission of the persons done at Luxembourg on 18th June 2007, hereinafter referred to as "the Agreement",

following the national legislation of the States of the Parties,

in accordance with the Article 16 (1) of the Agreement,

have agreed as follows:

Article 1
Competent Authorities

1. The competent authorities of the Parties entrusted with the implementation of the Agreement and authorized to direct cooperation are:

   for the Republic of Poland:

   - Commander-in-Chief of the Border Guard.

   for Ukraine:

   - State Migration Service of Ukraine – central competent authority;
   - Administration of the State Border Guard Service of Ukraine.

2. Competent authorities responsible for submission and processing of the readmission application of own nationals in accordance with Article 2 of the Agreement, and third country nationals and stateless persons in accordance with Article 3 of the Agreement are:

   for the Republic of Poland:

   - Commander-in-Chief of the Border Guard.

   for Ukraine:

   - State Migration Service of Ukraine.

3. Competent authorities responsible for submission and processing of the transit applications in accordance with Article 11 of the Agreement are:

   for the Republic of Poland:

   - Commander-in-Chief of the Border Guard.

   for Ukraine:

   - Administration of the State Border Guard Service of Ukraine (regarding transit by air);

- State Migration Service of Ukraine (regarding transit by land).

4. Competent authorities responsible for submission and processing of the readmission applications under the accelerated procedure in accordance with Article 5 (3) of the Agreement are:

   for the Republic of Poland:
   - Commander of the Border Guard Post Warszawa – Okecie;
   - Commander of the Border Guard Post Krakow – Balice;
   - Commander of the Border Guard Post Katowice – Pyrzowice;
   - Commander of the Border Guard Post in Dorohusk;
   - Commander of the Border Guard Post in Hrebenne;
   - Commander of the Border Guard Post in Hrubieszow;
   - Commander of the Border Guard Post in Korczowa;
   - Commander of the Border Guard Post in Medyka;
   - Commander of the Border Guard Post in Kroscienko;
   - Commander of the Border Guard Post in Lubaczow;

   Commander of the Border Guard Post in Dolhobyczow.

   for Ukraine:
   - Lutsk Border Guard Detachment;
   - Lviv Border Guard Detachment;
   - Mostyska Border Guard Detachment;
   - Chop Border Guard Detachment;
   - Separate Border Crossing Point 'Kyiv'.
5. The competent authorities referred to in paragraph 1 of this Article shall exchange in writing of their contact data and contact data of competent authorities mentioned in paragraphs 2, 3 and 4 of this Article within 14 calendar days following the day on which this Implementing Protocol enters into force.
6. The Parties notify each other through diplomatic channels of any changes in the list and scope of responsibilities of the competent authorities referred to in this Article.
7. The competent authorities referred to in paragraph 1 of this Article shall immediately notify each other in writing of any changes regarding the contact data received in accordance with paragraph 5 of this Article.

Article 2
Border Crossing Points

1. The Parties shall use all functioning air border crossing points within territories of their States for readmission and transit by air.
2. For readmission and transit purposes the Parties shall also use the following border crossing points:

Dorohusk (the Republic of Poland) – Yahodyn (Ukraine);
Zosin (the Republic of Poland) – Ustyluh (Ukraine);
Hrebenne (the Republic of Poland) – Rava Ruska (Ukraine);
Korczowa (the Republic of Poland) – Krakovets (Ukraine);
Kroscienko (the Republic of Poland) – Smilnytsia (Ukraine);
Medyka (the Republic of Poland) – Shehyni (Ukraine);
Budomierz (the Republic of Poland) – Hrushev (Ukraine);
Dolhobyczow (the Republic of Poland) – Uhryniv (Ukraine).

3. The Parties shall immediately notify each other through diplomatic channels of any changes in the list of border crossing points referred to in this Article. The use of other, not mentioned in this Article, border crossing points for readmission shall be agreed upon by the Parties through diplomatic channels on case to case basis.

Article 3
Additional means and documents

1. The following additional means and documents shall be considered as those that may confirm the grounds for readmission of persons:
   1) photographic and audiovisual materials attached to documents confirming entry and/or stay of the persons on the territory of the State of one of the Parties;
   2) copy of marriage certificate;
   3) positive results of fingerprint comparison with the fingerprints stored in the available data bases.
2. If competent authority of the requesting Party considers that some means and documents not listed in this Article and Annexes 1, 2, 3 and 4 to the Agreement may be essential for establishing the grounds for readmission of persons, such means and documents can be attached to the readmission application submitted to the competent authority of the requested Party.

Article 4
Mode of submission of readmission application and reply thereto

1. Readmission application referred to in Article 5 of the Agreement shall be submitted by the competent authority of the requesting Party to the competent authority of the requested Party by post, e-mail or by fax.
2. In case of any doubts concerning submitted readmission application, the competent authorities of the Parties can organize a meeting in order to verify provided information and to make final decisions. The term of conducting such meeting shall not affect the time limits referred to in Article 8 (2) of the Agreement.
3. Reply to the readmission application shall be sent by the competent authority of the requested Party to the competent authority of the requesting Party by post, e-

mail or fax. The reply to readmission application shall be also sent by other technical means of communication if such request is included to section 'D' of the readmission application referred to in Annex 5 to the Agreement.

Article 5
Readmission under accelerated procedure

1. Readmission under accelerated procedure referred to in Article 5 (3) and Article 8 (3) of the Agreement, shall be carried out as follows:
   1) a readmission application shall be submitted to a competent authority of the requested Party by e-mail or by fax;
   2) the competent authority of the requesting Party shall additionally inform the competent authority of the requested Party by phone of any conditions referred to in Article 5 (3) of the Agreement;
   3) the competent authority of the requested Party shall reply to the readmission application to the competent authority of the requesting Party by e-mail or fax within time limits referred to in Article 8 (3) of the Agreement and additionally informs by phone about taken decisions;
   4) in case of consent to the readmission, the competent authority of the requested Party may specify the date and place of transfer of a person in the reply to the readmission application;
   5) readmission of a person shall take place within 24 hours following the moment of the receipt of the consent for readmission and in accordance with Article 8 (6) and Article 9 of the Agreement.
2. In case of any doubts concerning the submitted readmission application, the competent authorities of the Parties shall organize a meeting in order to verify provided information and to make final decisions. The term of conducting such meeting shall not affect the time limits referred to in Article 8 (3) of the Agreement.

Article 6
Confirmation of transfer of a person

1. The date, hour and place of a person's transfer shall be agreed upon by e-mail or fax.
2. Transfer of a person under escort shall be documented with protocol of transfer/acceptance. A specimen of such protocol is an Annex to this Implementing Protocol and shall be its integral part.

Article 7
Mode of submission of transit application and reply thereto

Submission of a transit application referred to in Article 11 of the Agreement by the competent authority of the requesting Party and giving reply thereto by the competent authority of the requested Party shall take place by post, e-mail or fax.

Article 8
Special cases

1. In case of retaining of travel document of a citizen of the State of other Party according to national legislation of the State of the Party retaining the travel document:
   1) during the stay or leaving the territory of the State of the Party retaining the travel document of a citizen not possessing other documents entitling to cross the border of the State of the Party of his/her citizenship, a diplomatic mission (consular representation) issues travel document, upon request of the competent authority of the Party retaining the travel document;
   2) in the moment of entering into the territory of the State of the Party retaining travel document, the person is allowed to return to the State of his/her citizenship without the above-mentioned document, in accordance with national legislation of this State, in particular in case of possessing other national identity document or submitting travel document retained by competent authority of the State of the Party retaining travel document.
2. In case of transfer of a person, in accordance with Article 5 (2) of the Agreement, the competent authorities of the Parties, referred to in Article 1 (4) of this Implementing Protocol, shall inform each other about the date and place of transfer of such person.

Article 9
Escort

Transfer and transit of persons under escort shall take place in accordance with the following conditions:

1) the competent authority of the requesting Party shall specify in Section 'D' of the readmission application referred to in Annex 5 to the Agreement or in Section 'C' of the transfer application referred to in Annex 6 to the Agreement the following data: names, surnames of escorting officers, as well as the series, numbers, dates of issuance and validity of their travel documents;
2) the competent authority of the requesting Party shall notify immediately the competent authority of the requested Party of any data changes concerning the authorized escorting officers referred to in section 1 of this Article;
3) the escorting officers shall fulfill their duties unarmed and in civil clothes, being then in possession of valid travel documents and official documents confirming the approval of the requested Party for readmission or transit of the escorted person;
4) the escorting officers shall bear responsibility for the escorted persons and for their transfer to the state of destination;

5) the escorting officers shall be responsible to properly protect the documents on the basis of which the escorted person is transferred, and to provide these documents to the authorities of the state to which the escorted person is transferred;
6) the escorting officers are obliged to obey the national legislation of the State of requested Party. Without prejudice to section 8 of this Article, the rights of escorting officers during transfer or transit shall be limited to the right of necessary defense;
7) the competent authorities of the requested Party shall ensure the escorting officers the same level of security and support which is given to the officers of the requested Party performing such duties under the national legislation of the State of the requested Party;
8) in case of absence of the authorized representatives of the requested Party, entitled to provide support or assistance, the authorized escorting officers shall have the right, under existing circumstances, to use, according to the national legislation of the State of the requested Party, direct coercive measures in case of a risk of escape, a risk of self-inflicted injury, a risk of inflicting bodily harm on the escorting officers or third persons, a risk of destruction or damage of property by the person to be readmitted or transferred;
9) if required, the escorting officers should hold necessary visas to the state of destination and transit states.

Article 10
Interview

1. If it is not possible to establish the citizenship of a person to be readmitted and there is no possibility to present any document referred to in Annex 1 and 2 to the Agreement, as well as additional means and documents referred to in Article 3 (1) of this Implementing Protocol, the competent authority of the requesting Party, in Section 'D' of the readmission application referred to in Annex 5 to the Agreement, shall inform the competent authority of the requested Party about the necessity to conduct an interview with the person to be readmitted in accordance with Article 6 (2) of the Agreement. The competent authority of the requesting Party shall send a copy of the readmission application to a diplomatic mission (consular representation) of the State of the requested Party.
2. An interview conducted by an authorized representative of the diplomatic mission (consular representation) of the State of the requested Party shall be held in a place agreed upon on case to case basis.
3. Representative referred to in paragraph 2 of this Article, while organizing an interview with the person to be readmitted, shall provide an opportunity for authorized representatives of the competent authority of the requesting Party to attend the interview.
4. Representative referred to in paragraph 2 of this Article, in the shortest possible

term, but not later than within 2 calendar days following the date of conducted interview, shall, according to Article 6 (2) of the Agreement, inform in writing the competent authorities of the requesting Party and requested Party about the results of the interview and pointing out the reasons why the citizenship could not be established.

Article 11
Costs

1. If necessary, the readmission, transit and readmission in error costs incurred by requested Party in accordance with Article 12 of the Agreement shall be borne by requesting Party and reimbursed in euro on the basis of the proper accounting documents reflecting in details the incurred costs and done in accordance with national legislation of the State of the requested Party within the 30 calendar days following the day of their receipt.
2. The competent authority of the requested Party submitting the proper accounting documents referred to in this Article, shall provide information about the bank account number and any other information necessary for reimbursement.

Article 12
Language of Communication

Unless the competent authorities of the Parties agree upon otherwise, the direct communication in writing and consultations between the competent authorities of the Parties shall be conducted in the Polish and Ukrainian language.

Article 13
Experts' Meetings and Consultations

The competent authorities of the Parties by mutual agreement, shall carry out working meetings and experts' consultations regarding implementation of the Agreement and this Implementing Protocol.

Article 14
Amendments and Supplements

This Implementing Protocol may be amended and supplemented by mutual consent of the Parties. Amendments and supplements shall be the integral part of this Implementing Protocol and enter into force in accordance with Article 15 (2) and (3) of this Implementing Protocol.

Article 15
Entry into Force and Termination

1. This Implementing Protocol is concluded for an unlimited period and shall be terminated upon termination of the Agreement.

2. The Parties shall notify each other in writing through diplomatic channels about the completion of all internal legal procedures necessary for the entry into force of this Implementing Protocol.
3. The Polish Party shall notify the European Commission about the completion by the Parties of the internal legal procedures and shall inform the Ukrainian Party thereof. This Implementing Protocol shall enter into force 30 days after receiving by Ukrainian side of Polish notification informing that Joint Readmission Committee has been notified in accordance with Article 16 (2) of the Agreement.
4. This Implementing Protocol may be terminated by any of the Parties by sending notification through diplomatic channels. In such case it shall cease to be in force 180 days following the date of the receipt of such notification.

Done at________on ________ in duplicate, each in the Polish, Ukrainian and English language, each of these texts being equally authentic. In case of divergences in interpretation, the English text shall prevail.

For the Government of the Republic of Poland	**For the Cabinet of Ministers of Ukraine**

ABOUT THE AUTHORS

Dr. Stanisław Dubaj is a Vice Dean of the Faculty of Social Sciences at the School of International Relations and Social Communication in Chełm. Until 2008, he served as a lieutenant colonel in Nadbużański Border Guard Division in Chełm.

Justyna Gileta, M.A. is an assistant in the Department of European Union Law at the John Paul II Catholic University of Lublin.

Dr. Anna Kosinska is an associate professor in the Department of European Union Law at the John Paul II Catholic University of Lublin, where she created the Research Center for European Migration Law and Policy.

Dr. Edyta Krzysztofik is an associate professor in the Department of European Union Law at the John Paul II Catholic University of Lublin.

Prof. dr. Artur Kuś is Head of the Department of European Union Law and Director of the Institute of European Studies at the John Paul II Catholic University of Lublin.

Dr. Volodymyr Motyl is a graduate of the National University of Ivan Franko Lviv, the Diplomatic Academy of Vienna and the University of Bayreuth. He works at the Ivan Franko National University of Lviv (Faculty of International Relations).

Agnieszka Parol, M.A. is an assistant in the Department of European Union Law at the John Paul II Catholic University of Lublin.

Dr. Anna Szachoń-Pszenny is an associate professor in the Department of European Union Law at the John Paul II Catholic University of Lublin.

Major SG Violetta Żakowiecka-Górnik is a Deputy Head of the Department for Foreigners in Nadbużański Border Guard Division in Chełm.

Dr. Tomasz Sieniow is a graduate of Chicago-Kent College of Law and the John Paul II Catholic University of Lublin, where he works at the Institute of European Studies. He is president of the Rule of Law Institute.

The monograph has been published in the framework of the Project „Return migration: theory and practice", implemented by the scholars from the Department of European Union Law (Institute of European Studies at the John Paul II Catholic University of Lublin). They have launched the research lab named Research Centre of European Migration Law and Policy, that groups interdisciplinary team of academics focusing on migration research. The project has been co-financed by the European Return Fund.

The Series "Migration Law and Policy Studies" is published by the Rule of Law Institute Foundation together with the John Paul II Catholic University of Lublin (Institute of European Studies – Research Centre of European Migration Law and Policy).

Project is co-financed by the European Return Fund

ISBN 978-83-6144-95-3