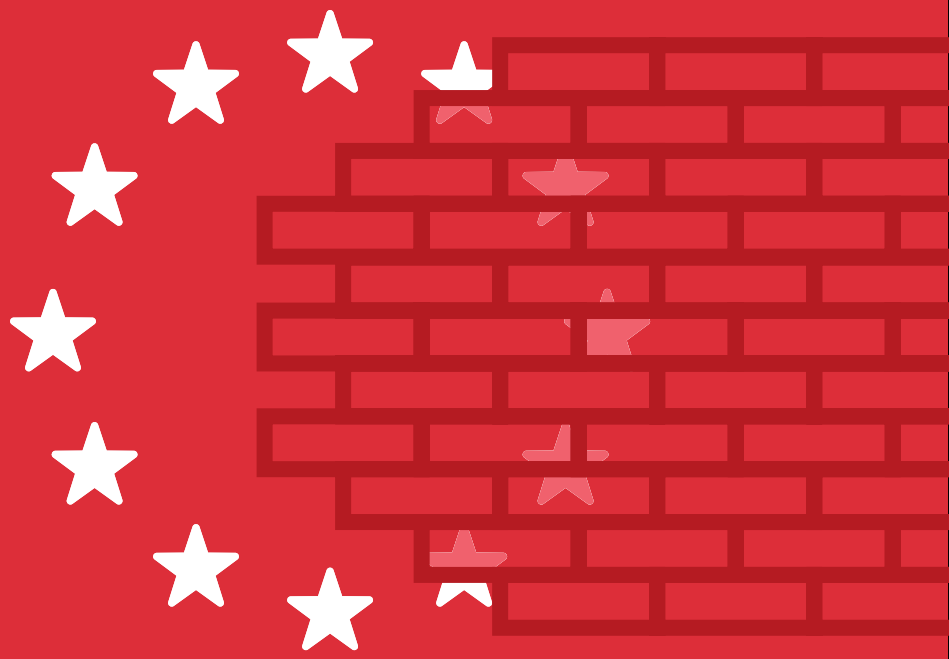
Polish Economic Institute



# Economic Protectionism in the European Union

MARCH 2019

WARSAW

ISBN 978-83-66306-04-2

Warsaw, March 2019
Author: Piotr Semeniuk
Editing: Annabelle Chapman
Cooperation: Krzysztof Kutwa
Graphic design: Anna Olczak
Text and graphic composition: Sławomir Jarząbek
Polish Economic Institute
Al. Jerozolimskie 87
02-001 Warsaw, Poland


ISBN 978-83-66306-04-2

# Contents

# Key findings

Although the European Union' aim is to build an internal market, member states continue to use protectionist measures. Combating certain aspects of protectionism, the European Commission appears to treat some member states or groups of them unequally.

**3.1 tn euros**
trade in goods between member states in 2016

**75%**
trade in goods as a percentage of trade within the EU

**21%**
percentage of EU GDP generated by trade in goods

**183 bn euros**
how much the EU economy would gain if barriers to trade in goods were removed

EU actions fostering protectionism can be directed "outwards", using tariffs barriers against the EU's trade partners, but also "inwards", which damages the internal market.

Tariff barriers – customs duties, import bans, restrictions and import quotas – are traditional protectionist tools. More sophisticated ones include non-tariff barriers, such as excessive regulation, tax breaks or direct money transfers.

Since the EU's big eastern enlargement of 2004, "old" member states have granted around nine times more public aid (EUR 65 per year on average) than "new" ones (EUR 7 billion) (figures from 2005 onwards).

The European Commission's DG Competition questions aid granted by "old" member states much less often than that provided by "new" ones. Big countries – Germany and France – are particularly privileged. For unclear reasons, the Commission only orders "new" members to suspend public aid.

The Commission is currently conducting the most proceedings concerning infringement of EU law against "old" members like Spain, Germany or Italy. The most proceedings for "systemic" infringements are being conducted against Germany.

The Commission also uses "delaying" measures towards "old" members (especially Germany) more often. It treats Germany with the most "delay". Over the past decade, the average time between the Commission

**10%**
the increase in the number of trade barriers reported by European exporters in 2016

**372**
the number of trade barriers reported by European exporters in 2016

**Spain, Germany and Italy**
– the countries with the most EU infringement proceedings concerning the internal market

**65 bn euros**
the average annual amount of public aid granted in "old" member states

**7 bn euros**
the average amount of public aid granted in "new" member states

launching proceedings against Germany and their next stage or termination was almost 50 days longer than for the next country, Spain.

"New" members appear to win against the Commission at the EU Court of Justice more often, but are much less "keen" to complain against the Commission's decisions there.

In cases concerning the abuse of a company's dominant position (Article 102 of the TFEU), the Commission seems to be slightly more lenient towards "old" members, both in terms of its tendency to settle cases in an "amicable" way and the size of the fines imposed.

The Commission is more also more likely to fine "new" member states. Taking into account the size of "old" and "new" member states' economies, the size and number of fines on companies from "new" countries seems disproportionately higher than for companies from "old" members.

Examples of possible protectionism within the EU include the Polish tax on retail sales, the amendment to the directive on posted workers, EU regulations on biocides and the Danish RUT system.

# Introduction

The OECD and ECB call rising protectionism the biggest threat to the global economy (European Central Bank, 2018; OECD, 2018).

Trade tensions escalated in 2017, with 467 new protectionist measure introduced around the world (Euler Hermes, 2018). The United States was responsible for one-fifth of them (90) and was the only country to introduce more that year than in 2016 (84).

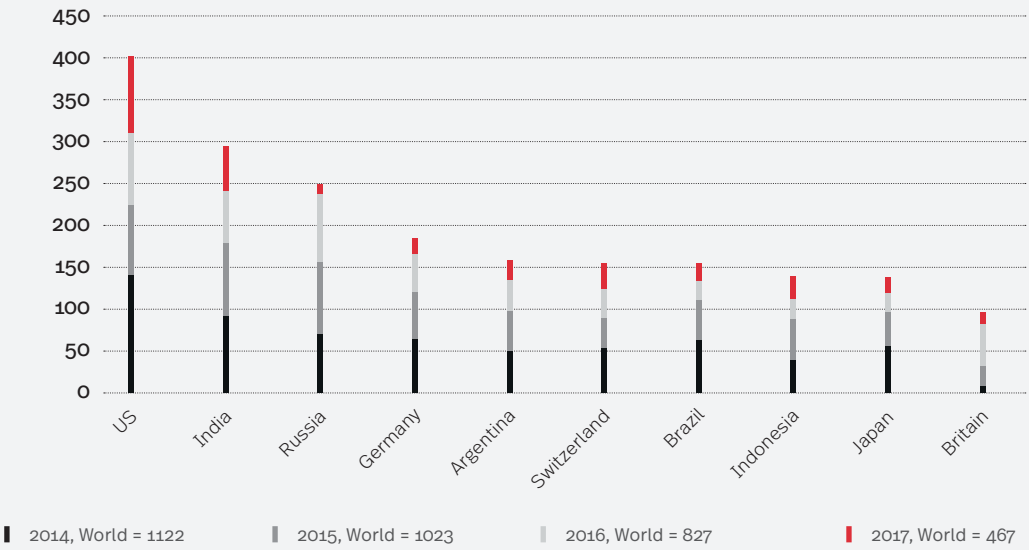
The top ten protectionist countries worldwide include three European countries and two in the EU-28: Germany (fourth place), Switzerland (sixth) and Britain (tenth). In Germany and Switzerland, the main protectionist tool is using funding policy to protect developed branches of industry, such as the production of machines and devices. Britain increases its attractiveness by funding trade and supporting the purchase of local natural resources.

The European Commission also highlights the increase in protectionism globally. In 2016, EU exporters reported a 10-per-cent increase in trade barriers, to 372 at the end of December 2016 (European Commission, 2017b). Businesses lost an estimated EUR 27 bn. In 2017, 67 new barriers to trade with 57 non-EU countries were registered; above all with China (10), Russia (6) and South Africa (4). This could cost EU exporters EUR 23.1 billion. Meanwhile, the number of active barriers to trade and investment in the EU amounted to 396 at the end of 2016, primarily relating to Russia (36), China (25), India (21) and the US (20) (European Commission, 2018f).

The EU is trying to react to barriers to market access reported by exporters. In 2017, it lifted 45 barriers, one-sixth of which concerned agriculture or fishing. Most of these related to trade with China (7), Brazil, Canada and Turkey (3 each). Removing these trade barriers could affect trade worth an estimated EUR 8.2 bn, almost twice as much as in 2016 (EUR 4.4 bn).

The Commission has succeeded in removing trade and investment barriers resulting from protectionist

↘ CHART 1. Top ten countries with the most new protectionist measures introduced




○ Source: Euler Hermes (2018).

measures introduced by non-EU countries. Yet with the escalation of trade tensions in Europe, the internal barriers used by member states need to be analysed, too.

Despite the EU's internal market, member states' national regulations are increasingly protectionist. The Commission should counteract member stations' protectionism, especially if it gets in the way of building the internal market. Still, EU countries continue to use protectionist measures and the Commission is not always able to stop them. It may even favour certain forms of protectionism, or at least not oppose them as strongly, when it comes to particular member states.

This report provides an overview of economic protectionism within the EU, focusing on the European Commission's actions. It examines whether the Commission is more "lenient" when it comes to protectionist measures used by particular countries or groups of them, taking into account the division between so-called "old" and "new" member states, the latter being those that have joined the EU since 2004[1].

Unlike statistics from various registers and databases, the examples of EU bodies appearing to favour protectionism presented in this report are not representative. They were chosen to illustrate the ways in which EU bodies can potentially foster protectionism. They concern "Polish" matters, so they do not necessarily mean that the EU fostered protectionism in a given case.

[1] Cyprus, the Czech Republic, Estonia, Lithuania, Latvia, Malta, Poland, Slovakia and Slovenia joined the EU in 2004, Romania and Bulgaria in 2007, and Croatia in 2013.

# Economic protectionism in the EU – a theoretical perspective

## Types of protectionist measures

Protectionism is a policy of "protecting national industry against foreign competition" using tariffs, subsidies, quotas or other tools (Encyclopaedia Britannica, 2018). Traditional protectionist tools used by states or economic groups of states include tariffs and custom duties, along with import bans or quotas (WTO, 2015, p. 11), which are often called tariff barriers. Protectionism can also be a response to dishonest practices by trade partners, whether countries (compensatory measures, protective duties) or companies (anti-dumping measures).

Non-tariff barriers are more sophisticated. They include import licences, rules on establishing customs value and various regulations, such as excessive red tape that ostensibly regulates economic life, but really aims to protect domestic companies. Examples include regulations on checks on foreign entrepreneurs, who are subject to stricter standards than domestic ones, or norms on where products come from – so-called rules of origin (WTO, 2015, p. 49–51). These rules can also facilitate imports; for example, within a free trade area.

Red tape is more difficult to identify. It is less easy to state objectively whether it reflects the need to regulate an area of economic life or is merely a protectionist tool. For instance, not all countries approach food safety in the same way (PAP, 2014).

Protectionist measures also include subsidies, transfers of public funds to companies to help them compete with (usually foreign) competitors (WTO, 2015, pp. 44–46).

All these protectionist tools aim to restrict market access for competitors. Protecting a national market may not be limited to public measures, such as tariffs, subsidies and red tape; companies themselves fight for their share of the market. This latter type of barrier should be counteracted by anti-trust regulations, which prevent abuse of a company's dominant position and anticompetitive agreements by companies with market power. If a state or jurisdiction does not enforce its anti-trust regulations or does so selectively, this can also be considered use of protectionist tools. For a typology of protectionist measures, see Table 1.

↘ TABLE 1. Types of protectionist measures

| TYPE | EXAMPLES |
|---|---|
| tariff barriers | tariffs, import bans, quantitative restrictions (import quotas) |
| conditional protectionism | anti-subsidy and anti-dumping measures, protective duties |
| other non-tariff restrictions (red tape) | standards on products' origin, rules on checks on entrepreneurs, labour regulationse |
| subsidies | direct money transfers, tax breaks |
| not counteracting private barriers | anti-trust authorities do not react to exclusionary "price predation", rebates, aggressive patent policy, etc. |

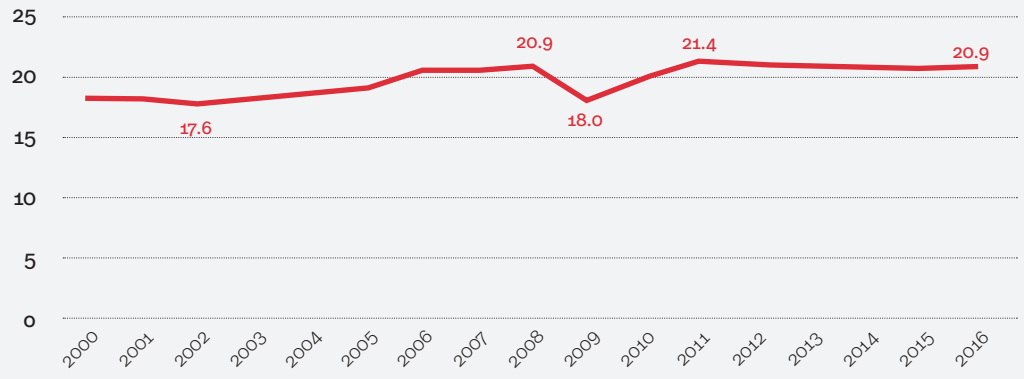
o Prepared by the author.

## Protectionism vs. the internal market

Although the EU treaties do not mention protectionism outright, reducing – or even eliminating – it is one of the basic aims of the internal market. Article 26 of the Treaty on the Functioning of the EU (TFEU) states: "The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market", comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital".

Based on the idea of the internal market, the EU and its bodies are supposed to counter protectionist measures used by member states. Member states no longer use tariff barriers (Chalmers, Davies, Monti, 2014, p. 673), as customs policy is among the EU's exclusive competencies and tariffs between member states are forbidden, as set out in Articles 30 and 31 of the TFEU. Still, non-tariff restrictions remain relatively common.

↘ CHART 2. Intra-EU exports of goods as a share of GDP




○ Source: Prepared by the author based on Eurostat data.

Trade in goods accounts for 75% of intra-EU trade, or over one-fifth of the EU's GDP. In 2016, the value of trade in goods between member states amounted to EUR 3.1 tn. Removing obstacles to trade could contribute EUR 183 bn to the EU economy (European Parliament, 2018).

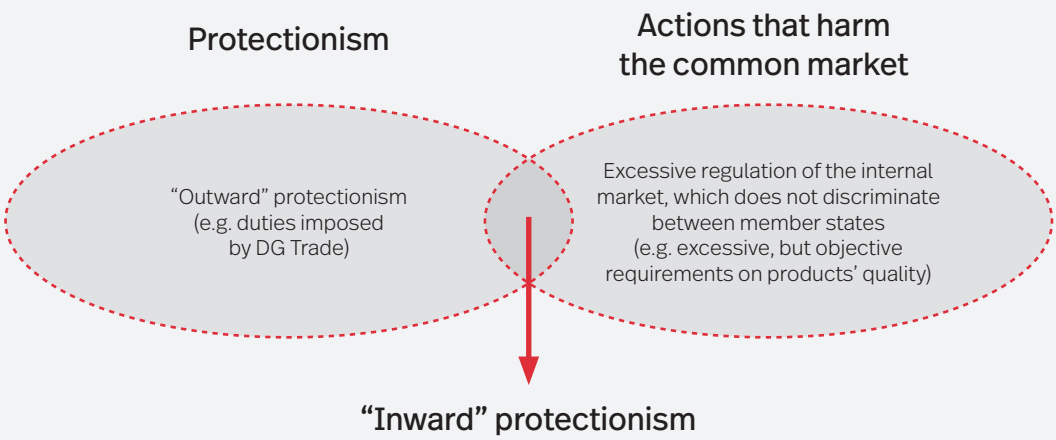
To reduce barriers (usually non-tariff ones) on the internal market, the Commission can launch a procedure against a country that violates the rules of the internal market. The procedure can result in a case against the country at the Court of Justice of the European Union (CJEU). EU bodies can also take legislative action: firstly, to lift barriers on the internal market, and secondly, to harmonise the standards used by different EU countries (for instance, on product ingredients or consumer protection) (Chalmers, Davies, Monti, 2014, p. 671). In theory, the latter is only possible when "the approximation of the provisions laid down by law, regulation or administrative action in member states (...) have as their object the establishment and functioning of the internal market" (Article 114 of the TFEU). In practice, though, this premise is understood extremely broadly (Chalmers, Davies, Monti, 2014, p. 677).

EU bodies are also supposed to counter subsidies that EU law considers public or state aid. Based on Article 107 of the TFEU, "any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between member states, [is] incompatible with the internal market". Finally, to build the internal market, the European Commission's DG for Competition enforces the EU's own anti-trust law regime for businesses if their practices may "affect trade between member states" (see Articles 101 and 102 of the TFEU).

## How the European Commission favours protectionism

The EU is meant to counter protectionist measures introduced by member states in the name of the internal market. Yet often, EU bodies are accused of not being free of protectionist tendencies themselves. While they are supposed to act to the internal market's benefit, this is not always simple; the EU is made up of many states with

↘ DIAGRAM 1. Protectionist behaviour and behaviour that harms the internal market




○ Source: Prepared by the author.

↘ TABLE 2. Forms of potential behaviour by the European Commission fostering protectionism

| TYPE OF BEHAVIOUR | ACTION OR PREVENTION | LEGISLATIVE OR NON-LEGISLATIVE |
|---|---|---|
| Failure to respond to protectionist measures by EU countries that damage the internal market (or a different response to the same or similar protectionist measures used by different EU countries) | Prevention/action | Non-legislative |
| Adopting protectionist regulations that have an uneven impact on companies in EU countries | Action | Legislative |
| Failure to adopt desired regulations countering protectionist measures detrimental to the common market adopted by EU countries | Prevention | Legislative |

○ Source: Prepared by the author.

their own economic interests, which are not always the same. EU bodies can be influenced by countries' governments and favour their interests, which sometimes translates into actions that damage the internal market. EU bodies, like other public ones, are also vulnerable to what the academic literature refers to as regulatory capture (Carpenter, Moss, 2014). There are two fundamental forms of protectionism by member states and EU bodies. Firstly, the protectionism can target companies from outside the EU, such as DG Trade's tariffs on goods from outside the EU. This "outward" protectionism does not affect how the internal market functions, though it can have negative economic consequences, which the World Trade Organisation was established to mitigate. Secondly, there is "internal" protectionism, which, in the name of particular EU countries, violates their neighbours' economic interests. This second type of protectionism, which damages the internal market, always bears signs of discrimination.

Protectionist behaviour that damages the internal market can involve legislative action to favour certain member states and their companies. EU bodies can also fail to respond to member states' protectionist actions. This passivity might involve a lack of legislative action or failure to enforce EU law. Table 2 presents the ways in which the European Commission can foster protectionism.

# Economic protectionism and member states' infringement of EU law

## Analysis

The Treaty on the Functioning of the European Union (TFEU) provides the European Commission with tools to protect the Treaties and respond to actions by member states that violate EU law. Based on Article 258 of the TFEU, the Commission can launch a formal complaint against member states for violating EU law, known as an infringement procedure. This begins with a formal notice. Then, after the country has had the chance to comment, the Commission can issue a "reasoned opinion" if it thinks that the country has "failed to fulfil an obligation under the Treaties". "If the state concerned does not comply with the opinion within the period laid down by the Commission", the latter may bring the matter before the CJEU. If the CJEU finds that the country has violated EU law, "the state shall be required to take the necessary measures to comply with the judgment of the Court" (Article 260 of the TFEU). Ultimately, if the Commission thinks that the country has not complied, it can bring the case before the CJEU, asking it to "impose a lump sum or penalty payment". If the country does not transpose an EU directive, the Commission can immediately ask the CJEU to fine it a lump sum[2].

The Commission's DG Internal Market, Industry, Entrepreneurship and SMEs publishes an annual Internal Market Scoreboard on the Commission's responses to infringements of EU law. The data includes "cases concerning the internal market", which spans taxes, employment, social policy, education, culture, public health, consumer protection, energy, transport, information society and media, and the environment (except "nature protection"). These categories de facto cover most of the cases concerning infringement of EU law conducted by the Commission[3]. As noted above, building the internal market also serves to "harmonise standards" enforced by EU countries, so most EU provisions on particular policies by member states "concern the internal market", according to DG Internal Market. Most cases on the infringement of EU law concerning the internal market relate to member states' late transposition of EU directives (see Chart 3). The Commission usually launches these cases automatically once the deadline for implementing the directive has passed, when the country has not informed it about steps taken to implement it.

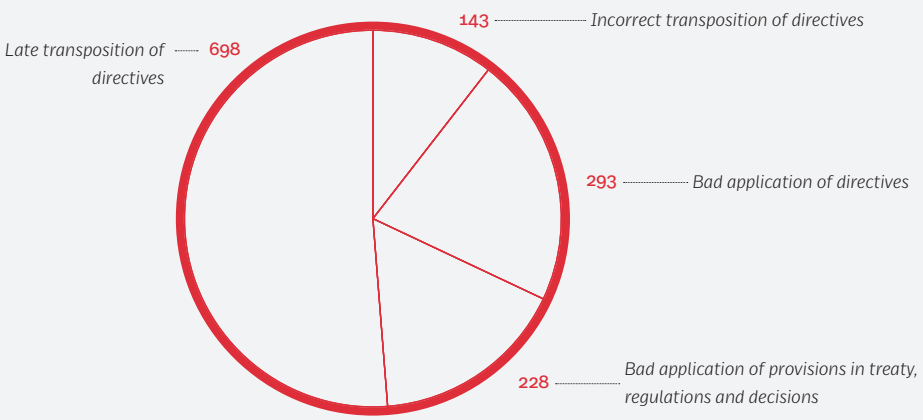
Because cases on the late transposition of directives are launched automatically, not even DG Internal Market takes it into account when presenting data on cases concerning member states' infringement of EU law. Chart 4 presents this data, which does not include cases concerning the late transposition of directives. The biggest number of proceedings is being conducted against "old" member states, such as Spain, Germany and Italy.

As mentioned, the cases span a wide range of areas, including the environment, energy, waste management, personal data or consumer protection. Some are only remotely connected to the EU's combating of

[2] In 2008, the Commission implemented the "EU Pilot" procedure, which involves informal communication with a member state in a situation where the Commission suspects that it has violated EU law.

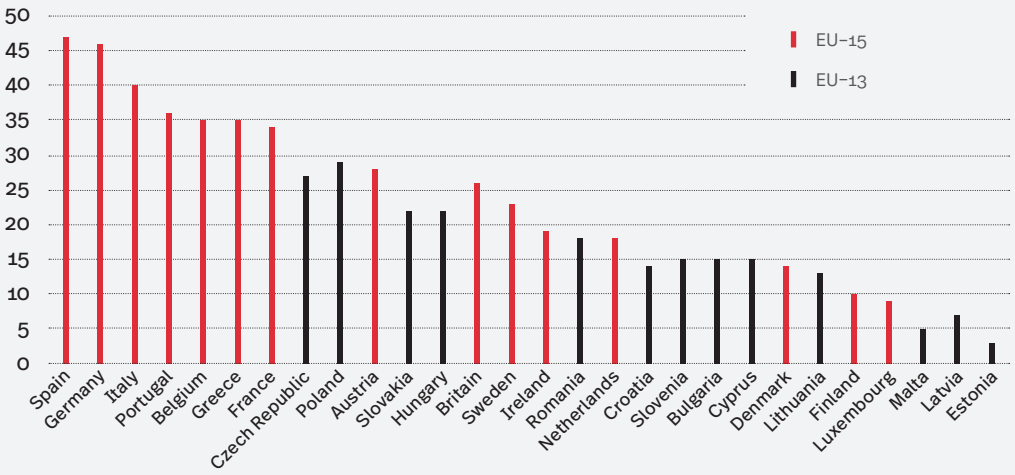
[3] They do not include, for example, cases concerning protecting the rule of law.

↘ CHART 3. Number of ongoing EU infringement proceedings concerning the internal market by type (as of 1 December 2017)




○ Source: European Commission (2018e).

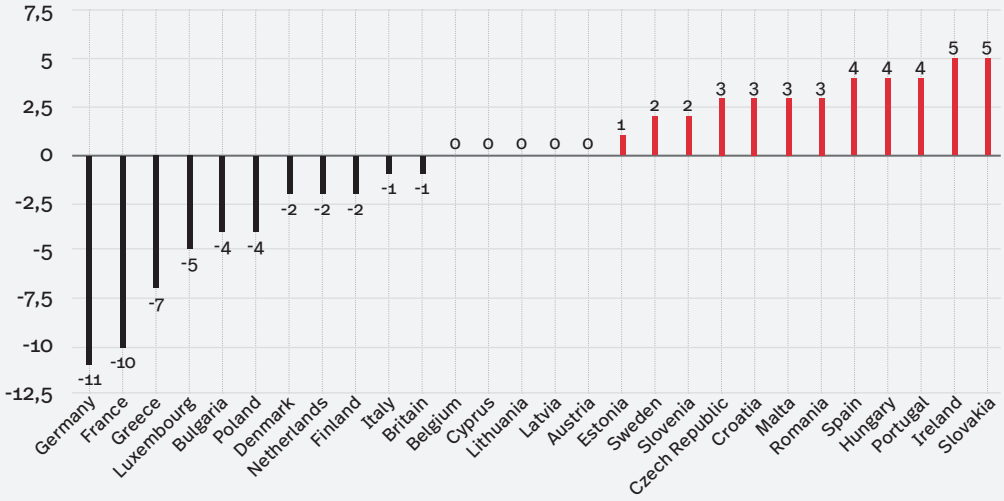
↘ CHART 4. Number of EU infringement proceedings concerning the internal market (as of 1 December 2017)




○ Source: European Commission (2018e).

protectionist measures. Data on the number of Commission proceedings not counting those of a sectoral nature (such as energy or transport), just those of a "systemic nature", where possible protectionism takes its purest form, looks slightly different. Of the categories considered by DG Internal Market, these include cases on the free movement of goods, market supervision, "direct" and "indirect"

↘ CHART 5. Change in the number of ongoing EU infringement proceedings concerning the internal market, EU-28 = 0 (1 December 2017 vs. 1 December 2016)

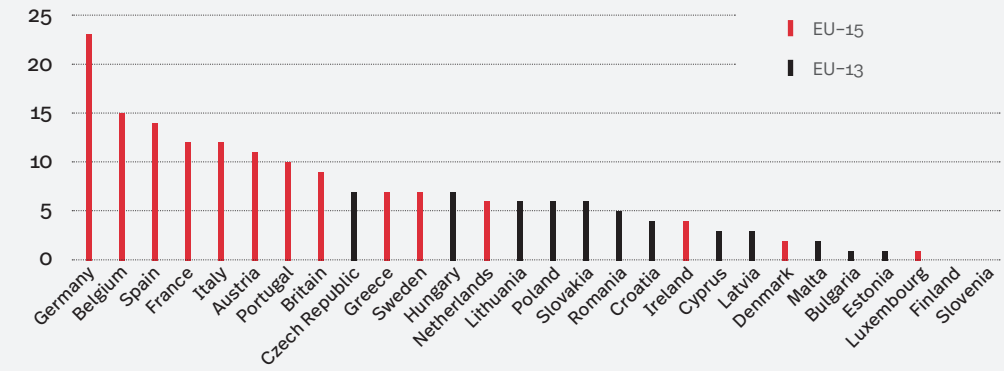



○ Source: European Commission (2018e).

taxes, services, free movement of people and public procurement. Charts 6 and 7 show the number of infringement proceedings conducted by the Commission in these areas.

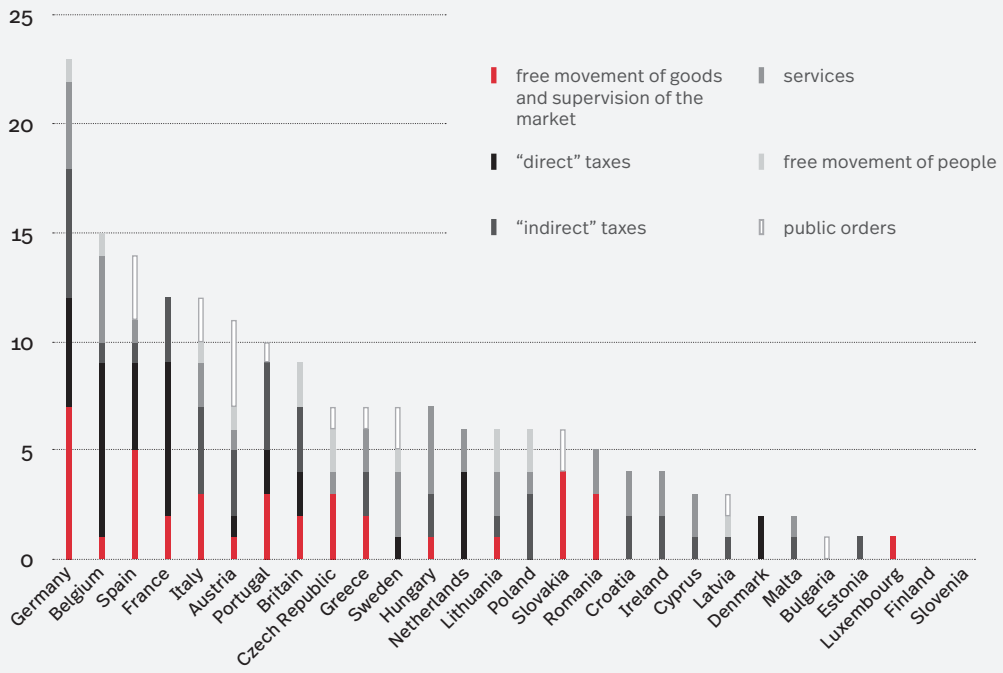
Another way to obtain quantitative data on proceedings is to analyse the database of the Commission's cases managed by its Secretariat-General. It contains information on all the Commission's cases, including ones that have been closed; around 10,000 since 2008. Unlike the data presented by DG Internal Market, it allows historical data to be analysed. Chart 8 presents data on the total number of the Commission's cases (ongoing or closed) against individual member states over the past decade, since the start of 2008. Italy, Greece, Portugal and Cyprus open the list, while Estonia,

↘ CHART 6. Number of proceedings in cases involving "systemic" infringements of the internal market (as of 1 December 2017)




○ Source: Prepared by the author based on the European Commission Secretariat-General's data.

↘ CHART 7. Number of proceedings in cases concerning the "essence" of the internal market (as of 1 December 2017)



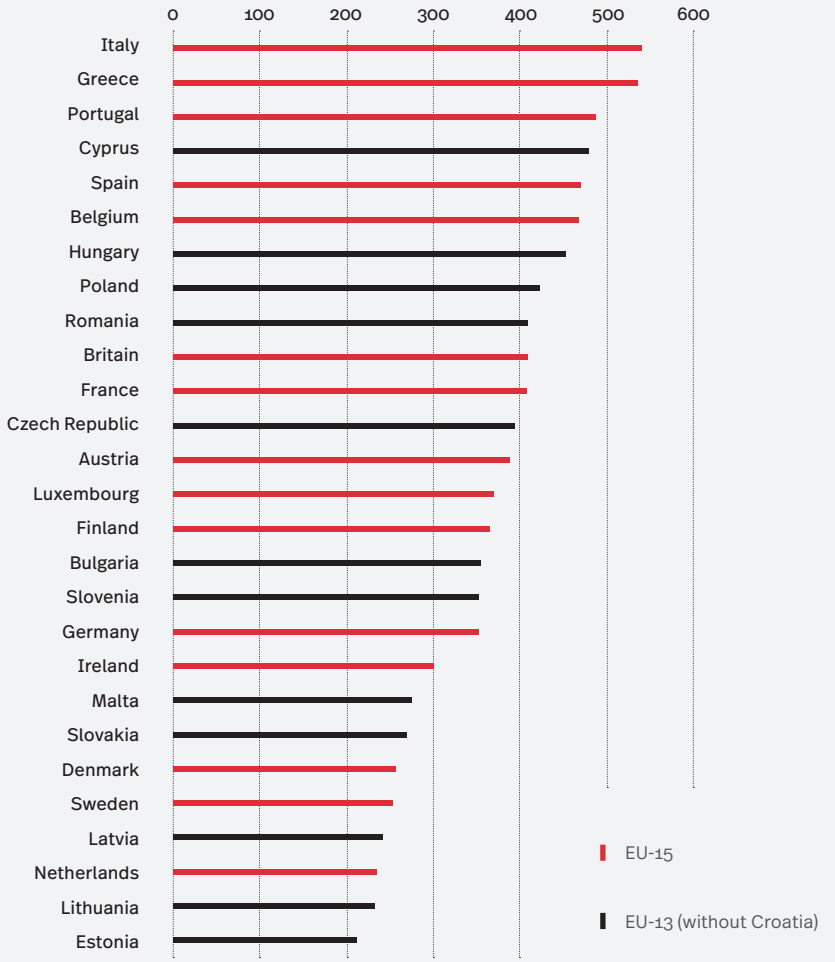

○ Source: Prepared by the author based on the European Commission Secretariat-General's data.

Lithuania, the Netherlands and Latvia close it. Poland is in 8th place, with 422 cases.

The Secretariat's database also allows the average duration of cases for violating EU law on the basis of Article 258 of the TFEU to be calculated (excluding measures of a delaying nature and regardless of whether or not the initiation of proceedings was accompanied by a press release), up until the next stage in the proceedings or the case's closure, if that happens directly after proceedings are launched. Chart 9 shows the average duration of cases against individual member states over the past decade.

Nevertheless, duration is only a partial indicator of the Commission's "lenience" towards a given country, as it includes a possible case at the CJEU and does not consider why a given case "drags on". For example, sometimes a case is de facto "closed" despite not being formally ended by the Commission. This makes the duration of individual stages of proceedings, rather than their total duration, a better measure. A good indicator of the Commission's possible "leniency" is the average time between the formal launch of proceedings and

↘ CHART 8. Number of cases involving infringement of EU law (since 2008)

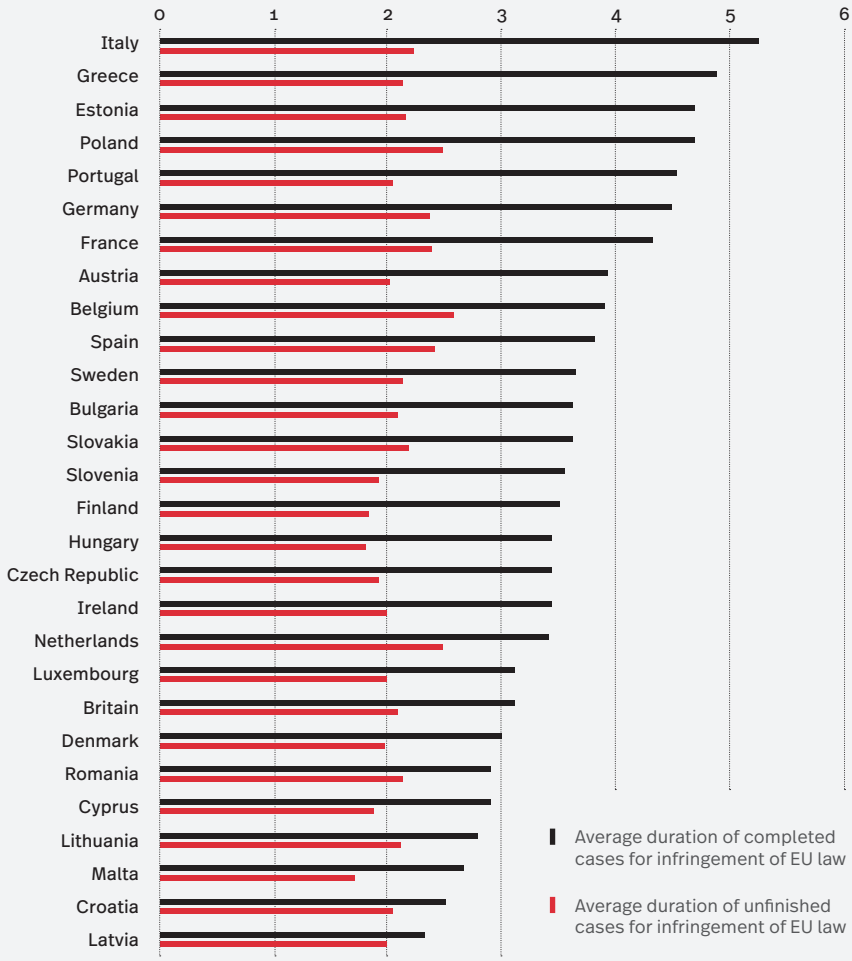



○ Source: Prepared by the author based on the European Commission Secretariat-General's data.

their next stage (usually the Commission presenting the member state with a "reasoned opinion", based on Article 258 of the TFEU) or the case's closure[4]. If a proceedings against a given country "gets stuck" between its launch and the "reasoned opinion", it usually does not mean that the case has been de facto closed. Rather, the Commission and the country are communicating, which prevents officials from moving onto the next stage. Chart 10 shows the average time for individual member states between the start of proceedings and the next stages (usually the Commission issuing a "reasoned

[4] If this closure is the stage directly after the proceedings are launched.

↘ CHART 9. Average duration of cases for infringement of EU law, including proceedings before the CJEU, cases launched since 2008 (in years)

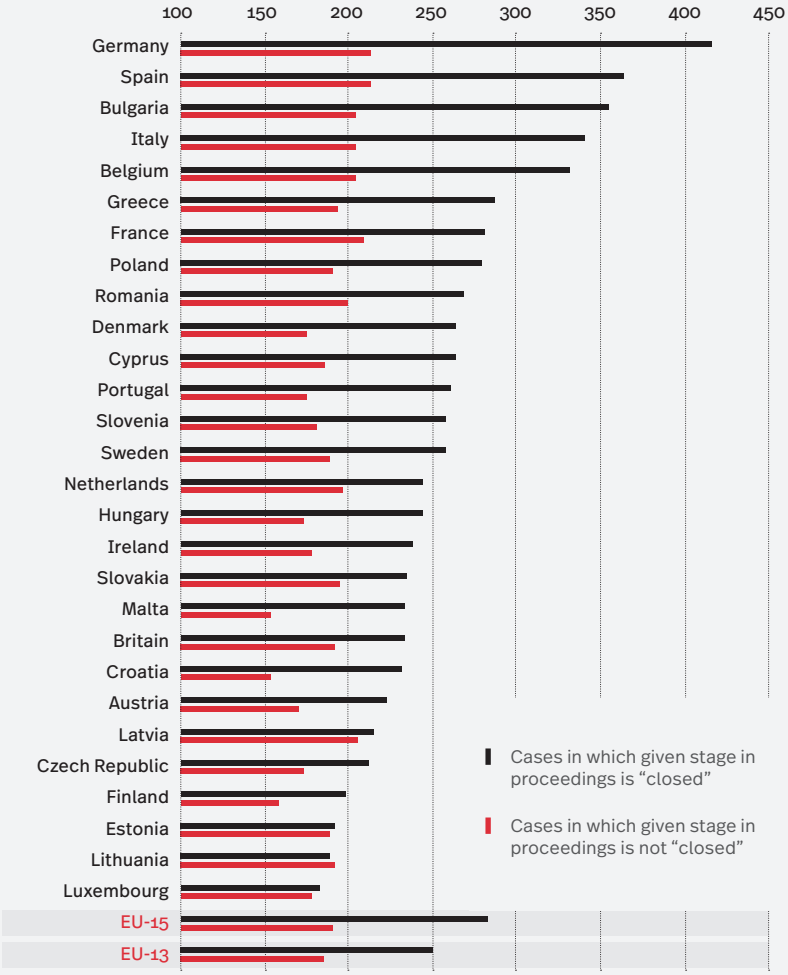



○ Source: Prepared by the author based on the European Commission Secretariat-General's data.

opinion"). This data differs significantly from the data on the average total length of cases. The data for Germany is particularly striking: over the past decade, the average time between the Commission launching proceedings against Germany and their next stage or closure was almost 50 days longer than for the country with the second-longest gap, Spain. On average, the first stage of proceedings against Germany since 2008 has lasted 415 days, compared to 363 for Spain.

Another good indicator of the EU's "leniency" is the number of "inquiring" or "delaying" measures used by the Commission in these proceedings. Often, the Commission moves on to subsequent stages immediately. Sometimes, though, it sends member states additional calls to remove the infringement or additional "reasoned opinions". Comparing data on the average

↘ CHART 10. Average time after launch of proceedings by the Commission for infringement of EU law based on Article 258 of the TFEU since 2008 (in days)




o Source: Prepared by the author based on the European Commission Secretariat-General's data.

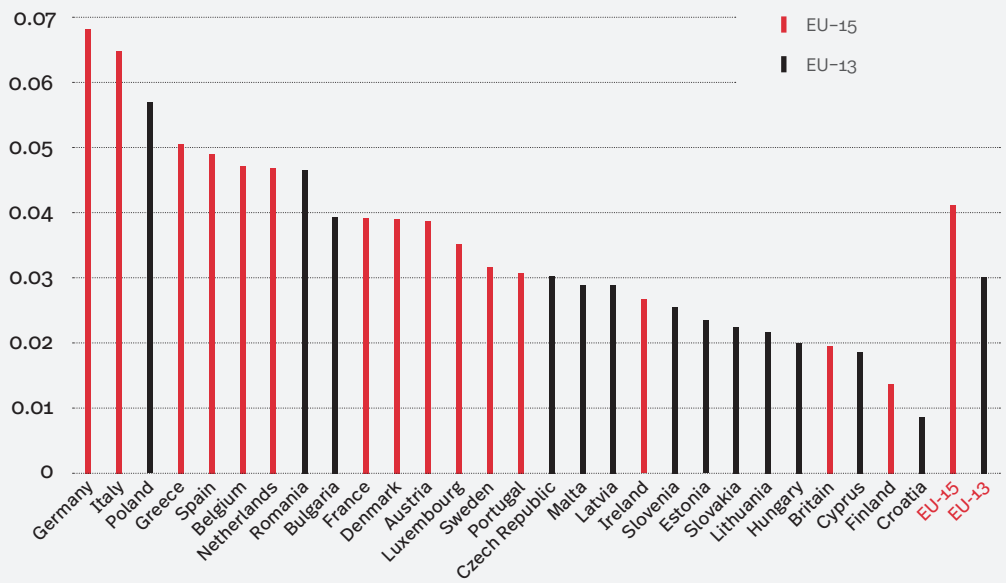
number of these "delaying" measures with the total number of proceedings provides an insight into the Commission's "leniency" towards particular states. Analysis of cases since 2008 shows that delaying measures (such as a second, additional call to comply (Article 258 TFEU)) are used more often in cases against "old" member states than in those against "new" ones (see Table 3). Comparing the ratio between the number of measures with the total number of cases against individual countries also shows that the Commission uses "delaying" measures proportionally more often towards "old" member states (most often Germany). A significant exception is Poland, which is in third place, after Italy (see Chart 11).

↘ TABLE 3. Number of formal measures "asking further questions" or "delaying" used by the European Commission in cases concerning violation of EU law (since 2008), without data on Croatia

| | DETAILS | | AVERAGE PER COUNTRY |
|---|---|---|---|
| EU (13) | "Second additional call to remove infringement (Article 258 TFEU)" | 6 | 0.46 |
| | "Additional call to remove infringement (Article 258 TFEU)" | 90 | 6.92 |
| | "Additional reasoned opinion (Article 258 TFEU)" | 51 | 3.92 |
| EU (13) COMBINED | Total number of "delaying" measures by Commission | 127 | 9.77 |
| EU (15) | "Second additional call to remove infringement (Article 258 TFEU)" | 15 | 1 |
| | "Third additional call to remove infringement (Article 258 TFEU)" | 1 | 0.07 |
| | "Additional call to remove infringement (Article 258 TFEU)" | 174 | 11.6 |
| | "Additional call (Article 260 TFEU)" | 3 | 0.2 |
| | "Additional reasoned opinion (Article 258 TFEU)" | 77 | 5.13 |
| EU(15) COMBINED | Total number of "delaying" measures by Commission | 240 | 16 |
| Total | | 367 | |

o Source: Prepared by the author based on the European Commission Secretariat-General's data.

↘ CHART 11. Ratio of "delaying" measures to number of proceedings (since 2008)




o Źródło: Opracowanie własne na podstawie danych Sekretariatu Generalnego Komisji Europejskiej.

↘ TABLE 4. Frequency of filing complaints and winning at the CJEU in disputes with the Commission for individual member states (without Croatia)

| COUNTRY | CASES CONCERNING VIOLATION OF EU LAW | CASES WITHOUT DISPUTES OVER TRANSPOSITION OF DIRECTIVES | CASES AT CJEU | NUMBER OF WINS AGAINST COMMISSION | % OF CASES AT CJEU | % OF WINS |
|---|---|---|---|---|---|---|
| Austria | 744 | 352 | 67 | 2 | 0.19 | 0.03 |
| Belgium | 896 | 505 | 96 | 8 | 0.2 | 0.08 |
| Germany | 1357 | 1046 | 83 | 14 | 0.08 | 0.17 |
| Denmark | 537 | 277 | 13 | 2 | 0.05 | 0.15 |
| Greece | 1405 | 890 | 103 | 6 | 0.12 | 0.06 |
| Spain | 1470 | 1143 | 120 | 10 | 0.1 | 0.08 |
| Finland | 723 | 277 | 37 | 6 | 0.13 | 0.08 |
| France | 1234 | 866 | 109 | 9 | 0.13 | 0.08 |
| Ireland | 835 | 509 | 47 | 4 | 0.09 | 0.09 |
| Italy | 1783 | 1230 | 149 | 13 | 0.12 | 0.17 |
| Luxembourg | 601 | 191 | 93 | 3 | 0.49 | 0.03 |
| Netherlands | 627 | 365 | 41 | 6 | 0.12 | 0.17 |
| Portugal | 951 | 403 | 71 | 6 | 0.18 | 0.08 |
| Sweden | 624 | 314 | 33 | 4 | 0.11 | 0.12 |
| Britain | 1216 | 810 | 60 | 14 | 0.07 | 0.23 |
| Bulgaria | 386 | 194 | 1 | 0 | 0.01 | 0.5 |
| Cyprus | 600 | 204 | 4 | 1 | 0.02 | 0.25 |
| Czech Republic | 645 | 202 | 18 | 2 | 0.09 | 0.11 |
| Estonia | 392 | 113 | 3 | 0 | 0.03 | 0 |
| Hungary | 567 | 230 | 6 | 1 | 0.03 | 0.17 |
| Latvia | 290 | 133 | 3 | 0 | 0.02 | 0 |
| Malta | 555 | 205 | 6 | 2 | 0.03 | 0.33 |
| Poland | 761 | 446 | 30 | 3 | 0.07 | 0.1 |
| Romania | 494 | 154 | 1 | 1 | 0.01 | 1 |
| Slovakia | 444 | 171 | 6 | 2 | 0.04 | 0.33 |
| Slovenia | 450 | 139 | 5 | 0 | 0.04 | 0 |
| Lithuania | 443 | 139 | 0 | 0 | 0 | nd |
| Median EU (13) | 502 | 194 | 7 | 1 | 0.03 | 0.21 |
| Median EU (15) | 1000 | 612 | 75 | 7 | 0.14 | 0.11 |

o Source: Toshkov (2016).

The final indicator illustrating possible differences in how the Commission treats member states – or its greater "leniency" – is how they cope in disputes with the Commission concerning the infringement of EU law at the CJEU. At first glance, it seems that the more a country wins against the Commission at the CJEU, the more the Commission launches "groundless" cases against it. Table 4 shows how often member states won disputes with the Commission at the CJEU in 2003-2014.

Yet drawing wide-ranging conclusions based on this frequency is problematic. Firstly, the data on wins at the CJEU is not representative, as countries rarely complain to the Court about the Commission's decisions. Secondly, as D. Toshkov has noted, the correlation between cases launched by the Commission and the results of disputes at the CJEU is greater than the correlation between these results and cases taken to the CJEU. This means that the less often a country gets involved in disputes with the Commission at the CJEU (and the more often it reaches an "amicable" solution), the more (proportionally) often its wins at the Court. In other words, one group of countries only complain about Commission decisions when they are likely to win. Another group complains about the Commission's decisions relatively often and therefore loses more often. "New" members were over four times less keen to complain about the Commission's decisions at the start of 2015, but when they did, they won practically twice as often (0.21%, compared to 0.11%).

## Summary

At the end of 2017, the European Commission conducted the most cases concerning the infringement of EU law against "old" EU member states, like Spain, Germany and Italy. For Commission proceedings in cases concerning "systemic" infringements of the internal market, by far the most proceedings are conducted against Germany.

Over the past decade, cases concerning the infringement of EU law (taking into account proceedings at the CJEU) against Italy, Greece and Estonia lasted the longest on average. Yet the catalogue of countries with "delayed" proceedings looks quite different if we consider the average time between the formal launch of proceedings and their next stage or closure. This is a more

"New" member states win against the Commission at the CJEU more often, but are much less keen to complain about the Commission's decisions to the CJEU.

The more rarely a country gets involved in disputes before the CJEU (and the more often it reaches an "amicable" settlement with the Commission) the more often it wins (proportionally) against EU officials at the CJEU.

credible way of illustrating the Commission's possible leniency towards particular member states. The duration of cases involving Germany is particularly striking: over the past decade, the time between the launch of cases and the next stage or closure of proceedings was almost 50 days longer on average than for the next country, Spain.

The Commission also uses "delaying" measures more often towards "old" EU members than "new" ones. If we compare the ratio of the Commission's use of these measures to the total number of cases against a given country, Germany comes first. "New" members win against the Commission at the CJEU more often, but are much less "keen" complain in the first place.

# Economic protectionism and EU policy on public aid

## Analysis

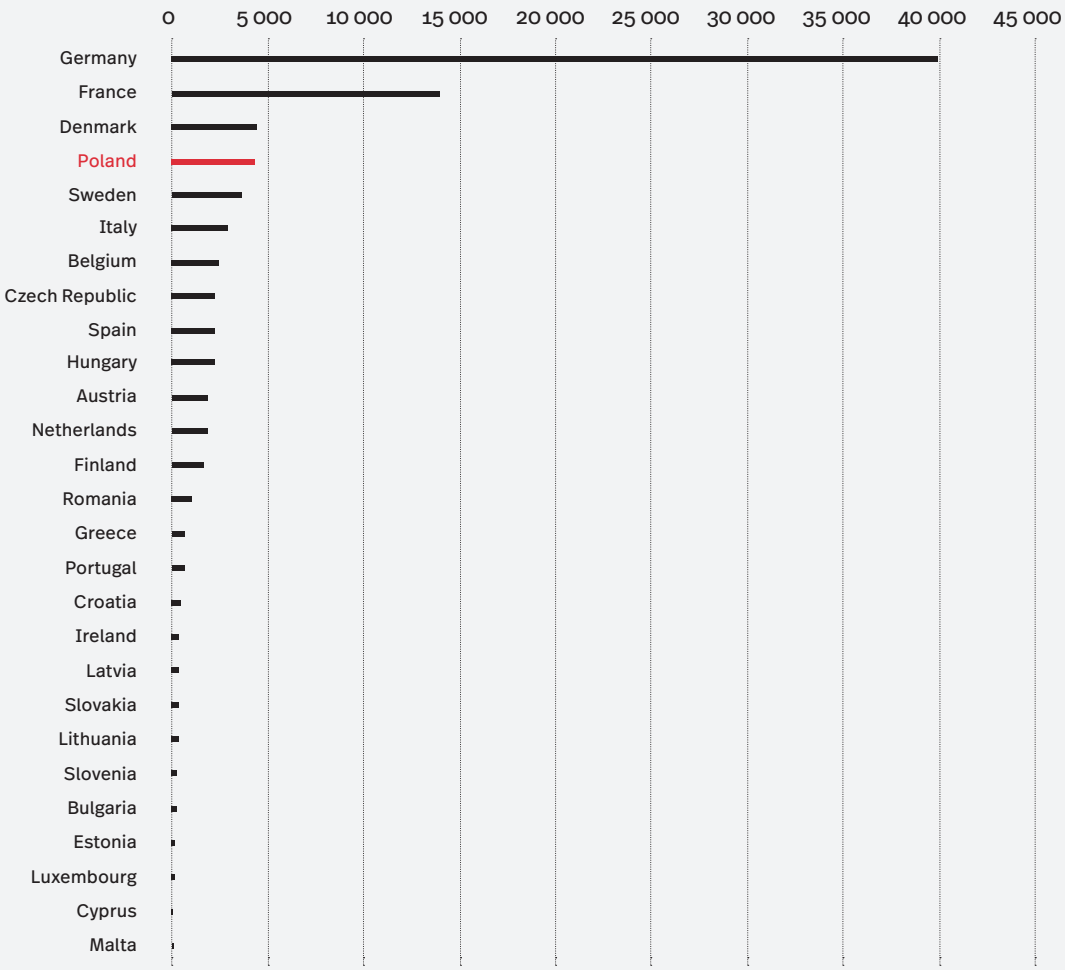
The European Commission's DG Competition enforces EU rules on public aid, checking whether member states grant companies illegal subsidies. As mentioned, this ban on the provision of public aid is set out in Article 107 of the TFEU. EU law defines public aid broadly as direct transfers from the state budget to a given company, state guarantees, selective tax breaks and even capital engagement in an unprofitable company. However, EU regulations introduce numerous exceptions "legalising" public aid because of its purpose (aid for regions, SMEs, environmental protection or R&D) or size (so-called *de minimis* aid). Based on Article 108 of the TFEU, states are obliged to notify DG Competition about public aid and should wait until they receive its permission. States report both individual cases of aid and aid programmes.

Based on Article 6 of the Commission's Regulation 794/2004[5], member states submit data every year on aid granted to companies. The Commission collects it, adds information on unreported aid and publishes reports on subsidies granted in the EU. This data shows that Germany has granted the most public aid in recent years, in terms of the total amount. In 2016, the German authorities granted companies almost three times more in subsidies than the next country on the list, France. Chart 12 presents total subsidies granted by member states in 2016. According to the European Commission, data on aid by main objective does not include certain types of aid (such as for the railway sector) or aid linked to the crisis on financial markets. The data here spans the period since the EU's big eastern enlargement (from the start of 2005).

[5] Commission Regulation No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, Official Journal of the European Union, 30.4.2004, L 140/1.

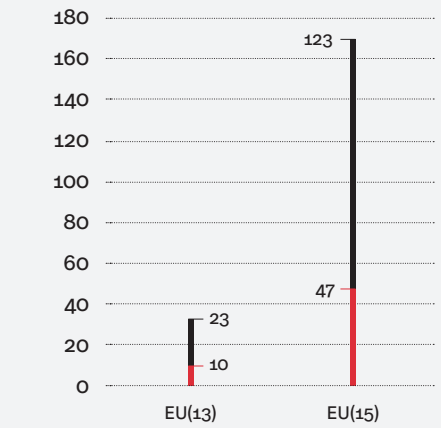
Member states do not always comply with EU rules on public aid. If the Commission deems a country to have provided illegal aid, it can order it to retract the subsidy. This can involve collecting tax from an company initially exempted from it or ordering it to return a money transfer. In practice, these decisions are issued in two situations: when a state did not notify DG Competition about aid that must be reported or when the aid was reported but the country did not wait for the Commission's permission before granting it (and the subsidy was deemed against

↘ CHART 12. Public aid granted by EU countries in 2016 (millions of euros)




○ Source: Prepared by the author based on European Commission (2017c).

**↘ CHART 13.** Decisions to order the return of aid (2005-2018)




Decisions not executed

Decisions executed in full

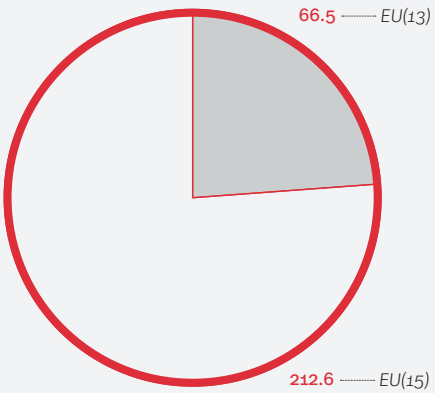
o Source: Prepared by the author based on DG Competition (2018).

EU rules). Usually, failure to comply involves proceedings against the Commission's decision at the CJEU or the CJEU repealing the decision. More rarely, a state simply ignores it.

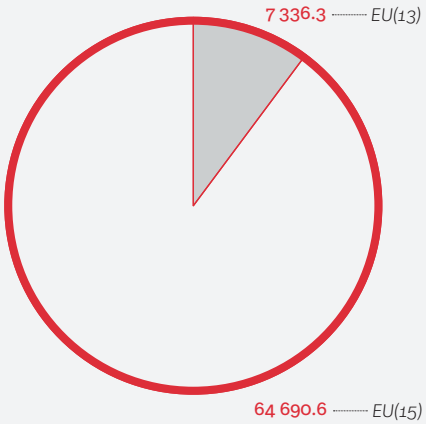
Chart 15 presents the ratio between the total number of Commission decisions to retract aid between 2005 and 2018 and the number of decisions that countries complied with in full. The chart compares "new" and "old" EU members (the EU-13 and EU-15).

National legal instruments are used to retract public aid. The Commission simply wants the aid to be returned. Governments can also complain about the order to the CJEU. Charts 14a and 14b present the ratio between aid successfully questioned by the Commission (the average for 2005-2018) and aid granted by member states (the average for 2005-2016)[6]. The data concerns aid that was successfully questioned, which means that there are no proceedings underway at the CJEU or national courts questioning the Commission's decision. The data suggests that the Commission is much more "inclined" to question subsidies provided by "new" member states.

**↘ CHART 14A.** Average aid returned in 2005-2018 (EUR million)




**↘ CHART 14B.** Average aid granted in 2005-2016 (EUR million)



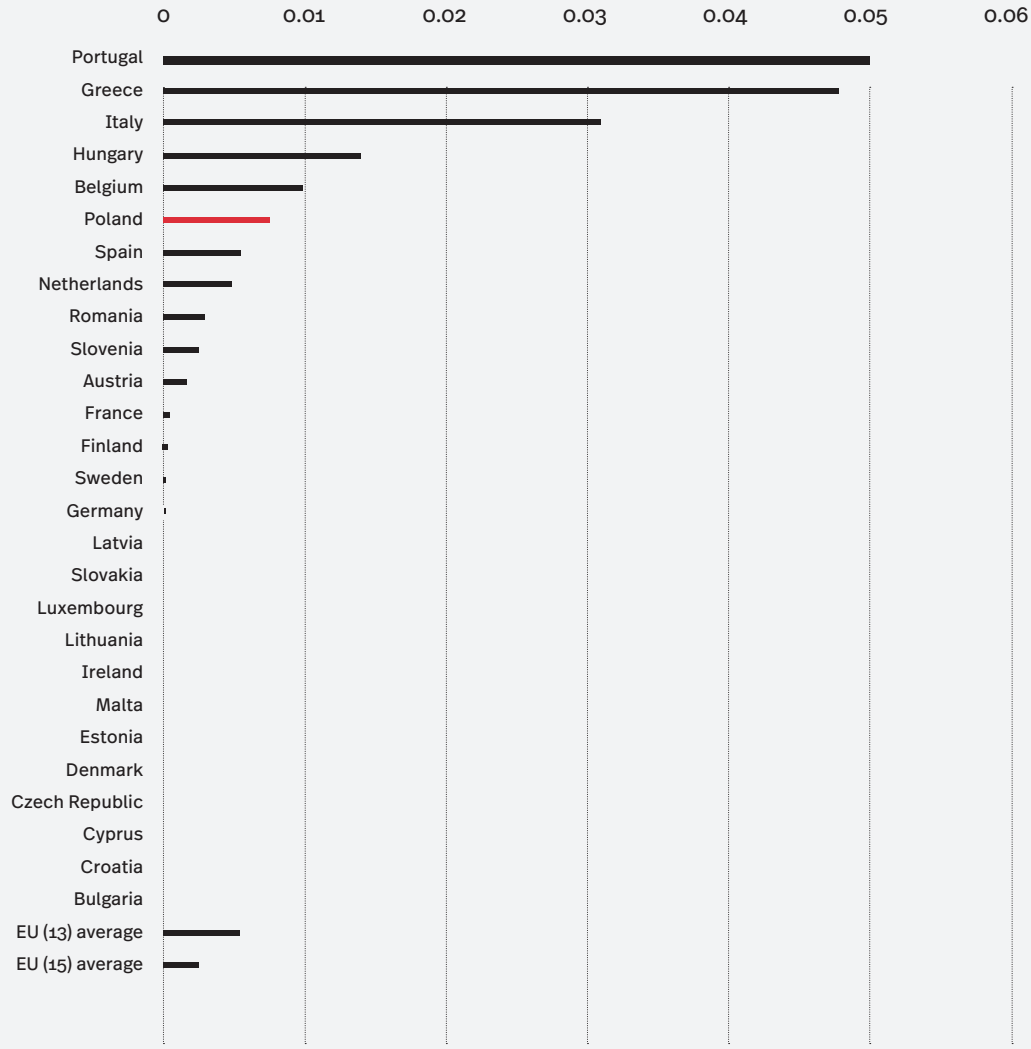

For Romania, Bulgaria and Croatia, only full years when they were EU members were taken into account

o Source: Prepared by the author based on: (DG Competition, 2018).

[6] This is an important reservation, because the data do not include, say, the recent case in which the Commission ordered Apple to pay Ireland close to EUR 13 billion. Dublin is complaining about this decision to the EU courts.

The Commission can order a state to suspend the aid before the case is fully examined. This is known as a "suspension injunction". According to Article 13 of EU Regulation 2015/1589[7], this is an exceptional measure that can be used if there is "an urgency to act" and "a serious risk of substantial and irreparable damage to a competitor". Since 2005, the Commission has issued suspension injunctions just four times. In each case, the country was a "new" member state (see Table 5).

↘ CHART 15. Ratio of the average aid ordered to be returned (2005-2018) to average aid granted (2005-2016)




For Romania, Bulgaria and Croatia, only full years when they were EU members were taken into account

o Source: Prepared by the author based on: (DG Competition, 2018).

[7] Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), Official Journal of the European Union, 24.9.2015, L 248/9.

↘ TABLE 5. Orders to suspend public aid issued by the European Commission in 2005-2018

| DATE AND DECISION NUMBER | COUNTRY | BENEFICIARY OF THE POTENTIAL AID | SECTOR | DETAILS |
|---|---|---|---|---|
| **2007 (41/2007)** | Romania | Tractorul | farming machinery | too low price obtained by the Romanian government from privatization (in exchange, the investor committed to operate for 10 years) |
| **2014 (SA. 38517)** | Romania | Ion Micula (a person) and companies SC European Food, Starmill, Multipack | food | tax incentives used by the Romanian government in special investment zones |
| **2015 (SA. 39235)** | Hungary | medium-sized media companies | media | Hungarian progressive tax on media companies for advertising |
| **2016 (SA. 44351)** | Poland | small and medium-sized shops | retail | The case is described in Chapter 6.1 |

o Prepared by the author based on: (DG Competition, 2018).

## Summary

Since 2005, after the EU's big eastern enlargement, "old" member states have granted companies around nine times more public aid (EUR 65 bn per year on average) than "new" ones (EUR 7 bn).

Data on the amount of aid returned shows that DG Competition questions aid granted by "old" member states proportionally much less often than that granted by "new" ones (if the ratio of effectively contested aid to subsidies granted is considered). Big countries – France and Germany – are especially privileged.

Although "old" members provided nine times more public aid than "new" ones, the Commission issued just five or so times more decisions on returning aid towards them (123) than towards "new" members (23). Moreover, for unclear reasons, the Commission only uses the exceptional legal instrument of suspending aid towards "new" member states.

# Economic protectionism and EU anti-trust policy

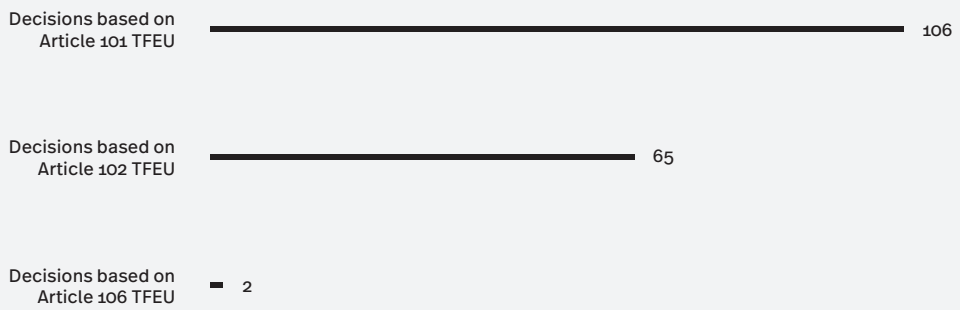
## Analysis

To build the internal market, the EU has its own anti-trust policy. Competition law is enforced by DG Competition, like in cases involving public aid. If the EU enforces anti-trust laws insufficiently or selectively, it can be considered EU protectionism.

According to the TFEU, anti-trust practices violating EU rules can involve using agreements that result in the "prevention, restriction or distortion of competition within the internal market" (Article 101 of the TFEU) or "abuse of a dominant position" (Article 102). Article 106 also forbids member states from maintaining measures incompatible with TFEU standards (including Articles 101 and 102) in relation to "public undertakings and undertakings to which member states grant special or exclusive rights". These norms (Articles 101, 102 and 106 of the TFEU) constitute the EU's competition protection system. The practices described in Articles 102 and 106 usually have more in common with protectionism than the "incompatible" agreements in Article 101.

The agreements limiting competition forbidden by Article 101 are types of "exploitative" practices in which the victims are mostly consumers. Unlike the company practices forbidden by Article 101, the Commission's interventions in cases concerning Articles 102 and 106 are meant to counter "excluding" practices – situations in which a state or dominant company limit market access for other entrepreneurs (Semeniuk, 2018). More of the cases launched and closed by the Commission concern "agreements restricting competition" (Article 101) than Articles 102 and 106 (see Chart 16, which shows the types of anti-trust cases closed by the Commission over the past decade). The decline in cases launched by the Commission concerning Article 106, which mostly involve protectionist actions by states, when governments limit access to the domestic market "via" companies (usually state-owned) that are so-called natural monopolists, is particularly interesting. In 2008-2017, the Commission closed two cases of this kind, compared to ten cases in 1998-2007.

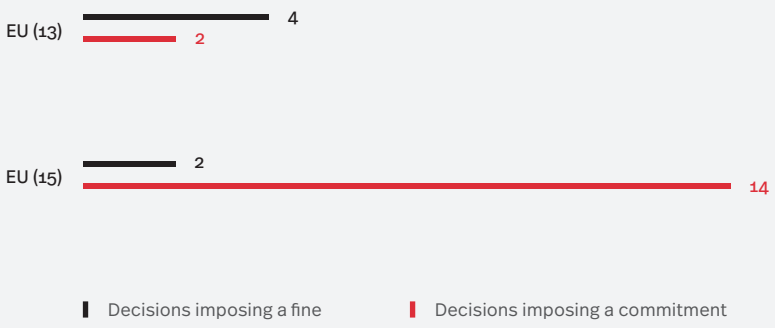
↘ CHART 16. Anti-trust decisions by the European Commission in 2008-2018




o Source: Prepared by the author based on: (DG Competition, 2018).

In cases concerning Article 102 (abuse of dominant position), the Commission can withdraw its claim that a dominant company violated Article 102 and impose an "commitment" on the company (the Commission has the right to issue a commitment decision "if the parties concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment)[8]. Dominant companies usually prefer to face commitments than fines. Since the EU's eastern enlargement of 2004, the Commission has imposed commitments on "old" member states proportionally more often (see Chart 17), while fining "new" ones more often. Taking into account

↘ CHART 17. Decisions by the European Commission on the violation of Article 102 TFEU in 2005-2018




o Source: Prepared by the author based on data in European Commission (2018d).

[8] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal of the European Union, 4.1.2003, L 001.

the size of "old" and "new" members' economies, the size and number of fines on "new" ones seems disproportionally higher than fines on companies from "old" members[9].

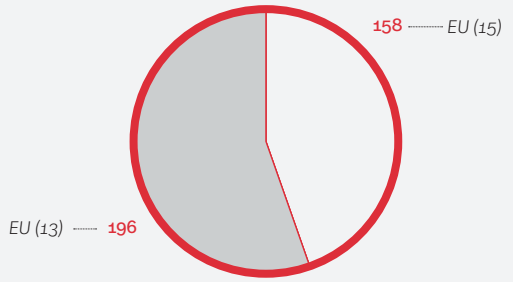
## Summary

In recent years, the European Commission's anti-trust policy has focused on protecting EU consumers' interests (Article 101 of the TFEU, forbidding agreements limiting competition), rather than combating private barriers to entering a market; that is, countering protectionism (Articles 102 and 106). This trend seems to be intensifying.

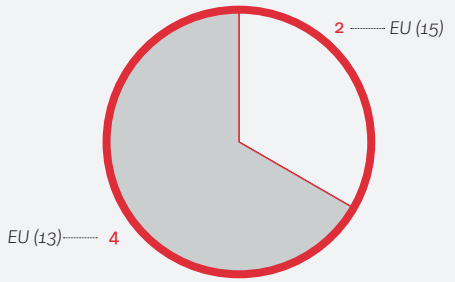
If the Commission decides to drop a case concerning a company's abuse of its dominant position (Article 102), it seems slightly more lenient towards "old" member states, both in terms of its tendency to reach an "amicable" settlement and in the size of the fines imposed.

↘ CHART 18. Commission fines in anti-trust cases and GDP in 2005-2018

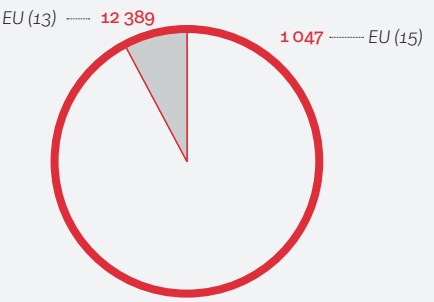
Total penalties for violation of Article 102 TFEU (2005-2018, millions of euros)




Number of decisions imposing a fine for violation of Article 102 TFEU (2005-2018)




Average GDP (2005-2017, billions of euros)




o Source: Prepared by the author based on data in European Commission (2018d).

[9] Comparing the size of the economies of "old" and "new" member states with data on cases of infringement of Article 102 of the TFEU, GDP in 2005-2017 (current prices in euros) was taken into account. Determining a company's "origin" or "nationality" was based on the content of the European Commission's decision in the case in question. The Commission often defines a given company as "German", "French" or "Polish". If the Commission did not mention the company's nationality, its headquarters or the country it was registered in state were taken as the starting point. After that, the actual place where the company is active was considered and finally the "nationality" of the entity (another company, person or government) controlling it. The last of the above criteria was decisive, especially in cases where a company's country of registration (e.g. Luxembourg) could be dictated by tax reasons. In some cases, when the entity controlling the company was located in a country other than the one where the company employs most of its employees, more than one "nationality" was given.

# Economic protectionism and the consequences of EU regulations

## Analysis

When proposing new regulations, the European Commission prepares an impact assessment. These are prepared for "initiatives expected to have significant economic, social or environmental impacts", such as "legislative proposals, "non-legislative initiatives (e.g. financial programmes, recommendations for the negotiations of international agreements)" and "implementing and delegated acts" (European Commission, 2018a). According to the Commission, the assessment must contain a "description of the environmental, social and economic impacts" of the initiative, its "impacts on small and medium enterprises and competitiveness", "who will be affected by the initiative and how" and "the consultation strategy and the results obtained from it". The assessments are published with the legislative motions or legal acts adopted by the Commission. They are also sent to EU legislators – the European Parliament and Council – so that they can decide whether to accept or reject the proposed regulations (European Commission, 2018a).

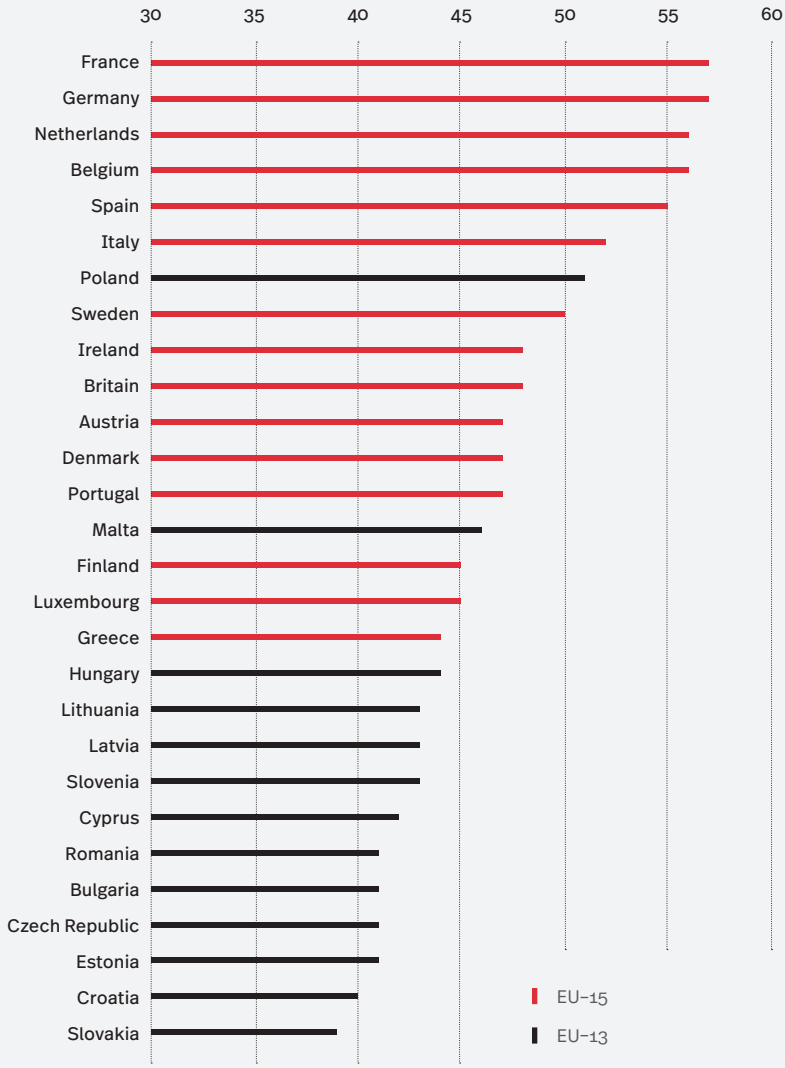
A Regulatory Scrutiny Board advises the Commission's college of commissioners. It analyses draft impact assessments issued by the Commission and prepares opinions and recommendations. The Board is made up of senior officials from the Commission and independent experts. A positive opinion from the Board is needed for initiatives accompanied by an impact assessment before they are submitted to the Commission for adoption. If the Board issues a negative opinion, the Commission must review the impact assessment and present it to the Council (European Commission, 2018b).

After the Commission adopts a motion, all the impact assessments and Board opinions are published online. The Board also publishes annual reports evaluating the impact assessments prepared by the Commission. The Board sometimes criticises the impact assessments in its individual opinions and annual reports for defining the aims of a regulation imprecisely or for circumventing the principle of subsidiarity of EU law, among other things (European Commission, 2018c).

However, the Regulatory Scrutiny Board does not analyse the Commission's impact assessments in terms of their potentially different impact on individual member states' economies. This has not featured in the Board's annual reports over the past five years, at least. Yet analysis of all the impact assessments prepared by the Commission in 2016[10] (61 documents plus over 19,000 mentions of individual countries) shows that the Commission "mentions" certain member states much more often than others. "Old" member states like France, Germany, Belgium and the Netherlands are "mentioned" in more impact assessments than "new" members (see Chart 19). This disproportion between "mentions" of "old" and "new" member state is even more visible when the total number of "mentions" of a country in a given act is

[10] As of 15 November 2018, the Commission had not yet published a comprehensive list of impact assessments for regulations in 2017 (European Commission, 2017).

↘ CHART 19. Number of impact assessments of EU regulations mentioning a given country (2016)

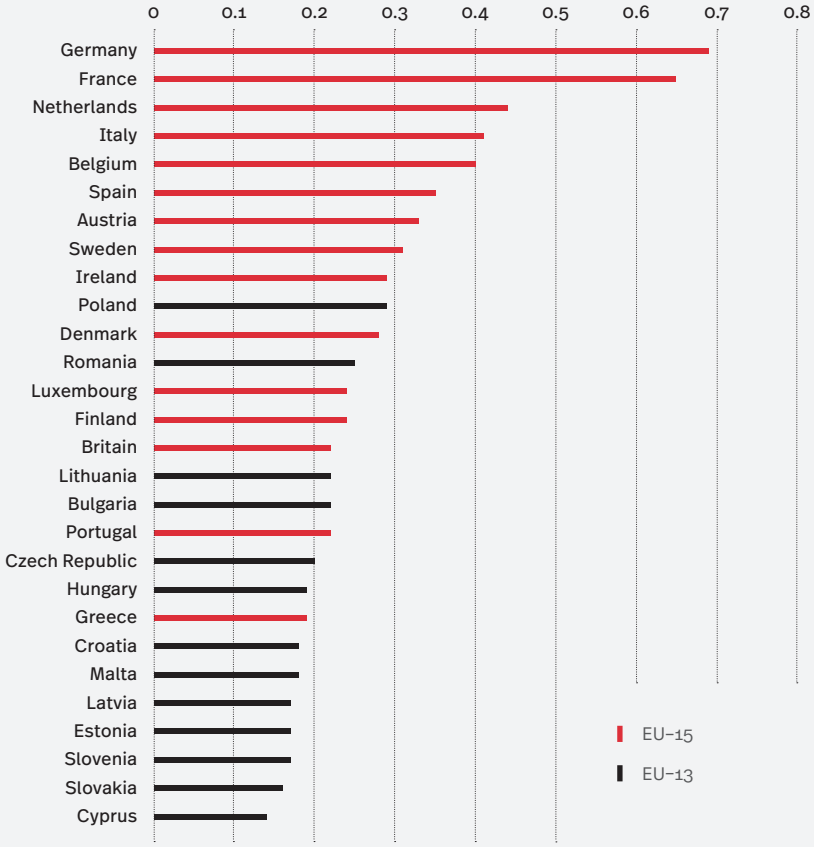



o Source: Prepared by the author based on European Commission (2017a).

compared (for instance, when assessing the impact of a given regulation, the Commission can "mention" both Poland and Germany, but Germany might be mentioned a few or even a few dozen times more). Chart 19 presents more precise data on "mentions" of individual countries in the Commission's impact assessments, taking into account not only the mention itself, but also the number of mentions.

These numbers come from impact assessments for 2016 (European Commission, 2017). The coefficient of how often a given country was mentioned (Chart 20) was

↘ CHART 20. Frequency coefficient of mentions of a given country in impact assessments of EU regulations (2016)




○ Source: Prepared by the author based on European Commission (2017a).

calculated by giving the country with the most "mentions" in each impact assessment a result of "1". For other countries, the result was the number of times they were "mentioned" in an impact assessment divided by the number of times the most-mentioned country was "mentioned". After that, the average of these coefficients for all impact assessments in 2016 was calculated.

## Summary

The Commission's impact assessments of EU regulations are not studied in terms of how much attention EU officials devote to analysing rules' impact on various member states' economies. Analysing impact assessments suggests that the Commission considers certain "old" member states (Germany, France and the Netherlands) much more often when compiling them.

# Possible examples of protectionism in the EU

## The tax on retail sales

In July 2016, the Polish parliament passed a law on the tax on retail sales, calculated based on turnover. The law introduced a tax-free amount of PLN 17 m and two tax rates: 0.8% for monthly turnover of PLN 7-170 million and 1.4% for turnover of over PLN 170 m. It was supposed to enter force on 1 September 2016. Yet before Polish tax offices collected the tax's first instalment, the Commission ordered its suspension in September 2016. In June 2017, it deemed the tax to violate the law on public aid. According to the Commission, the tax's progressive structure and tax-free amount would allow smaller businesses to pay a relatively smaller tax than big ones, while "thousands of local shops" are fully exempt from it. One of the government's arguments for the tax was the need to fund its Family 500Plus[11] monthly child subsidy, along with the fact that major retail companies pay very low income taxes. In the Commission's opinion, the Polish government did not "present any convincing explanations why, in the context of collecting the tax on retail sales, bigger and smaller economic entities are in a different factual and legal situation". Poland complained to the CJEU. The case has not been settled yet.

The Commission's intervention was of an exceptional nature. Brussels ordered that Poland suspend alleged public aid based on preliminary reservations, without considering the case in full, which it does exceptionally rarely. The validity of the Commission's arguments is also debatable, as it questioned a key elements of states' tax policy: the ability to impose progressive taxes depending on the taxpayers' size. Progressive taxes can be justified by redistributive purposes. In the past, before the EU enlargement of 2004, the Commission admitted that some regulations reducing taxation of SMEs can be justified in a similar way to traditional tax progression (*Commission notice on the application of the State aid rules to measures relating to direct business taxation*, point 27). Critics of the Commission's intervention against Poland highlight that a tax similar to the Polish one questioned exists in France, where businesses with a turnover of EUR 460,000 from retail sales must pay tax on premises with a usable area of over 400 m². The French tax rate is calculated based on turnover per square metre (SGH, 2016).

## Posted workers

On 21 June 2018, the Council of the EU adopted an amendment to the directive on posted workers, which regulates the legal status of people sent to work abroad by companies when fulfilling foreign contracts. The directive proposed to shorten the time for which a worker can be posted, and primarily subject to the regulations of the country where the employer is based, from the current unlimited timeframe to 12 months (with the option of extending it by six months). After that, the worker will be subject to local employment rules. The time will not be calculated per job, rather than per person. According to the amendment, companies posting workers abroad will have to pay them a local salary, its components regulated by national law. Based on the current regulations, the posted worker must receive at least the minimum salary in the host country, but pay all his or her social security contributions in the sending country. The new EU law will enter force in mid-2020. It will not apply to international freight drivers immediately; that will happen when the EU's Mobility Package enters force. Negotiations

[11] It grants parents 500 złoty (around 120 euros) per month per child from the second onwards.

between member states are still underway; among other things, they concern the time after which drivers will be considered posted workers and requirements for specific types of transport, including so-called cabotage.

The directive was opposed by Poland and Hungary. Other Central European countries were sceptical, too. In October 2018, the Polish and Hungarian governments announced that they will complain about the directive to the CJEU. In a statement, the Hungarian government warned that the directive will "not help protect posted workers, but (...) is an instrument of protectionism". Poland expressed a similar stance (EURACTIV, 2018). Indeed, the new provisions will primarily affect countries in Central Europe. Poland posts the most workers in the EU – over 500,000 in 2016, in sectors such as construction, industry, agriculture and services (for example, at care facilities and in the financial sector) (Polityka Insight, 2018). The changes to the directive will significantly increase the costs of Polish and other Central European companies that post workers abroad, making them less competitive on the western European market. Poland is also the EU leader on the international freight market (Frączyk, 2017).

Meanwhile, the Commission has yet to issue a decision on the enforcement of rules on the minimum wage by France and Germany. The Commission launched proceedings against Germany in May 2015, extending them to France in June 2016. In the Commission's opinion, France and Germany's enforcement of rules on the minimum wage for all transport services on their territories disproportionately restricts the EU principle of the free movement of goods and services. In its statement, the Commission unequivocally stressed that it is not questioning the idea of the minimum wage, just its potentially protectionist character (European Commission, 2016). Yet over three years since addressing the member states, the Commission has not moved on to the next stage of proceedings, beyond sending Germany and France formal notice based on Article 258 of the TFEU.

## The biocide market

Biocides are compounds (usually synthetic) for combating harmful organisms in agriculture, forestry and storage. The basic legal act regulating the introduction of biocides in the EU is Regulation 528/2012[12]. In place since 1 September 2013, it repeats and develops solutions used in an earlier regulation while tightening the requirements for documents submitted when applying to register a biocidal product. The basic problem created by the EU's regulation of biocides is this: despite knowledge in the sector on how most active substances work, the EU regulation requires that – once it enters force – every active substance must be tested again, as it were "from scratch". This is necessary to introduce the substance on the market. The tests are broad in scope and detached from how an active substance is used; regardless of where it will be used (and regardless of whether and to what extent it has been tested so far), its impact on the full spectrum of organisms and physical and biochemical processes must be re-examined. As a result, preparing a so-called registration dossier is expensive, involving research, validating new research methods and risk assessment. Representatives of biocide producers say it costs around EUR 6 m for the research needed to register a single active substance. Regulation 528/2012 also prohibits repeating tests on vertebrates. If a producer has received permission for a biocide product and conducted research on vertebrates as part of the procedure, this research cannot be repeated. The only solution is to ask producers who have already conducted research of this kind to share their results and for these to be used to obtain permission to start selling the active substance. Market practice shows that companies with exclusive possession of research involving the active substance tend to place obstacles in competitors' way to prevent them from benefiting from their results.

The current regulation of the biocide market significantly disrupts competition. Firstly, registering a product is expensive; few companies (especially smaller producers) can spend EUR 6 m on testing a single substance. Usually, this is done by big chemical companies, such as German BASF and Bayer. These companies act to maximise their

[12] Regulation No 528/2012 of the European Parliament and the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, Official Journal of the European Union, 27.6.2012, L 167/1.

own profits, giving themselves a quasi-monopoly over the sale of an active substance. They create obstacles preventing other companies from using their research and refuse to give active substances they have produced themselves to other companies (or offer to sell them under non-market conditions).

These market distortions hit Polish biocide producers particularly hard. For historical and organisational reasons, they are not usually among the biggest players on the market. In many cases, production plants were founded on the basis of local chemical plants, such as Organika-Azot S.A. in Jaworzno or the former Firma Chemiczna Dwory S.A. in Oświęcim. Leaving their old workplaces, former employees used their know-how and founded their own companies. While some of these companies generate significant revenue, few Polish biocide producers have grown beyond the SME stage. Almost none have enough capital to test and register a series of new active substances or compete freely with companies like BASF or Bayer.

It is therefore possible that some EU provisions regulating the biocide market do not actually seek to ensure that the products are safe. Instead, they may be a protectionist instrument for maintaining the high market share of dominant companies, mostly from "old" member states.

## The Danish RUT system

Denmark has an electronic register of foreign contractors known as RUT. Foreign companies active on Danish territory must notify it and register their employees working in Denmark. According to the Danish administration, this is needed for the Danish authorities to oversee foreign companies[13]. According to some MEPs, "making some of the data in the RUT register public enables Danish trade unions to seek out foreign companies, often with the aim of forcing them to join collective agreements, as well as facilitating Danish companies' unfair fight against foreign competition". Danish law also requires that Danish contractors be presented with proof of a company's RUT registration before signing a contract. Failure to register is punishable with severe financial penalties (DKK 10,000 each time).

In response to accusations[14] that how RUT operates may violate the rules of the EU internal market, the European Commission said in September 2013 that it is "fully aware" of them. It has "initiated an informal dialogue with the Danish authorities to better understand the nature and scope of the RUT system" and "establish whether the system (or any of its elements) constitutes a restriction to the freedom to provide services" in the EU, it stated[15]. In October 2014, the Commission repeated that "some of the obligations under the RUT system" may apply even to foreign service providers who do not post workers to Denmark, "which would need to be considered in light of the relevant case-law". Discussions with the Danish authorities are underway "to quickly find a solution", it added[16].

Nevertheless, the Commission did not launch proceedings for the infringement of EU law against Denmark. The RUT system does not seem to have been modified in any significant way – failure to register can still lead to a fine (KPMG, 2017) and the obligation to register does not seem to be limited to entrepreneurs who perform services through employees located on Danish territory.

[13] See https://workplacedenmark.dk/pl-pl/about-workplacedenmark [accessed: 16.11.2018]. The information on the website comes from the Danish Working Environment Authority, the Ministry of Labour, the Tax Office, the Employment and Recruitment Agency and the Labour Inspectorate, which run the website.

[14] In July 2013, Polish MEP Danuta Jazłowiecka submitted an interpellation concerning RUT and, in August 2014, Polish Minister of the Economy Janusz Piechociński sent a letter on the Danish system to the Commission. See http://www.europarl. europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-008679+0+DOC+XML+V0//EN&language=sl

[16] Answer by commissioner Michel Barnier to a question by Polish MEP Danuta Jazłowiecka, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-008679&language=SL

[16] Answer by commissioner Michel Barnier to a question by Danish MEP Ole Christensen, http://www.europarl.europa.eu/doceo/document/P-8-2014-006801-ASW_BG.html?redirect [accessed: 16.11.2018].

[17] See https://indberet.virk.dk/myndigheder/stat/ERST/Register_of_Foreign_Service_Providers_RUT#tab2 [accessed: 16.11.2018].

## Summary

There are many forms of protectionism. Protectionist measures are most often used by states, but sometimes it can be fostered by the actions of supranational organisations such as the European Union. The EU's actions fostering protectionism can be directed "outwards" (tariffs for the EU's trade partners), but also "inwards", damaging the internal market. The EU may foster protectionism when its bodies are more "lenient" concerning protectionist measures used by particular member states or groups of countries (including "old" and "new" member states). Examples of various forms of behaviour by EU bodies fostering protectionism were outlined in Chapter 1.3. The quantitative analysis in this report shows that not only member states use protectionist measures, but also that – in certain areas of its activity – the European Commission may foster protectionism. In cases linked to protectionism, certain member states or groups of them appear to be treated with more leniency than other countries or groups. This applies especially to big "old" member states. The data on Germany is especially interested. Although it violates it violates EU law in cases concerning the internal market often, if not the most often among member states, the Commission's proceedings against the country last the longest. The Commission often uses "delaying" measures in these cases against Berlin, too. Even though German grants its companies the highest subsidies (in terms of their total value)[18], the Commission practically never questions them in terms of rules on public aid. Moreover, when preparing impact assessments of EU regulations, officials in Brussels "mention" their impact on Germany the most often.

At the end of 2017, the European Commission conducted the most proceedings for the infringement of EU law "concerning the internal market" against "old" member states like Spain, Germany and Italy. For Commission proceedings for the infringement of EU law in cases concerning "systemic" infringements of the internal market, the largest number are conducted against Germany. "New" member states appear to win against the Commission at the CJEU more often, but are less "keen" to complain about the Commission's decisions to the CJEU. The best benchmark of the Commission's possible "lenience" towards individual member states in cases involving the infringement of EU law is not the number of proceedings conducted, but rather the length of specific stages in the Commission's proceedings and how often the Commission uses "delaying" measures towards individual countries. The Commission acts with the most "delay" towards Germany. Over the past decade, in cases against Germany for the infringement of EU law, the time between the proceedings' launch by the Commission and their next stage or termination was on average almost 50 days longer than in cases against the next country on the list, Spain. The Commission uses "delaying" measures in cases involving "old" member states (especially Germany) more often in those involving "new" ones.

Since 2005, after the EU's big eastern enlargement, "old" member states have provided around nine times more in public aid (EUR 65 bn per year on average) than "new" members (EUR 7 bn). Yet the Commission's DG Competition questions aid granted by "old" member states much more rarely than that provided by "new" members. Big countries like Germany and France are particularly privileged. For unclear reasons, the Commission only uses the exceptional legal instrument of suspending aid towards "new" member states.

In recent years, the Commission's anti-trust policy has focused on protecting the interests of EU consumers, rather than dismantling private barriers to entering the market – i.e. preventing protectionism (Articles 102 and 106 of the TFEU). This trend is intensifying. When the Commission decides to take action in cases involving abuse of a company's dominant position, it appears to be slightly more lenient towards "old" member states.

Analysis of the impact assessments of EU regulations prepared by the European Commission suggests that certain "old" member states (Germany, France, the Netherlands) are taken into account more often by the

[18] In terms of the ratio to GDP, in 2016 Germany also granted the highest subsidies in relation to GDP among the "big six" countries (1.31%, compared to 1.08% in Poland, which came second, 0.65% in France, which came third).

Commission. Even when the size of member states' populations is accounted for, "old" member states still occupy the first nine places.

This report does not presume why the Commission may be favouring certain countries or groups of countries. Firstly, member states' situation is not analogous; the size of their economies and their populations differs significantly. Where the size of the economy matters for the comparisons made (e.g. in anti-trust cases: a bigger economy means more companies), differences in the size of GDP were taken into account. In terms of the number of cases concerning the infringement of EU law, the size of a country's economy or population should not matter much; regardless of them, ensuring that a country's laws comply with EU requirements on the internal market seems to be a comparable challenge for all member states. Secondly, it is highly likely that certain member states (especially "old" ones) simply have a better legal or lobbying representation in cases before the Commission or at the legislative stage, which makes it easier for them to obtain a lenient response. For example, variation in the number of "mentions" of individual countries in the Commission's impact assessments prepared may result from the greater activeness of business organisations or NGOs from countries such as Germany and the Netherlands at the EU legislative stage.

In any case, this report aims to stimulate discussion on economic protectionism in the EU and the European Commission's role in combating it, rather than present radical theses or propose ready solutions.

# List of charts, tables and diagrams

## List of charts

## List of tables



## List of diagrams

# Bibliography


Carpenter, D., Moss, D.A. (2014), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it*, Cambridge University Press, Cambridge.

Chalmers, D., Davies, G., Monti, G. (2014), *European Union Law*, Cambridge University Press, Cambridge.

Dyrekcja ds. Konkurencji (2018), *Data and policy analysis*, http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html [accessed: 16.11.2018].

Encyclopaedia Britannica (2018), *Protectionism*, https://www.britannica.com/topic/protectionism [accessed: 16.11.2018].

Euler Hermes (2018), *Protectionism*, http://www.eulerhermes.fr/mediacenter/actualites/Lists/NewsDocuments/protectionism-may-not-besurging-overall-but-new-barriers-are-rising.pdf [accessed: 16.11.2018].

EURACTIV (2018), *Hungary, Poland challenge EU's posted workers reform in court*, https://www.euractiv.com/section/central-europe/news/hungary-poland-challenge-eus-posted-workersreform-in-court/ [accessed: 16.11.2018].

Europejski Bank Centralny (2018), *Press conference*, https://www.ecb.europa.eu/press/pressconf/2018/html/ecb.is180726.en.html [accessed: 16.11.2018].

Frączyk, J. (2017), *Polska wciąż królem transportu. Nie wystraszyły nas niemieckie i francuskie regulacje*, https://www.money.pl/gospodarka/unia-europejska/wiadomosci/artykul/transport-drogowyplaca-minimalna-komisja,208,0,2327248.html [accessed: 16.11.2018].

Komisja Europejska (2016), *Transport: Commission takes legal action against the systematic application of the French and German minimum wage legislation to the transport sector*, http://europa.eu/rapid/press-release_IP-16-2101_en.htm [accessed: 16.11.2018].

Komisja Europejska (2017a), *Final Impact Assessment (IA) reports 2016 – Impact Assessment*, http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2016_en.htm [accessed: 16.11.2018].

Komisja Europejska (2017b), *Sprawozdanie: wzrost protekcjonizmu, UE skutecznie przeciwdziała barierom*, http://europa.eu/rapid/press-release_IP-17-1765_pl.pdf [accessed: 16.11.2018].

Komisja Europejska (2017c), *State Aid Scoreboard 2017*, http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html [accessed: 16.11.2018].

Komisja Europejska (2018a), *Oceny skutków*, https://ec.europa.eu/info/law/law-makingprocess/ planning-and-proposing-law/impact-assessments_pl [accessed: 16.11.2018].

Komisja Europejska (2018b), *Rada ds. Kontroli Regulacyjnej*, https://ec.europa.eu/info/law/lawmaking-process/regulatory-scrutiny-board_pl [accessed: 16.11.2018].

Komisja Europejska (2018c), *Regulatory Scrutiny Board Annual Report 2017*, https://ec.europa.eu/info/publications/regulatory-scrutiny-board-annual-report-2017_en [accessed: 16.11.2018].

Komisja Europejska (2018d), *Search competition cases*, http://ec.europa.eu/competition/elojade/isef/ [accessed: 16.11.2018].

Komisja Europejska (2018e), *Single Market Scoreboard*, http://ec.europa.eu/internal_market/scoreboard/_docs/2018/infringements/2018-scoreboardinfringements_en.pdf [accessed: 16.11.2018].

Komisja Europejska (2018f), *Sprawozdanie Komisji dla Parlamentu Europejskiego i Rady w sprawie barier w handlu i inwestycjach 1 stycznia 2017 r. – 31 grudnia 2017 r.*, http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156998.pdf [accessed: 16.11.2018].

KPMG (2017), *Minimum wage requirements within Europe in the context of posting of workers*, https://assets.kpmg.com/content/dam/kpmg/ro/pdf/minimum-wage-survey-2017.pdf [accessed: 16.11.2018].

OECD (2018), *Interim Economic Outlook*, https://www.oecd.org/eco/outlook/High-uncertaintyweighing-on-global-growth-OECD-interim-economic-outlook-handout-20-September-2018.pdf [accessed: 16.11.2018].

PAP (2014), *Europa dostanie ropę z USA, ale tylko w pakiecie z amerykańską żywnością GMO*, https://www.polskieradio.pl/42/273/Artykul/1245047,Europa-dostanie-rope-z-USA-ale-tylko-w-pakieciez-amerykanska-zywnoscia-GMO [accessed: 16.11.2018].

Parlament Europejski (2018), *Free movement of goods within the EU single market*, http://www.europarl.europa.eu/EPRS/EPRS_BRIE_615638_Free_movement_of_goods_within_the_EU_single_market-Final.pdf [accessed: 16.11.2018].

Polityka Insight (2018), *Zmiany w delegowaniu utrudnią życie firmom.*
*Sekretariat Generalny Komisji Europejskiej, Infringement decisions (database)*, http://ec.europa.eu/atwork/applying-eu-law/infringementsproceedings/infringement_decisions/?lang_code=en [accessed: 16.11.2018].

Semeniuk, P. (2018), *Transgraniczne i międzynarodowe aspekty stosowania prawa konkurencji przez prezesa UOKiK*, http://www.pomysloprzyszlosci.org/att/pdf/UOKiK_02_2018.pdf [accessed: 16.11.2018].

SGH (2016), *Sprawozdanie z III Debaty Podatkowej SGH, Podatek handlowy,* http://kolegia.sgh.waw.pl/pl/KZiF/struktura/IF/cykl_debat_podatkowych/Documents/III_Debata_Podatkowa.pdf [accessed: 16.11.2018].

Toshkov, D. (2016), *Compliance and enforcement of EU law: Who wins, who loses, and who settles*, http://wp.peio.me/wp-content/uploads/PEIO9/102_80_1443441937982_Toshkov28092015.pdf [accessed: 16.11.2018].

WTO (2015), *Understanding the WTO*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf [accessed: 16.11.2018].

## The Polish Economic Institute

The Polish Economic Institute is a public economic think-tank dating back to 1928. Its research spans trade, energy and the digital economy, with strategic analysis on key areas of social and public life in Poland. The Institute provides analysis and expertise for the implementation of the Strategy for Responsible Development and helps popularise Polish economic and social research in the country and abroad.

Polish
Economic
Institute