

# **‘GIVING EFFECT TO POLICY’**

**A LEGAL AND EMPIRICAL INVESTIGATION OF THE  
IMPLEMENTATION OF EUROPEAN FOOD QUALITY SCHEMES IN  
POLAND (PDO, PGI, TSG)**

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## **Abstract**

‘Giving effect to policy’ a legal and empirical investigation of the implementation of European food quality schemes in Poland (PDO, PGI, TSG).

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Legal scholarship regarding the implementation of European Union law recognises the gap between policy, enacted law and its application. Writers typically focus on the role of the European Court of Justice, the role of the European Commission, as well as the obligations of Member States under European law stemming from the Treaties (and in a broader context, from the association with the European Union).

Political science literature offers a different explanation of the same gap between policy and implementation, highlighting the presence of extra-legal factors obstructing the occurrence of desired social changes. The literature has identified a number of variables which determine implementation outcomes, and suggested contextual conditions which may be conducive to ‘giving effect to policy’.

This thesis explores tensions arising from legal concepts of direct applicability and compliance, and political science concepts of implementation and practical effectiveness with reference to voluntary food quality schemes in Poland, in particular the laws of Protected Designations of Origin (PDO), Protected Geographical Indications (PGI) and Traditional Specialties Guaranteed (TSG).

The core of the research is an empirical study, using semi-structured interviews with actors at all levels of implementation of these laws in Poland: at the ministerial, regional and local level, including officials and producer consortia. An interview protocol derived from the theories of implementation in political science and law investigates the implementation chain in its entirety, from policy formation to the legislative act, and finishing with the ‘recipients’ themselves, the targets of legal intervention.

The results show that a lack of effectiveness does not mean non-compliance (in law) of an EU Member State. Member States might have implemented the Community legislation fully by creating a regulatory environment indispensable to its success. Yet, for implementation to be effective, enforcement agents must themselves be committed to the behaviour required by the law, circumstances external to the implementing agency should not impose critical constraints, and the recipients must be persuaded of the benefits of participating in voluntary schemes.

These findings appear to support the political science theory of perfect implementation and effectiveness of law, and highlight gaps in enforcement mechanisms available to the Union Institutions. For example, the European Court of Justice acts against non-compliance on the Commission’s motion, whereas the Commission often relies on claims lodged by Member States or other entitled actors, rather than on its own investigation.

The findings also confirm that political science models designed for international or national law remain valid for European Union law and can be applied in its specific context.

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*Per aspera ad astra*

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## Table of content

Copyright declaration.....	2
Abstract.....	3
<b>‘Giving effect to policy’ a legal and empirical investigation of the implementation of European food quality schemes in Poland (PDO, PGI, TSG).</b>	<b>3</b>
<b>Ewa Hartman .....</b>	<b>3</b>
<b>Acknowledgement: .....</b>	<b>4</b>
<b><i>Per aspera ad astra</i> .....</b>	<b>4</b>
<b>Introduction.....</b>	<b>8</b>
<b>Chapter One .....</b>	<b>16</b>
<b>1. The effectiveness of European Union law .....</b>	<b>16</b>
1.1. coercive measures.....	19
1.2. supremacy .....	20
1.3. direct effect .....	22
1.4. the principle of sincere cooperation / the principle of loyalty .....	25
1.5. additional prerogatives of the European Court of Justice .....	28
1.5.1. the principles of equivalence and effectiveness .....	29
1.6. the role of the European Commission .....	33
1.6.1. legislative power .....	34
1.6.2. comitology .....	35
1.6.3. executive power .....	39
1.6.4. quasi-judicial power .....	43
1.6.5. external power .....	44
1.7. soft measures.....	45
1.8. responsibilities of a Member State with regard to the implementation of EU law .....	45
1.9. responsibilities of the New Member States – 2004 enlargement.....	54
1.10. summary.....	58
<b>Chapter Two .....</b>	<b>60</b>
<b>The relationship between effectiveness of policy and effectiveness of law .....</b>	<b>60</b>
<b>1. The effectiveness of policy and the effectiveness of law .....</b>	<b>60</b>
1.2. instrumentalism and jurisprudence.....	64
1.3. the reconciliation of law and policy .....	70
<b>2. Implementation .....</b>	<b>71</b>
<b>3. Evaluation .....</b>	<b>80</b>
<b>4. Top-down and bottom-up approach to policy implementation .....</b>	<b>81</b>
4.1. the top-down implementation approach .....	81

4.2. the bottom-up implementation approach .....	83
Chapter Three .....	89
Methodology .....	89
1. Research questions .....	89
2. The fieldwork research approach .....	89
3. From law to political programme .....	91
3.1. studying and researching law .....	91
3.2. empiricism in law .....	93
3.3. studying effectiveness .....	96
3.4. top-down and bottom-up implementation approach in research .....	97
3.5. implementation of legislation .....	100
4. Interviews and transcription .....	101
4.1. interviewing sample .....	102
5. Limitations .....	103
6. Pilot study .....	104
7. Fieldwork .....	106
8. Case study .....	110
Chapter Four .....	119
Case study: Implementation of European food quality schemes in Poland .....	119
1. Law which is to be implemented – EU food quality regulations.....	120
1.1. a dispute over Geographical Indications before the WTO.....	129
1.2. Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed – the EU level.....	132
1.3. the practical operation of food quality schemes in Member States with strong food quality traditions.....	142
2. The national legal environment .....	146
2.1. Poland's pathway to the EU membership - the agricultural perspective	146
2.2. pre-existing legal solutions and changes that followed the introduction of the schemes .....	149
2.3. national food quality schemes .....	161
2.3.1. the List of Traditional Products.....	161
2.3.2. 'Quality Tradition' .....	162
2.3.3. 'Meet Good Food' .....	164
3. Implementing agencies and their tasks .....	167
4. Functioning of the EU food quality schemes in Poland – the post-introduction stage .....	175
4.1. knowledge about the schemes gained by participants .....	175
4.2. motivations of participants .....	181

4.4. availability of advice and financial support .....	184
4.4. participation in the scheme .....	191
4.4.1. producer's group .....	191
4.4.2. specification .....	195
4.4.3. inspections .....	201
4.4.4. enforcement of the new law .....	203
4.4.5. coexistence of various food quality schemes .....	205
4.4.6. the European Commission .....	206
5. Evaluation .....	208
Chapter Five .....	213
Analysis and Conclusions .....	213
1. Effectiveness in law is impeded by: .....	216
1.1. lack of, or misleading official information .....	216
1.2. no systemic post-implementation evaluation in EU law .....	218
1.3. complexity of legislation and overlap with related national law .....	220
2. Effectiveness from the political science perspective is impeded by: .....	222
2.1. lack of mechanisms linking desired outcomes/policy goals and regulative measures .....	222
2.2. behaviour of the Commission officials .....	224
2.3. behaviour of national implementing and enforcement agencies .....	225
2.4. obstruction by the national law .....	228
2.5. malfunctioning benefits .....	229
2.6. final recipients .....	230
3. Recommendations .....	233
Bibliography .....	238

## Introduction

For the European Union (EU), proper implementation and execution of its laws and policies are paramount. The Member States' compliance with the *acquis communautaire*<sup>1</sup> as well as compliance with various EU policies is the only way to guarantee the efficient functioning of the Union and the achievement of the Treaties' objectives. To quote Guy Peters, "the capacity to implement policy is one of the central defining features of any political system, and if in the future the EU is to be a functioning government then implementation becomes a crucial question".<sup>2</sup>

With regard to international law, the acceptance of the jurisdiction of the International Court of Justice (ICJ) depends, in principle, on the States' consent.<sup>3</sup> However, the European Union Member States cannot opt out of the jurisdiction of the Court of Justice of the European Union (ECJ).<sup>4</sup> The European Commission can bring infraction proceedings against defaulting Member States before the ECJ, which can impose pecuniary sanctions on Member States which persistently fail to comply with a judgement against them. And yet, the number of claims lodged against Member States demonstrates non-compliance with Union law: thus the deflection of its policy goals still remains a contentious issue.

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<sup>1</sup> The *acquis communautaire* is the body of Union law built up over the years. P. Craig and G. De Burca, *EU Law Text, cases and Materials* (OUP, Oxford 2008) 16

<sup>2</sup> G. Peters, 'The Commission and implementation in the European Union: Is there an implementation deficit and why?' 200, in: N. Nugent (ed.) *At the heart of the Union: Studies of the European Commission* (Macmillan, Basingstoke 1997)

<sup>3</sup> Article 36 of the Statute of the International Court of Justice available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> URL correct as of 1 May 2012

<sup>4</sup> The Court of Justice of the European Union, previously the European Court of Justice, functions under the new name since the entry into force of the Lisbon Treaty. Nevertheless the researcher decided to use the old acronym, i.e. ECJ as it is still widely used in the literature on the subject matter.



It is intended, therefore, to present a case study of the implementation and monitoring processes of Union law and policy in order to contribute to the understanding of conditions which determine the effectiveness at the Member State level.

This case study is concerned with the political and legal implementation of the EU's voluntary legal systems of food quality schemes<sup>5</sup> in Poland. At its core, it approaches this specific legal programme from a 'service delivery' point of view, which allows the researcher not only to investigate the legal and political variables determining the outcomes of the implementation, but also to trace other independent variables determining implementation feasibility. Additionally, the project aims to bridge the gap between legal and political studies of implementation, the importance of which continues to grow in the highly complicated, multi-dimensional context of the Union.

The case study section of the thesis, is preceded by a robust theoretical introduction which discusses in detail legal and political aspects of effectiveness. The theories of implementation in political science and law underpin the empirical research, and are used to develop an interview protocol to investigate the implementation chain of food quality regulations in Poland in its entirety, from policy formation to the legislative act, and finishing with the very 'recipients', the targets of legal intervention. Discussion of the legal aspect of effectiveness revolves around mechanisms available under Union law securing the compliance of Member States and guaranteeing the successful absorption of the law. The political aspect of effectiveness presents the implementation process through the prism of the political sciences.

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<sup>5</sup> The voluntary character of the law on Geographical Indications is of paramount importance for this thesis. A voluntary legal system creates rights and obligations for its addressees only after they make an intentional decision to embark upon the system. An individual needs to make a legal decision on the basis of the understanding of the particular situation. This stands in opposition to the vast majority of legal systems, which are not voluntary but they create rights and obligations for their subject without or very often against their consent. For example, within the system of civil law, a human being acquires a number of rights from the moment of birth, or even, in exceptional circumstances, can acquire some rights as a *nasciturus*. In many legal systems a *nasciturus* can become an heir under the condition he is born alive. Under the criminal law certain offences or crimes trigger the obligation on the part of law executing institutions to start an investigation on their own motion without the need to obtain consent from the victim of a crime.

This approach has been adopted in response to two factors: a critical review of the existing academic work in the area of food quality schemes and a review of the implementation literature to be found in the relevant legal and political scholarship.

A study of the academic enquiry into the food quality regulations has permitted the identification of legal, political, economic and even marketing perspectives on the subject as well as allowing the contextualisation of the European Union political interests in introducing this scheme.

As far as the legal underpinnings of the food quality system are concerned, this system has been established within the framework of the Common Agricultural Policy (CAP), although one of the schemes is considered part of Intellectual Property (IP) by enacting two Council Regulations: Regulation (EC) No 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, currently Regulation (EC) No 510/2006 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, and (EC) No 2082/92 on Certificates of Specific Character for Agricultural Products and Foodstuffs – currently Regulation (EC) No 509/2006 on Traditional Specialities Guaranteed. More importantly, however, the system is rooted within the broader regulatory framework of the CAP. In consequence, the introduction of this scheme to the whole body of the *aquis communautaire* entails questions about the significance of the food quality system and its effectiveness at the Member State level.

Given the overall complexity of EU law implementation and the difficulties encountered by Member States in adopting the *aquis* in general, the case of the voluntary food quality system constitutes a unique challenge for its implementers. The system presents such difficulties that it cannot simply be imposed on its addressees: the Member State's implementing agencies are dependent on willingness and capacity of individual participants to mobilise the law. The participants and not a Member State will ultimately render the system effective in practice.

For states like Poland, the complexity of such legal issues is increased, owing to its recent accession to the EU in 2004. New Member States are required to introduce the whole body of the Union legislation into their legal orders and render it effective at the moment of acquiring full membership. Moreover, the lack of previous governmental experience in the management of voluntary legal systems in Poland intensifies the problem. Therefore, an in-depth analysis of the processes governing the practical implementation of the Union's voluntary legal regime has the potential to contribute to the academic body of knowledge exploring the implementation and effectiveness of Union law.

Once again the focus of this project is the practical effectiveness of Union law with specific regard to the EU food quality regulations. A broad deliberation on the implementation of the law would go beyond the scope of this thesis. Union law understands implementation in conjunction with transposition, application and compliance as manifestations of the fulfilment of Member States' obligations which stem from the Treaties. The implementation is also discussed with reference to EU institutions, in particular their competence in utilising coercive measures, as well as general doctrines and principles of Union law. A political approach to implementation focuses on the policy, together with various legal as well as extra-legal variables, which influence the outcomes of the implementation. As a result, a part of the literature review will be devoted to the process of policy-making and enforcement of Union law followed by an explanation of the specificity of the CAP and the role it plays in the food quality system within the framework of the agricultural policy.

The implementation literature pivots on two major areas of academic enquiry - law and policy. The division between these disciplines has been caused by the simple fact that the implementation of a law does not necessarily imply the implementation of a policy; the law can be duly implemented while the policy built upon legal regulations might fail to achieve its objectives. The implementation of a policy goes beyond the scope of legislative parliamentary work and does not end with enacting or transposing the legal act. Indeed, the process of law enactment constitutes an inseparable part of the wider process

of policy implementation and neither policy nor law implementation should be neglected. And yet, legal and political enquiries use different tools and different measures of evaluation, which has widened the gap between the two fields.

The theoretical background of the project will be informed by main theories on implementation, namely the top-down and bottom-up hypotheses, and it will consider their applicability to EU law and policy, the multi-level governance structure of the Union in general, and the voluntary legal system in particular. The two insights predominantly concentrate on the internal characteristics of the policies as well as political and administrative infrastructures designated or designed to manage the implementation. Additionally, these theories draw attention to the outcomes and outputs of the implementation by emphasising the differences between the intended and achieved results of the policy.

Within the Union context, the elaboration of the effectiveness of its law is, in a vast majority of cases, inseparable from elaborating on the effectiveness of its policies, as legislation provides legitimisation of the policies built upon it. The author will understand the term ‘policy’ as embracing the two, unless clearly stated otherwise. Whenever the term ‘law’ is used, it will signify legal acts only

The thesis is structured as follows:

**Chapter One** in principle focuses on the enforcement of EU law. It discusses enforcement through the prism of competences of the European Commission and the Court of Justice of the European Union, as well as Member States’ responsibilities towards the Union. The chapter also presents development of the fundamental EU law principles such as the principle of supremacy or direct effect. The purpose of the chapter is to provide robust information on the availability of legal means designed to secure the effectiveness of EU law. The chapter also prepares the ground for further discussion on how these mechanisms respond to current challenges faced by the effectiveness of EU law at Member State level.

**Chapter Two** discusses the concept of effectiveness as seen by legal and political scholarship. This chapter also presents in detail the notion of implementation and implementation research methods as developed by political sciences. Information provided in this chapter also constitutes a basis for further discussion on research methodology applied to this project, namely on the top-down and bottom-up implementation approaches.

**Chapter Three** presents and justifies the design of research methodology, as well as its limitations. The chapter also presents the conduct and results of a pilot study.

Since the research project is the case study of legal implementation *and* current use – the effectiveness - of the food quality schemes in Poland therefore the interview protocol has been designed in such a way as to cover extra-legal factors which may influence the functioning of the schemes. In order to gather the necessary data the researcher based the study on two major sources: document analysis, for example: legal acts, content of official websites, and so forth; and semi-structured interviews. Such interviews owing to their exploratory character allow not only an understanding of the process of use regulations in but also the uncovering of possible tensions or constraints related to their functioning on the ground.

The whole case study, including empirical data, will be presented along with several points which constitute a list of elements that are important to the process of giving effect to the law. They were created by the researcher who has relied on the top-down, and bottom-up implementation methods and various models of perfect implementation or effective legislation widely described in Chapter Two. That list also represents a ladder on which subsequent implementation phases sit. For example, the top-down implementation approach advises the user to start any evaluation of the implementation process from a legal act which underpins a given programme. Then the logical corollary ought to be an investigation of a legal environment which welcomes such a legal act for the purpose of tracing obstacles or inconsistencies at the execution level.

The bottom-up approach on the other hand places a strong emphasis on final recipients and the public as well as private actors who influence the implementation process. Hence, in this case, the presented ladder starts from the food quality regulation and ends on agricultural producers or processors – the ultimate addressees of the schemes.

These elements are as follows:

1. The law which is to be implemented – EU food quality regulations;
  - 1.1. a dispute over Geographical Indications before the WTO;
  - 1.2. Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed – the EU level;
  - 1.3. the practical operation of food quality schemes in Member States with strong food quality traditions.
2. The national legal environment:
  - 2.1. Poland's pathway to EU membership – agricultural perspective;
  - 2.2. pre-existing legal solutions and changes that followed the introduction of the schemes;
  - 2.3. national food quality schemes.
    - 2.3.1. the List of Traditional Products;
    - 2.3.2. 'Quality Tradition';
    - 2.3.3. 'Meet Good Food'.
3. Implementing agencies and their tasks;
4. Functioning of the EU food quality schemes in Poland – the post-introduction stage:
  - 4.1. knowledge about the schemes gained by participants;
  - 4.2. motivations of participants;
  - 4.3. availability of advice and financial support;
  - 4.4. participation in the scheme:
    - 4.4.1. producers' groups;
    - 4.4.2. specification;
    - 4.4.3. inspections;
    - 4.4.4. enforcement;
    - 4.4.5. coexistence of food quality schemes;

4.4.6. the European Commission.

5. Evaluation of effectiveness

**Chapter Four** comprises the case study of Poland. The case study, will be presented along the points mentioned above which, guides the reader through the top-down and bottom-up implementation approaches and incorporates both sets of data into the study: document-based data and data stemming from the interviews.

**Chapter Five** is the concluding chapter in which the empirical study will be subjected to analysis aimed at highlighting both the specific findings and how they relate to or add to the theories, and also what the policy implications and recommendations are.

## **Chapter One**

The effectiveness of law determines its existence. The enactment of law that does not actually function resembles a linguistic exercise rather than an act aimed at introducing social changes. In this chapter, attention will be given to effectiveness of the law of the European Union (EU); various doctrines, measures, and prerogatives of the Union's Institutions, the purpose of which is the Union law effectiveness. This section will discuss, among other things, the development of the jurisdiction of the European Court of Justice, and the practice of, *inter alia*, the European Commission as the Guardian of the Treaties. The purpose of that is not only to present various mechanisms under which the law of the European Union can be successfully applied and obeyed, but also to indicate the spheres in which the EU law functions but its effectuation remains beyond the reach of doctrines or Institutions.

### **1. The effectiveness of European Union law**

For the European Union the question as to whether it has the power to ensure effective compliance with its law by Member States is of paramount importance.

Legal scholarship and political science understand the effectiveness of law/policy in different terms, which has resulted in the emergence of separate research approaches to explain the same phenomenon. The gap between the two ways of analysing and securing the effectiveness of the Union results from both sets of activities being performed by the organisation. On the one hand, the Union enacts legislative acts, and on the other it creates various policies. Both kinds of activities are predominantly driven by the imperative to bring all Member States closer via, amongst other things, harmonisation of their laws and policies.



In less than 50 years integration<sup>6</sup> between Member States has become a reality. The Union has been transformed from an organisation unified merely by common management of the coal and steel production into a major economic and monetary entity, where the ECJ has developed fundamental principles governing the relationship between the Union and its Member States. At the same time the ECJ has harnessed national courts into the process of enforcing EU law.<sup>7</sup> Those substantial foundations and procedural principles constraining Member States procedural autonomy developed by the ECJ judiciary are: the doctrine of direct effect, supremacy, loyalty, and the principles of equivalence and effectiveness.

Needless to say, the effectiveness of any legal system is based on two pillars: the compliance with and the implementation of the legal rules of that system. For the European Union to be effective, the implementation must be ensured in such a way as to achieve the objectives of the Union. Therefore, the general legal framework, against which the required conduct of the Member States and their institutions should be measured, has been established.

In legal writing concerning the implementation of Union law, the main emphasis is put on obligations and the normative effects that the Union system creates, such as the doctrine of direct effect, the doctrine of supremacy or institutional competences vested in the ECJ and the European Commission, or national governments' responsibilities. The analysis of legal and institutional 'facilitators' of law implementation, although very important from the theoretical point of view, seems not to explain aspects of practical implementation of the law in Member States. The implementation viewed through the prism of normative arrangements stemming from the Treaties or the Union judiciary takes on a shape of either a model process in which an oeuvre of Union law provides solutions to conflicts amid actors in the European arena, or a discussion mostly on the transposition of directives. Legal literature does not centre upon the implementation of EU regulations.

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<sup>6</sup> The elaboration on the integration processes through the prism of neo-functionalism or intergovernmentalism goes beyond this thesis.

<sup>7</sup> C. Barnard, *The Substantive Law of the EU* (OUP, Oxford 2004) 13-15

The reason for less interest in regulations on the part of researchers might be their direct applicability, which implies a far less complicated process of implementation, or even the absence of it. It suffices here to say that incorporation of EU regulations into national legal orders forces changes in the existing domestic legislation such as, for example, the enactment of additional legal acts by national authorities.

There are various types of measures which have been developed in order to secure a proper implementation of Union law. In general, these measures have a twofold character: coercive (binding) and soft.

The category of coercive measures encompasses the following:

1. requirements to deliver comprehensive information on implementation measures undertaken by a Member State on its territory;
2. individual complaints by European citizens to directly inform the Commission on infringements of the EU order by national administrations;<sup>8</sup>
3. on-the-spot controls and inspections carried out by authorised agents;
4. introduction of detailed procedural rules in specific sectors, for example the Union Customs Code; and finally
5. the Commission's substitution in the place of national public administration and its direct exercise of implementation powers.<sup>9</sup>

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<sup>8</sup> R. Bieber and M. Vaerini, 'Implementation and Compliance: Stimulus for New Governance Structures in the Accession Countries' 391 in: G.A. Bremann and K. Pistor, (eds.) *Law and Governance in an Enlarged European Union*. (Hart Publishing, Oxford 2004)

<sup>9</sup> European Parliament and Council Directive 2001/95/EC of 3 December 2001 on general product safety [2002] OJ L11/4, Article 13 'If the Commission becomes aware of a serious risk of certain products to health and safety of consumers in various Member States, it may, (...), adopt a decision (...) requiring Member States to take measures from among those listed in Article 8 (1)(b) to (f)...'

All of these measures are additionally strengthened by the fundamental, substantial and procedural constraints placed on Member States and their institutional autonomy, and finally guaranteed by the enforcement procedures laid down in Articles 258 to 260 of the Lisbon Treaty. It is worth emphasising here that the final stage of enforcement proceedings ensures not only the compliance of Member States, but also clarifies the law for the benefit of all Member States and, indeed, of all interested parties.<sup>10</sup>

### **1.1. coercive measures**

The formation of the European Economic Community (EEC) did not in itself determine the relationship between EU law and national law, nor it determined the standing of individuals in the Union legal order. Since these two legal orders are independent in the sense that national law does not derive its validity from Union law and yet there has been a transfer of some sovereign rights from the Member States to the Union,<sup>11</sup> and the Treaties do not expressly state that Union law takes precedence over national law, the ECJ carefully crafted and expanded the fundamental rules governing the relationship between the two.<sup>12</sup>

The first cardinal foundation upon which the European Union rests is the doctrine of the supremacy of EU law.

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<sup>10</sup> Bieber (n 8) 392 – 394

<sup>11</sup> L. Erades, 'International Law, European Community and Municipal Law of Member States' (1966) 15 *International and Comparative Law Quarterly* 118

<sup>12</sup> T. Hartley, *The foundation of European Community Law, an Introduction to the Constitutional and Administrative Law of the European Community* (OUP, Oxford 2007) 188 – 90. In the case of Poland, the issue of application of Union law into national legal order had been regulated via constitutional provision, before Poland entered the European Union. According to Article 90 (1) read in conjunction with Article 91(3) of Polish Constitution it can be said that Poland not only agreed to limit its decisive autonomy for the European Union but also agreed on direct application and primacy of the Union provisions.

Article 90(1) "The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters."

Article 91(3) "If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of conflict of laws."

## 1.2. supremacy

At its core, the principle provides a comforting guarantee for the Union that in the event of a conflict between EU law and national law, the former should take precedence over the latter.

The supremacy of Union law has long been recognised by the Court of Justice as a constitutional principle of Union law. However, it was not given the green light from the very beginning. The primacy of Union law was announced for the first time in the *Costa v. ENEL* case<sup>13</sup>, where the Court explicitly stated that direct application of regulations would be quite meaningless if a State could unilaterally nullify their effects via legislative measures which could rescind previous Union law. Moreover, the possibility that national legislation could override the law stemming from the Treaty would deprive Union law of its special character and call the Union itself into question.

In this case, the Court delivered a statement of paramount importance, addressing how the Union had initially acquired its authority. The explanation was that the powers of the Union were transferred to it by the Member States, which by so doing permanently limited their sovereign rights. As a result of that transfer, any subsequent unilateral Member State's acts, incompatible with European Union law, cannot prevail.<sup>14</sup>

The Court also recognised that the implementation, by taking place largely at the national level, could have easily been hampered by national procedural autonomy.<sup>15</sup> In the *Simmenthal*<sup>16</sup> case, an attempt had been made to bypass the Member States' procedural autonomy. The Court held that a directly applicable Union rule renders even validly adopted national provisions incompatible with Union law. What is more, the Court addressed national judges as well, and called on them to give full effect to the Union provisions

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<sup>13</sup> Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585

<sup>14</sup> Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585

<sup>15</sup> G. De Burca, 'National procedural Rules and Remedies: The Changing Approach of the Court of Justice' in: J. Lonbay and A. Biondi, (eds.) *Remedies for Breach of EC Law* (John Wiley & Sons Ltd, Chichester 1997) 37

<sup>16</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

“if necessary by refusing on its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await a prior setting aside of such provisions by legislative or other constitutional means.”<sup>17</sup>

The development of the supremacy principle reached its apex in the establishment of state liability in damages and the right to reparation for private damages. Article 4(3) TEU (Ex. Article 10 EC) has proved to be an indispensable tool for developing this principle. The Court used Article 4(3) TEU – the loyalty principle to underpin its reasoning that Member States should create the legal possibility for every organ of the state to nullify the unlawful consequences of a breach of Union law. For example, national courts are obliged to provide individuals with a remedy for an infringement of their rights derived from the EU system.<sup>18</sup>

In the Lisbon Treaty – the Declaration concerning primacy – the Council Legal Service once again emphasised the unyielding character of the doctrine of supremacy by saying that *this principle is inherent to the specific nature of the European Union* even though it has not been mentioned in any of the treaties up to date, and shall not in any way undermine the existence of the doctrine and the existing case law of the Court of Justice.<sup>19</sup>

The doctrine of supremacy acts as a guardian for Union law provisions, which, deprived of the ability to prevail over national legislation, would become unenforceable at Member State level. Moreover, the sole supremacy of EU law transforms its legislative system into a supranational legal entity, which exerts greater power over its signatories than common international organisations.

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<sup>17</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

<sup>18</sup> Case C-8/88 *Federal Republic of Germany v Commission* [1990] ECR I-2321; Joined Cases C-6/90 and C-9/90 *Andrea Francovich and others v Italian Republic* [1991] ECR I-5357; Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith* [1999] ECR I-623

<sup>19</sup> Lisbon Treaty / FINAL ACT (2007/C 306/02). 17. Declaration concerning primacy

### 1.3. direct effect

The doctrine of direct effect is a logical corollary of the supremacy rule, and as stated above, together with supremacy it makes the Union system supranational. The doctrine of direct effect, just like the doctrine of supremacy, had been crafted by the ECJ. The Court recognised that the Union system would be largely ineffective if it were governed by the traditional rules of public international law where the law belongs to an exclusive province of a State and where individuals are in principle deprived of enforceable rights.<sup>20</sup>

The doctrine was formulated in one of the very first preliminary rulings initiated by the preliminary question submitted before the ECJ by a Dutch court. The case *Van Gend and Loos* is one of the most important ECJ judgements, the words of the Court itself will be the most suitable to present the essence of the doctrine:

Independently of the legislation of Member States, Union law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly-defined way upon individuals as well as upon the Member States and the Institutions of the Union.<sup>21</sup> The doctrine of direct effect means that if Union provisions are endowed with certain characteristics, individuals can rely on them in their national courts directly, regardless of their previous implementation into national legal orders. In other words, individuals are able to exercise rights granted to them by Union law in Member States. Consequently, in real cases – usually against state public authorities, following Weiler<sup>22</sup> it is individuals who

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<sup>20</sup> E.F. Hinton, 'Strengthening the Effectiveness of Community law: Direct Effect, Article 5 EC, and the European Court of Justice' (1999) 31 *International Law and Politics* 314

<sup>21</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 585

<sup>22</sup> J.H. Weiler [sic!], 'Community Member States and European Integration: Is the Law Relevant?' (1982) 21 *Journal of Common Market Studies* 46

became the ‘guardians’ of the legal integrity of Union law within Europe.<sup>23</sup> This is why claims lodged by individuals have been recognised as constituting one of the coercive measures used by the Union. Moreover, as a result of direct effect, a breach of Union law has become automatically perceived as a breach of national law.<sup>24</sup>

However, not all Union provisions are directly effective. In fact, it is only those imposing obligations, which are clear and unambiguous; unconditional and have an operation that must not be dependent on further actions taken by the Union or national authorities.<sup>25</sup>

If these conditions are met, the Court may give rise to direct effect, as it is a question of EU law interpretation over which the Court has exclusive jurisdiction.<sup>26</sup> An example of a legal provision that cannot be directly effective is Article 4 TEU, which obliges Member States to undertake all appropriate measures to “facilitate the achievement of the Union’s tasks” and “abstain from any measure which could jeopardise the attainment of the objectives of the Treaty”<sup>27</sup> This Article, to become fully operational, requires either application in conjunction with other, more precise provisions, or the introduction of further legislation.<sup>28</sup>

In subsequent cases, the ECJ stated that regulations<sup>29</sup> can be directly effective<sup>30</sup>, decisions<sup>31</sup> might be directly effective<sup>32</sup> contrary to

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<sup>23</sup> J.H. Weiler, ‘The Transformation of Europe’ (1991) 100 The Yale Law Journal, Symposium: International Law 2413-14

<sup>24</sup> Weiler (n 22) 46

<sup>25</sup> Hartley (n 12) 193

<sup>26</sup> T. Daintith, *Implementing the EC Law in the United Kingdom: Structures for Indirect Rule* (John Wiley & Sons, London 1995) 36

<sup>27</sup> Article 4 of the Consolidated Version of the Treaty on European Union [2008] OJ C 115/13

<sup>28</sup> Hartley (n 12) 194

<sup>29</sup> Regulations, like directives or decisions, are items of secondary legislation. Regulations according to Article 288 of the TFEU Treaty lay down essential rules which are binding in their entirety, to any legal or natural entity, both at the Union and national level, e.g. Member State, institutions and individuals. Regulations are directly applicable, which means that no measures to incorporate them at national level are required.

<sup>30</sup> Case C-253/00 *Antonio Muñoz y Cia SA and Superior Fruticola SA v Furmar Ltd and Redbridge Produce Marketing Ltd* [2002] ECR OJ I-07289; Case 93/71 *Leoneiso v Ministry for Agriculture and Forestry of the Italian Republic* [1972] ECR 287, However in Case C-408/98 *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna, Organismo*

recommendations and opinions<sup>33</sup> which cannot have direct effect because they are not binding,<sup>34</sup> while directives<sup>35</sup> are capable of having direct effect in situations where they are clear, precise and unconditional and only after the deadline for transposition has expired. Then, private individuals can bring an action against a Member State or a public body (vertical direct effect) not, however, against another private individual (horizontal direct effect). If these criteria are not met, directives will not be available to private individuals for presentation before national courts.<sup>36</sup>

And yet, direct effect appears more like '*l'art du possible*'<sup>37</sup>, that is firstly, the provision in question must be capable of being ruled upon, and secondly, national judges acting *bona fide* and with constructive minds are ready and prepared to accept it.<sup>38</sup> Nevertheless, the lack of directly effective provisions hands the enforcement of Union law over to Member States which, endowed with broad decisional discretion, can bypass EU law easily. The ECJ, being aware of national judges' independence, has established certain procedural

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*Comprensoriale n° 24 della Sardegna and Ente Regionale per l'Assistenza Tecnica in Agricoltura (ERSAT)* [2001] ECR I-103 the Court stated that even though the provisions of regulations generally exert immediate effect in the national law of the Member States some of the regulations may not be directly applicable in their entirety. Whenever the full effectiveness of a regulation depends on the Member State bringing into force the measures necessary to comply with that regulation and the Member State failed to adopt the legislature implementing the regulation or some pieces of it, individuals may not be able to rely on that regulation into its entirety before national courts.

<sup>31</sup> Decisions are binding in their entirety but only to a defined category of persons. Decisions can be addressed to one or more Member States as well as to institutions and individuals. Decisions are required for Union legislation where harmonisation and approximation of laws is an issue.

<sup>32</sup> Case 9/70 *Frantz Grad v Finanzamt Traunstein* [1970] ECR 825

<sup>33</sup> Recommendations and opinions are these kinds of acts which are not legally binding, but which provide Member States with the Union's guidelines for future, desired actions.

In terms of their content, taking under consideration an ever-growing size of the *aquis*, it is sometimes difficult to draw very clear distinction between regulations, decisions and directives, but generally regulations and decisions take the form of an administrative and implementing regulation whereas directives lay down policy principles for the Member States to achieve.

<sup>34</sup> Case C-322/88 *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR I-4407

<sup>35</sup> Directives, according to Article 288 of the TFEU, are not binding on all categories of subjects; they are only binding on whom they are addressed to. Directives oblige Member States to achieve certain outcomes but they leave to national authorities the choice of form and methods. For the directive to exert direct effect the transposition to the internal legal order of a Member State is required. If transposition is not finalised within a set period of time, a Member State may face legal consequences such as a negative ruling handed down by the ECJ or a fine.

<sup>36</sup> Hinton (n 20) 318- 320

<sup>37</sup> P. Pescatore quoted in: D. Wincott, 'The Court of Justice and the European Policy' in: J. Richardson, (ed.) *European Union Power and policy-making* (Routledge, London 1996) 172

<sup>38</sup> Wincott (n 37)



constraints on the autonomy of Member States' judiciary, namely, the principles of effectiveness and equivalence, which will be presented in the next part of the thesis.

These shortcomings, jeopardising the effectiveness of EU law, have been addressed by the ECJ by invoking Article 4 TEU on many occasions. The Article has become efficiently exploited in order to ensure Member States' compliance with their legal duties, and more importantly, it has served to underpin the development of the loyalty principle. This principle will be discussed in the next paragraph.

#### **1.4. the principle of sincere cooperation / the principle of loyalty**

In order to enhance the effectiveness of Union law, the ECJ has elevated Article 4 TEU (Article 10 EC) to an almost constitutional principle. The Court adapted Article 4 TEU as an interpretational device which has strengthened the binding force of the law far beyond the limits established by the doctrine of direct effect. The Article has been used in order to define obligations imposed on the Union and Member States in cases of their omission and failure, and where Member States have already breached their obligations or thwarted the enforcement of the Union law. According to the wording of Article 4 TEU, Member States shall take all appropriate measures to ensure the fulfilment of their obligations arising from the Treaty or actions taken by the Union's institutions, as well as facilitate the achievements of the Union's tasks. Moreover, Member States shall abstain from any measures which could jeopardise the attainment of the objectives of the Treaty.

According to Lang, Article 4 TEU can be used by the Court in order to enhance the effectiveness of Union law by imposing obligations on Member States towards, for example, the Commission. A Member State may be obligated to consult the Commission if there is any doubt as to whether a national measure conflicts with Union law. Additionally, a Member State may be expected to provide certain information if the Commission requests it, and

furthermore, a Member State should cooperate with the Commission while implementing Union measures and policies.<sup>39</sup>

Not only domestic courts cherish autonomy in decision-making. In the 1970s, the ECJ enunciated the principle of institutional autonomy of Member States with regard to implementation procedures. The Member States were endowed with full discretion when entrusting national bodies with powers indispensable for fulfilling the obligations conferred on Member States by Union legislation.<sup>40</sup> However, the Court later refined the principle by imposing *procedural constraints* (there are also substantive limits on Member States such as direct effect and supremacy) on the Member States' institutional autonomy in an effort to minimise the negative impact of this prerogative on the effectiveness of implementation. The Member States, while implementing European Union law, are obliged to employ the most effective, legally binding measures without prejudice to Union law. These measures must belong to the same category as those adopted for domestic regulation. Moreover, the Member State cannot evade transposition by invoking special circumstances,<sup>41</sup> or by claiming that non-incorporation would not interfere with the proper functioning of the Union.<sup>42</sup>

Article 4 TEU also served as an underpinning of the principle of Member States' liability in damages for EU law infringement. In *Francovich*<sup>43</sup>, the Court stated that the full effectiveness of Union law may be jeopardised if individuals could not obtain compensation when their rights were infringed by the Member State. Therefore, the Court acknowledged the principle by virtue of which the State's liability for loss and damage caused to individuals is inherent in the system of the Treaty. Moreover, the obligation stems from Article 4 TEU, under which the Member State is required to take all

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<sup>39</sup> T. Lang 'Community Constitutional Law: Article 5 EEC Treaty' (1990) 27 Common Market Law Review 645

<sup>40</sup> Joint Cases C-51/71 to C-54/71 *International Fruit Company NV and Others v Produktshap voor Groenten en Fruit* [1971] ERC 1107

<sup>41</sup> Case 30/72 *Commission of the European Union Communities v Italian Republic* [1973] ECR 161

<sup>42</sup> Case 147/77 *Commission of The European Communities v Italian Republic* [1978] ECR 1307

<sup>43</sup> Joined Cases Case C-6/90 and C-6/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357

appropriate measures to ensure the implementation of Union law, and subsequently, to nullify all unlawful consequences of a breach of the law in question.<sup>44</sup>

All of the doctrines presented above constitute the fundamental condition for the effective functioning of the Union. Without them the Union would remain merely an international organisation completely dependent on the *bona fide* of its Members. These doctrines serve an executive function which supports the implementation of EU law, the application of Union policies and overall compliance. Even though these mechanisms are not completely successful in guaranteeing maximum and constant compliance of the Member States, without them the law of the Treaties and, what is more, secondary legislation would be a dead letter.<sup>45</sup>

The principle of sincere cooperation not only requires Member States to implement the law in question but also to provide adequate administration and execution of EU provisions.<sup>46</sup> And yet, the implementation is not completed when the national or administrative act is enacted in order to comply with the obligation to integrate Union acts into the domestic legal order. The actual application of EU law by the national administration organs determines to a large extent the practical effectiveness of implemented rules.<sup>47</sup> National public administrations<sup>48</sup> are key elements for securing the proper conduct of Union legislation in the place of its final destination. Therefore, the preparation and readiness of the State's public service to introduce EU law into the main body of domestic legal order is of paramount importance.<sup>49</sup> The Union has created the vast majority of its laws and policies in such a way that their application

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<sup>44</sup> Joined Cases Case C-6/90 and C-6/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357

<sup>45</sup> Weilee (n 22) 45

<sup>46</sup> Hinton (n 20) 313

<sup>47</sup> H. Siedentopf, J. Ziller, *Making the European Policies Work. The implementation of Community Legislation in the Member States. Vol. I Comparative Synthesis* (Sage Publications, London 1988) 2

<sup>48</sup> Here understood as government agendas, local governments' departments and domestic courts.

<sup>49</sup> In Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2002] ECR I-6325 the ECJ reminded that the Member State obligation, under the Article 5 (now Article 10 EC), to achieve the results envisaged by a directive are binding on all the authorities of the Member State including the courts.

requires reforms or at least adaptation of institutional changes into the existing States' structures.<sup>50</sup> Where the public administration lacks expertise or regulatory equipment to manage Union legislation, the practical effectiveness of the legislation is in jeopardy.<sup>51</sup>

### **1.5. additional prerogatives of the European Court of Justice**

Judicial review is a power of the court to control the acts of the subject of law for conformity with that law. The ECJ, by virtue of the Treaty, is vested with the power to conduct a judicial review over the acts of the EU institutions. For example, the acts adopted by the Council and the Commission for their conformity with the law of the Treaties and the acts of the Member States for their compliance with the law itself.<sup>52</sup>

A significant proportion of the judicial review is carried out via preliminary rulings. Article 267 TFEU enables national courts to ask for referral to the ECJ concerning the interpretation of the Treaty or validity and interpretation of acts of the Union institutions. The referral must be made during proceedings before a national court and cannot be made after the case has been decided. The ECJ decision does not render the provision of national law invalid. It provides the interpretation of Union law vital to the outcome of the case. Once the answer is given, the case goes back to the national court, which then applies the ECJ's ruling while pronouncing the judgement. The ECJ indicates the judgement in a particular case, but it is the national court that makes the final decision on it.<sup>53</sup> For example, in Case 41/74 *van Duyn v. Home Office*<sup>54</sup>, the Court ruled that Directive 64/221<sup>55</sup> was directly effective and that the plaintiff, Ms van Duyn, could rely on it before a British Court. However, the court decided that, having

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<sup>50</sup> Article 41 of Charter of Fundamental Rights [2000] OJ C 364/1

<sup>51</sup> H.P. Graver, 'National Implementation of EU law and the Shaping of European Administrative Policy' available at: [http://www.arena.uio.no/publications/wp02\\_17.html](http://www.arena.uio.no/publications/wp02_17.html) URL correct as of 1 May 2012

<sup>52</sup> Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337

<sup>53</sup> M. Horspol and M. Humphreys, *European Union Law* (OUP, Oxford 2006) 104

<sup>54</sup> Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337

<sup>55</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health OJ 056

applied the Directive, the decision to exclude Ms van Dyun from the United Kingdom had been justified anyway.<sup>56</sup>

Nevertheless, this procedure is very important as it gives the individuals the opportunity to demand the correct application of Union law since cases are initially brought before national courts by them. In France, interest groups intentionally violate national implementation measures in order to bring a case before a domestic court and thus possibly trigger the preliminary rulings procedure.<sup>57</sup> In Poland, on the other hand, courts are reluctant to send an inquiry to the ECJ, therefore, such a manoeuvre might prove to be utterly ineffective. Additionally, the very fact of having the ECJ jurisdiction binding on all Member States sets the Union apart from other international organisations, for example the United Nations (UN), within which the States are not obliged to subject their disputes under the jurisdiction of the International Court of Justice.

Having said that the ECJ cannot declare the national law provision invalid but also cannot decide the case concerned,<sup>58</sup> the national courts' procedural autonomy could easily have hampered the effectiveness of EU law. This is why the ECJ has bound national courts with an obligation to construe existing domestic norms by reference to the role of that provision in the procedure,<sup>59</sup> according to Maher, in such a way as to enforce Union law even if national authorities fail to implement relevant Union provisions.<sup>60</sup>

### **1.5.1. the principles of equivalence and effectiveness**

In an early example of case law, the ECJ ruled that the protection of persons affected by an infringement of the Community provisions should be regulated

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<sup>56</sup> Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415

<sup>57</sup> *Siedentopf* (n 47) 72

<sup>58</sup> *Horspol* (n 53) 111-112

<sup>59</sup> Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein – Wesfalen* [1984] ECR 1891, See also: Cases C-430-431/93 *Van Schijndel & Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-47-5

<sup>60</sup> I. Maher, 'National Courts and European Community Courts' (1994) 14 *Legal Studies* 231

by national law. The major responsibility for ensuring the enforcement of individuals' rights derived from directly effective EU law provisions belonged to national courts. As a result, Member States were not bound to provide new law-enforcing measures, except those prescribed by national law, as long as existing ones did not render the exercise of rights stemming from EU law impossible in practice.<sup>61</sup>

The great defence to national procedural autonomy was given in cases such as *Humblet*<sup>62</sup> or *Rewe-Zentralfrantz*<sup>63</sup>, in which the Court stated that as long as a national law applicable to actions based on Union law was no less favourable to the national law applicable to similar actions of a domestic nature and as long as the national law did not render the exercise of Union provisions impossible or excessively difficult, national procedural autonomy remained unaffected by EU law.

The *Simmenthal* judgement, however, put strong emphasis on the practical effectiveness of Union law. The Court held:

[...] any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union law by withholding from the national court, having jurisdiction to apply such law, the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Union rules from having full force and effect are incompatible with those requirements which are the very essence of Union law.<sup>64</sup>

Subsequently to the established expectations, new more robust requirements were added, namely judicial protection of rights should be real and effective, and the compensation for the breach of the law should be commensurate with

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<sup>61</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

<sup>62</sup> Case 6/60 *Humblet v Belgium* [1960] ECR 559

<sup>63</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

<sup>64</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

the damage sustained.<sup>65</sup> Subsequent rulings such as *Factortame*<sup>66</sup> and *Marshall (no.2)*<sup>67</sup> gave prominence to the effectiveness of EU law, rather than to national procedural autonomy by repeating the obligation to override national procedural rules in order to ensure the supremacy of Union legislation. The conditions imposed on Member States have been developed into two procedural constraints on national courts' independence: the principles of equivalence and effectiveness, all in an effort to enhance the effectiveness of EU law.

The requirements of equivalence and effectiveness complement one another. Equivalence means that actions based on Union rules must be treated no less favourably than those based on national law. In other words, if national law guarantees a certain level of protection of domestic rights, the same level of protection must be granted to those of the Union. As a result, it can be said that the principle of equivalence perceives Union rights as integrated with a national legal system of remedies, not as emanating from a separate legal order.<sup>68</sup>

The requirement of equivalence is applicable to Union law-based claims, where the cause and purpose of these claims are similar to the national law-based ones. Establishing 'what is similar' is a matter for domestic courts to decide on a case-by-case basis. In the *Palmisani*<sup>69</sup> case the Court pointed out that a claim for reparation for loss or damage suffered as a result of the belated implementation of a directive was comparable to a claim for the non-contractual liability of the State, which falls under national law. Therefore, those two might be subjected to the same time-limits. *A contrario*, an action to recover the loss suffered as a result of the failure to implement Directive

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<sup>65</sup> Case 14/83 *Sabine Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891

<sup>66</sup> Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433

<sup>67</sup> Case C-271/91 *M. Helen Marshall v Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367

<sup>68</sup> T. Tridimas, *The General Principles of EU Law* (OUP, Oxford 2006) 423

<sup>69</sup> Case C-261/95 *Rosalba Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* [1997] ECR I-4025

80/987<sup>70</sup> should not be perceived as similar to an action to claim benefits provided by that Directive and, in consequence, these two might be subjected to different limitation periods.

The requirement of effectiveness means that national rules must not render the exercise of Union rights impossible or excessively difficult. It obliges a domestic court to pursue an enquiry in order to determine whether a national procedural provision acts as a constraint on a Union clause. National norms ought to be analysed with reference to the role of that provision in the procedure<sup>71</sup> and with respect to the basic principles of the domestic judicial system such as protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure must where appropriate be taken into consideration.

But national courts are not obligated to raise on their own motion an issue concerning the breach of provisions of Union law, where such an examination would lead to an *ultra vires* action on the part of the courts. Whenever national procedures describe courts as passive agents, acting within the ambit of a dispute defined by the parties themselves, then for the sake of certainty and predictability within the national procedural system, courts cannot determine the case beyond the demands laid down by the parties in the claim. An exception can and should be made when domestic law allows national courts to look at the facts other than those on which the claim was based – only then can the domestic court apply Union provisions which go beyond the ambit of the claim.<sup>72</sup>

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<sup>70</sup> Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of Member States relating to the protection of employees in the event of the insolvency of the employer [1980] OJ L 283/23

<sup>71</sup> *Byrne v Motor Insurers' Bureau and another* [2008] EWCA Civ 574. The Untraced Drivers Agreement 1972 subjected to a limitation period of three years the procedure for making a claim for compensation in respect of injury caused by untraced drivers. However, following the Court of Appeal this limitation constituted a breach of Community law, article 1(4) of Council Directive 84/5EEC, on the part of the United Kingdom, which according to principle of equivalence and the wording of the directive should provide the limitation period no less favourable than that which applied under s 28 of the Limitation Act 1980 to the commencement of proceedings by minors for personal injury in tort a traced driver.

<sup>72</sup> *De Burca* (n 15) 40



The judicial system of EU law enforcement is not, however, free from weaknesses. Firstly, the Court of Justice is not bound by precedent. This enables the Court to test new ideas for ensuring effectiveness which may also prove to be unsuccessful. Secondly, the Court's actions are targeted on the Member State's failure to fulfil its Treaty obligations, and triggered by, for example, the Commission's or another Member State's claim, which means that the Court acts *post factum* and only when the infringement was discovered. Thirdly, when the increasingly broad interpretation of Article 4 TEU reaches its limits, the legitimacy of the Court might be undermined and desired political or social changes might not be achieved.<sup>73</sup>

Nevertheless, the Court's contribution to effectiveness is of key importance. The very involvement of the Court in the development of the legal principles of the Union has made the implementation of EU law, in comparison to international law, far more successful. Those substantial and procedural constraints have strengthened the Court's capacity to thwart the Member State's designs to impede the efficacy of the implementation processes whenever the Member State's interests are in conflict with the interests of the Union.

### **1.6. the role of the European Commission**

At the Union level, efforts to improve the quality of implementation also belong to the sphere of the competence of the European Commission. Given the Commission involvement, albeit in different ways, in every aspect of the EU affairs and EU policy-making, it has been vested with a variety of powers; both coercive and soft in nature, in order to improve the enforcement of the Treaties' objectives.

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<sup>73</sup> F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 50 -53

According to Nugent, the Commission's powers can be divided into four major categories: legislative, executive, judicial, and external in which the Commission exercises a number of different competences respectively.<sup>74</sup>

### **1.6.1. legislative power**

The Commission, by virtue of the Treaty, is endowed with legislative powers to a certain extent. Generally, law-making competence lies within the legislative capacity of the Council of the European Union and the European Parliament,<sup>75</sup> but the Commission plays a significant role in the law-making process. The ECJ established that whenever the Commission, by virtue of the Treaty, has been rendered responsible for carrying out a specific task, it implicitly acquires all powers, including legislative, which might prove to be indispensable in conducting its duties.<sup>76</sup> And yet, most important in this respect is the Commission's right of legislative initiative which is also known as the driving force behind European integration. The Commission is endowed with the right to prepare drafts for legislative proposals. What is more, the Commission can issue legislation which is administrative or highly technical and detailed in nature.<sup>77</sup>

The second way in which the Commission exerts an impact on the initiation and formulation of policies is its role of setting an agenda.<sup>78</sup> The Commission develops overall legislative plans for any single year; and by so doing it shapes the priorities for the forthcoming years. Furthermore, the Commission develops general policy strategies for the Union.<sup>79</sup>

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<sup>74</sup> N. Nugent, *The European Commission* (Palgrave, New York 2001) 10-14

<sup>75</sup> The Commission, however, might be involved in filling the legislation gaps by providing more detailed rules or guidelines for issued legal acts, as a result of European Parliament and Council regulation being rather broad policy frameworks than detailed steering documents. M. Egeberg, 'The European Commission' 132 in M. Cini (ed.) *European Union Politics* (OUP, Oxford 2003). See also: European Commission: Protection of Geographical Indications, Designations of Origin and certificates of Specific Character for Agricultural Products and Foodstuffs. Guide to Community Regulations, 2<sup>nd</sup> Edition August 2004 available at: [http://ec.europa.eu/agriculture/publi/gi/broch\\_en.pdf](http://ec.europa.eu/agriculture/publi/gi/broch_en.pdf) URL correct as of 1 May 2012

<sup>76</sup> Case 248/84 *Federal Republic of Germany v Commission of European Communities* [1987] ECR 4013

<sup>77</sup> Nugent (n 74) 12

<sup>78</sup> Egeberg (n 75) 132

<sup>79</sup> P. Craig, *EU Administrative law* (OUP, Oxford 2006) 43

Considering the Commission's prerogatives, it should be able to negotiate legislative proposals and find legal and political consensuses between the Union and Member States in such a way as to render negotiated laws, programmes or reforms implementable and executable in congruity with the spirit of the Treaties.<sup>80</sup> Given the fact that the Commission lacks 'first-hand' knowledge of what is happening at the street-level EU law implementation, the ability of the Commission to produce legal acts or programmes available for smooth implementation seems limited.

### **1.6.2. comitology**

The Commission may adopt non-legislative acts which are of general application, and which supplement non-essential parts of legal acts. The Commission is also empowered to adopt acts for the sake of uniformity of already binding legal acts. This system to oversee the implementation of delegated acts by various Commission committees is known as comitology, and it stems from Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU). Since, together with the coming of the Lisbon Treaty into force and the previous comitology rules having been replaced, only the current legal developments will be presented.

As already stated, the Commission may adopt two types of acts. And yet, only one legal act can be classified under one heading at the same time. Articles 290 TFEU and 291 TFEU are mutually exclusive, and they vastly differ in scope. Acts adopted pursuant to Article 290 TFEU are defined in terms of range and consequences, acts adopted pursuant to Article 291 TFEU are determined by their rationale.<sup>81</sup>

Pursuant to Article 290 TFEU<sup>82</sup>, the European Parliament (EP) and the Council may confer on the Commission delegated powers which are expected

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<sup>80</sup> Siedentopf (n 47) 26-27

<sup>81</sup> The European Commission, Implementation of Article 290 of the Treaty on the Functioning of the European Union. COM (2009) 673 final, Brussels, 9 December 2009

<sup>82</sup> Article 290 of the Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47

to add further content to a legislative act, that is to supplement or amend the work of the legislator.<sup>83</sup> Legal acts adopted by the Commission in this way are referred to as delegated acts. Since delegated acts may clarify only non-essential elements of a legislative act, all essential elements of a given area are saved for legislative acts, and are not the subject of a delegation of power. In addition, delegated acts are only suitable for a general application. These two conditions, general application and supplementation or amendment of non-essential elements of the legislative act, must be present cumulatively. If either of these conditions is not met, Article 290 cannot be applied.<sup>84</sup> For delegated acts, the EP and the Council, in the agreed legislative act, will clearly define the terms of delegation, such as for example its objectives, scope and duration. The delegation may also be temporary and conditional, which means that the delegation may be revoked when the EP or the Council decides to revoke it, or the delegated act may not enter into force if there are objections against it expressed by either the EP or the Council.<sup>85</sup> Once a delegated act has been accepted, it becomes directly applicable to new directives and regulations. In addition, in the title of such an act the adjective ‘delegated’ should be inserted. This Article applies as of 1 December 2010 – the date of entry of the Lisbon Treaty into force. For existing legislation, however, the old regulatory procedure with scrutiny is maintained.<sup>86</sup>

According to Article 291 of TFEU, “Where uniform conditions for implementing legally binding acts are needed, those shall confer implementing powers on the Commission.”<sup>87</sup> Such acts are referred to as implementing acts, and they are adopted by the Commission and overseen by the Member

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<sup>83</sup> European Commission ‘Implementation of Article 290 of the Treaty on the Functioning of the European Union’ COM(2009) 673 final, Brussels, 9 December 2009

<sup>84</sup> European Commission ‘Implementation of Article 290 of the Treaty on the Functioning of the European Union’ COM(2009) 673 final, Brussels, 9 December 2009

<sup>85</sup> C. Stratulat, E. Morino: Implementing Lisbon: what’s new in comitology? European Policy Centre, Policy Brief, April 2011, available at: [http://www.epc.eu/documents/uploads/pub\\_1258\\_implementing\\_lisbon\\_-\\_what\\_s\\_new\\_in\\_comitology.pdf](http://www.epc.eu/documents/uploads/pub_1258_implementing_lisbon_-_what_s_new_in_comitology.pdf) URL correct as of 1 May 2012

<sup>86</sup> Council of the European Union, ‘Entry into force of new comitology rules’ 7070/11, Brussels, 28 February 2011

<sup>87</sup> Article 291 of the Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47

States.<sup>88</sup> They may take the form of either individual measures or acts of general application. For this purpose, the European Parliament and the Council will enact, following the ordinary legislative procedure, a regulation that would create mechanisms by means of which Member States could control the Commission's exercise of its implementing powers. Such a regulation has been adopted and entered into force on the 1<sup>st</sup> of March 2011.<sup>89</sup>

In the case of implementing acts, there are two mechanisms for controlling the Commission's actions: an advisory procedure and an examination procedure. These controls are performed by committees composed of representatives of Member States.

The advisory committee only issues non-binding opinions. The vote is facultative and is based on a simple majority of competent members. The Commission takes the utmost account of the conclusions drawn from the discussion within the committee and of the opinions delivered when deciding on the act to be adopted.<sup>90</sup>

The examination procedure is used mostly for measures of general scope, or for specific measures with a potentially important impact, for example, agriculture or fisheries. Here, in order for the draft of the Commission implementing act to be adopted, it must be supported by a qualified majority of the committee. If the Committee is negative towards the draft and expresses its opposition by a qualified majority, the Commission may:

1. submit an implementing act in an amended version, or
2. submit the same act to the appeal committee, and wait for the committee's opinion.

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<sup>88</sup> Statulac (n 85)

<sup>89</sup> Council Regulation (EU) No 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ L 55/13

<sup>90</sup> Internal note of Directorate General for Agriculture.

If there is no opinion from the committee, the Commission may adopt the draft unless it concerns: taxation, financial services, protection of human, animal or plant health, or definite multilateral safeguarding measures. If the act concerns the aforementioned issues, the Commission may either present the committee with an amended text, or pass a draft text to the appeal committee within one month.

If the implementing act concerns the adoption of definite anti-dumping or countervailing measures and a simple majority opposes it, the Commission must consult with the appeal committee.

When the draft act has been passed on to the appeal committee, the procedure is as follows – when the appeal committee issues a positive opinion, the Commission adopts the act. When the opinion is negative, the Commission must refrain from adopting the act. In the case of a lack of opinion, the Commission may adopt the draft act, unless it concerns definitive multilateral, safeguarding measures, where in the absence of a positive opinion voted by the qualified majority, the Commission must not adopt the act.<sup>91</sup>

The advisory and the examination committees are both endowed with an urgency mechanism. This mechanism comes into play when the Commission adopts a measure, on the grounds of urgency, without prior committee consultation. Such measures must, however, be presented for the committee approval, and if the committee disagrees, they can be repealed.<sup>92</sup>

Hence, the choice of action undertaken by the Commission is determined by the legislator. If the legislator comprehensively regulates a particular field of action and entrusts the Commission with ensuring the harmonised implementation of the legal acts in question, the Commission should act within the framework of Article 291 TFEU. If, however, the legislator chooses to regulate the field in question only partially, the Commission may use its

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<sup>91</sup> Council of the European Union, 'Entry into force of new comitology rules' 7070/11 Brussels, 28 February 2011

<sup>92</sup> Stratulat (n 85)

powers conferred by Article 290 TFEU and provide the necessary supplements via its delegated acts.

### **1.6.3. executive power**

The executive function of this institution contributes to the enhancement of its power to improve the quality of EU law implementation. Once the laws and policies have been formulated, they have to be administered. The Commission is responsible for monitoring their implementation by Member States.<sup>93</sup> Nevertheless, while Member States are primarily responsible for the correct implementation of the laws and policies, the Commission remains responsible for overseeing the Member States' actions and whether they actually fulfil those obligations.<sup>94</sup>

One of the Commission's duties as the 'guardian of the Treaties' is to publish annual reports on the monitoring of the transposition of Union law. The analysis of those reports seems to reveal that transposition of directives does not appear problematic since the vast majority of directives reach their destination in the domestic legal system in the end. Non-transposition has a predominantly temporary character, mainly because of cooperation between the Commission and the ECJ where the latter secures compliance with the pronouncement of the judgement at the latest.<sup>95</sup>

The executive power of the Commission is, however, not free from deficiencies. The Commission carries out front-line implementation only to a certain extent – in the legislative area of competition policy. Generally, the vast majority of street-level implementations takes place through national agencies. For example, domestic customs authorities collect the duties when goods from outside the Union enter their territory, or agricultural agencies work with farmers and traders on matters such as milk quotas, the quality of food or set-aside schemes. What is more, very often the implementation of EU

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<sup>93</sup> Egeberg (n 75) 133

<sup>94</sup> Article 211 (n 19)

<sup>95</sup> E. Mastenbroek, 'Surviving the Deadline. The transposition of EU Directives in the Netherlands' (2003) 4 *European Union Politics* 391

policies comes down to introducing and enforcing technical, hygiene or health and safety standards laid down in EU legislation. For the reason that those standards are applicable to individual enterprises, workplaces, factories, and so forth, carrying out all monitoring activities is undoubtedly easier when conducted by the local inspection bodies.<sup>96</sup>

These forms of the Commission's cooperation with national agencies have been classified by scholars who divided them into three categories.

The first form is called joint administration. Here the laws and policies come from the Union level but are implemented together by the Union Institutions and national agencies. For example, the administration of structural funds falls into this category.

The second form is known as decentralised administration. Here, the Union's institutions and Member States act in a parallel way. Their tasks are not clearly separated, but rather are performed by a single administrative apparatus – a European Agency. This form of cooperation can be found in drug-related activities, such as the combat of illegal trade, or activities focused on fighting addictions.

The third form is the so-called regulatory concert. The Union's institutions and national authorities establish a common organisation. For example, in the telecommunication sector, heads of Member States' regulatory bodies form a "European Regulators Group" in Brussels.

In these common systems it is very difficult to say which body, supranational or national, enjoys superiority. Successful implementation, however, tends to depend on the performance of the lowest level agency. Nevertheless, within the European Union legal system structural links have been created, among others, via committees or advisory groups which are composed of national representatives. These links allow national administrations and stakeholders to

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<sup>96</sup> Nugent (n 74) 264



take part in the decision-making process at EU level as well as transfer national issues to the EU agenda. It needs to be emphasised that not all proceedings involve national administration bodies. Such proceedings are relatively rare but are in place, for example, financial proceedings, under Council Regulation 1605/2002<sup>97</sup>, are wholly conducted by the Commission, and the establishment of links with national authorities is not required. Cooperation, however, is a more commonly occurring method of conduct.

In the proceedings conducting protection of geographical indications and designations of origin for agricultural products and foodstuffs, the responsibilities are shared between the Commission and Member States and are concurrent in an ascending fashion. At first, the application containing a protection request is scrutinised by the Member State which may accept or reject it. Only after the Member State approves the application it is forwarded to the Commission for further scrutiny. In brief, when the Commission decides to grant protection to a designation, it presents the decision to a special committee, composed of the representatives of Member States, which votes in favour of or against it. Failure to reach an agreement triggers comitology procedures, and if the decision cannot be made in the framework of comitology, it goes back for the Commission and the Council to adopt the decision themselves.<sup>98</sup>

Moreover, “the Commission has very limited resources so it cannot monitor national agencies and local inspection bodies with the required level of scrutiny and as a result whenever the flow of information between Brussels and the Member State’s institutions is distorted, the Commission has a very vague idea on what is happening at the front”.<sup>99</sup> Commission officials can carry out on-site visits but those tend to be time consuming and politically sensitive, therefore, the Commission predominantly bases its knowledge on

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<sup>97</sup> Council Regulation (EC) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2002] OJ L 248/1

<sup>98</sup> S. Cassese ‘European Administrative Proceedings’ 68 Law and Contemporary Problems 21-36

<sup>99</sup> Nugent (n 74) 262-263

Member States' reporting back on their implementation activities.<sup>100</sup> On the other hand, if all those standards were to be properly supervised by the Commission, local monitoring structures would have to be replaced by EU officials, which, in consequence, would lead to a dangerous workload for the Union administration. This in turn could be perceived as an encroachment upon Member States' autonomy, which they would strongly oppose. This is why the Union suffers from an 'implementation gap', because in the end it is still dependent on the bona fide of Member States in introducing Union provisions into their domestic legal systems.<sup>101</sup>

Commission attention with regard to implementation of Union legislation at the national level has grown in the last decade. In 2010, the Commission issued the White Paper on 'European Governance' in which the emphasis was put on improving the application of EU law by Member States. It was stated that "The European Union will rightly continue to be judged by the impact of its regulations on the ground. It must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts." At the same time, the Union must be able to reduce long delays in the adoption and implementation of Union rules.<sup>102</sup> The White Paper was followed by the Communication on 'Better Monitoring of the Application of Union Law' which put the focus on the Commission's role as the guardian of the Treaties and its obligation to make innovations geared towards the improvement of the implementation of Union law.<sup>103</sup>

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<sup>100</sup> T. Börzel, 'Non-compliance in the European Union: pathology or statistical artefact?' (2001) 8 *Journal of European Public Policy* 809

<sup>101</sup> Wincott (n 37) 171

<sup>102</sup> Commission of the European Communities 'European Governance a White Paper' COM (2001) 428 final, Brussels, 25 June 2001

<sup>103</sup> Among all proposed betterments such as for example an improvement in the transparency of the European legislation or faster notification where transposition is outstanding, two measures are worth noting: training and information campaigns for national administrations and judiciary, setting up appropriate points of contacts for questions concerning the application of the Community law and for coordination with national ministries and regional or local authorities in the Member States which did not already have them. Please see: Commission of the European Communities 'Better Monitoring of the Application of Community Law' COM (2002) 725 final, Brussels, 11 December 2002

#### **1.6.4. quasi-judicial power**

The quasi judicial power of the Commission comes into play when a Member State is in breach of EU law. The infringement procedures start when the State fails to notify the Commission of measures taken in order to implement a piece of EU legislation, or as a result of an audit, random checks or owing to affected individuals or companies. Nevertheless, the Commission does not have the resources to investigate all possible or suspected cases of infringement;<sup>104</sup> therefore, some of the transgressions can last for years before the Commission notices them, and it can be months before the Commission brings proceedings, and years before the ECJ concludes action against them. Needless to say, the Commission prefers to be reasonably sure before undertaking an action for the reason that it values its relations with national governments and avoids unnecessary tensions between the Union and the Member States. Very often, however, there are political, economic and social reasons which make pursuing infringement procedures questionable. Additionally, the Commission may not disclose all the cases in which it took action against infringements of EU law.<sup>105</sup>

The moment the Commission detects non-compliance and makes a decision to start infringement proceedings, a letter with a formal notice that a Member State is in possible breach of the law is sent. At this stage, the State is given a full opportunity to explain itself, rectify the situation or even refute any allegations made against it. The Member State has one to two months to respond.<sup>106</sup> The formal notice predominantly leads to negotiations, the failure of which triggers further steps – formulation of a reasoned opinion.<sup>107</sup>

According to Article 258 TFEU, whenever the Commission considers that Member States have infringed their obligations towards the Union, it should “deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.” However, “if the State concerned does

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<sup>104</sup> Nugent (n 74) 281

<sup>105</sup> Börzel (n 100) 808

<sup>106</sup> Börzel (n 100) 806

<sup>107</sup> Snyder (n 73) 28

not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.” The reasoned opinion is the first official stage of infringement proceedings where the Commission gives a detailed statement on the contravention of the provisions concerned and states a time limit for the State to rectify the problem.<sup>108</sup> Nevertheless, a formal legal action is perceived by the Commission as a last resort measure as efforts to resolve the matter through negotiations are given preference.<sup>109</sup>

The Commission’s role in judicial proceedings does not stop here. It enters the scene again when the ECJ judgement has been submitted and there is a justified suspicion that the Member State found responsible for the infringement of the law has not complied with the ruling. As a result, according to Article 258(2) TFEU, the Commission may bring the Member State concerned before the Court again if it has failed to observe the Court’s judgement within the time limit laid down by the Commission. While doing so, the Commission specifies the lump sum or penalty payment to be paid by the Member State as a consequence of the infringement.<sup>110</sup>

#### **1.6.5. external power**

The Commission represents the European Union externally. It negotiates trade and co-operation agreements with non-EU members as well as international bodies such as the World Trade Organisation (WTO).<sup>111</sup> However, the description of those duties goes beyond the scope of the thesis.

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<sup>108</sup> Börzel (n 100) 806, more on conditions governing the pre-litigation procedure in Case C-191/95 *The Commission of the European Communities v Federal Republic of Germany* [1998] ECR I- 5449

<sup>109</sup> Craig (n 79) 45

<sup>110</sup> Article 228 of the Treaty establishing the European Community (Nice consolidated version) [2002] OJ C 325 42

See also: Case C-387/97 *Commission of the European Communities v Hellenic Republic* [2000] ECR I-5047

<sup>111</sup> Craig (n 79)

### **1.7. soft measures**

Soft measures are aimed at triggering a behavioural change among Member States and their administrative structures in order to facilitate national implementation of EU law and policy or to guide Member States through the implementation process.<sup>112</sup>

The wide range of soft measures includes the following: implementation guidelines, professional training of state officials geared towards deepening euro-knowledge and enhancing euro-awareness among trainees, target-based programmes, and closer integration of private parties with the process of implementation.

### **1.8. responsibilities of a Member State with regard to the implementation of EU law**

The moment Union law and policies enter the national legal order they start to exert an influence on the Member State's agencies, administration bodies and courts at all levels with respect to their involvement in law-making or law-executing processes. As discussed in the previous part of the thesis, important principles aimed at strengthening the effectiveness of Union law have been established: the doctrine of supremacy, the doctrine of direct effect, and the principle of sincere cooperation. In consequence, all domestic institutions are responsible for putting Union laws and policies into effect<sup>113</sup> by using appropriate measures which guarantee their successful implementation and application of the EU law at the local level.

In order to understand how implementation operates, a brief explanation of the EU legislative instruments is required. Among all of the Union's secondary legal acts, two have particular prominence: regulations and directives. Directives specify the goals which need to be reached, but provide a Member State with latitude in the procedures and instruments that are to be used in

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<sup>112</sup> Bieber (n 8) 394

<sup>113</sup> M. Cini, (ed.) *European Union Politics* (OUP, Oxford 2006) 349

achieving that goal. Therefore, directives require a two-step implementation procedure. The first step is largely legal and it involves the transposition of the directive into national law – legal implementation. The second step is more administrative, focusing on implementation of the directive at street level, which involves direct application of this piece of legislation – practical implementation.<sup>114</sup> The Member States are obliged to notify the Commission of their progress in transposition of directives as well as of the accomplished transposition, as all directives establish a time period within which their transposition should be completed. A lack of notification on transposition before the deadline has passed is a sign for the Commission that a Member State may face difficulty in fulfilling its obligations. In such a case the Commission sends a warning to the State that it is tardy in implementation, which, if ignored, may eventually lead to infringement proceedings before the ECJ under Article 258 TFEU.<sup>115</sup>

Regulations are by nature directly applicable which means that their binding force is not dependent on implementation. Regulations often include a lot of details and they spell out not only the goal of the legislation, but also the means by which such goals must be achieved.<sup>116</sup> Therefore, regulations do not require any special enactment by the Member States.<sup>117</sup> The ECJ in *Commission v Italy*<sup>118</sup> judgement acknowledged that regulations are applied as Union law provisions, instead of provisions of national law, in which case it is improper for Member States to undertake any implementation procedures. The implementation of regulations should take the form of a one-step procedure limited to practical implementation only. The ECJ recognised that by allowing a Member State to convert a regulation into national law, judicial control over the Member State's application of the regulation could be hampered if the

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<sup>114</sup> Cini (n 113) 352

<sup>115</sup> P.G.G. Davis, *European Union Environmental Law: An Introduction to Key Selected Issues* (Ashgate Publishing Limited, Hants 2004)

<sup>116</sup> Cini (n 113) 352

<sup>117</sup> Case 34/73 *Fratelli Variola v Amministrazione italiana della Finanze* [1973] ECR 981 “Member States are under a Treaty obligation not to obstruct the direct applicability inherent in Regulations, so as to ensure their simultaneous and uniform application throughout the Community”

<sup>118</sup> Case 39/72 *Commission v Italy* [1973] ECR 101

Union origin of the regulation was disguised.<sup>119</sup> That is why, in principle, the sole promulgation of regulations results in their incorporation into the legal system of every Member State *ipso facto*.

And yet, a significant number of regulations oblige Member States to take additional implementing measures to put regulations fully into effect<sup>120</sup>. To give examples: terms of regulations are vague,<sup>121</sup> the national codification of a particular area of law could give a complete statement of relevant legal rules,<sup>122</sup> and the regulation expressly requires implementation.<sup>123</sup>

If this is the case, national authorities are still compelled to evaluate the extent to which and the manner in which the national law ought to be changed after the reception of regulation, and evaluate the regulation against national provisions in an effort to amend or abrogate all of the internal norms which remain in conflict with the regulation. When a regulation is received very easily, owing to full conformity of the regulation with domestic law, the Member State may refrain from any implementing action or merely issue enabling clauses to the text of the national law serving as appendices to the regulation in question.<sup>124</sup>

In the *Eridana* case, the ECJ acknowledged that regulations can contain provisions empowering Member States to pass the national legislation that is necessary to give full effect to the regulation in question.<sup>125</sup> Given the requirement set out in Article 4 TEU and the direct applicability of regulations

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<sup>119</sup> J. Usher, *European Community Law. The Irreversible Transfer?* (George Allen & Unwin, London 1891) 17

<sup>120</sup> Siedentopf (n 47) 44

<sup>121</sup> E. F. McCauley, 'Member State Implementation of Economic Community Legislation and Judgments' [1988] Boston College International & Comparative Law Review 163-164

<sup>122</sup> McCauley (n 121) 163-164

<sup>123</sup> In Case 31/78 *Francesco Bussone v Ministro dell'agricoltura e foreste* [1978] ECR 2429 the ECJ decided that MS can apply implementing measures for regulations "...to the extent to which the Regulation in question leaves it to the Member States themselves to adopt the necessary legislative, regulatory, administrative or financial measures to ensure the effective application of the provisions of that Regulation."

<sup>124</sup> H. Xanthaki, 'Transposition of EC law for EU Approximation and Accession: The Task of National Authorities' (2005) 7 European Journal of Law Reform

<sup>125</sup> Case 230/78 *Eridania-Zuccherifici nazionali and Società Italiana per l'Industria degli Zuccheri* Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and *Zuccherifici Meridionali* [1979] ECR 2749

to the domestic legal system, it can be said that the Member State should introduce the national legislation that is necessary for effective execution of regulations by the time they come into force, otherwise any dilatoriness on the part of the Member State may constitute a breach of EU law.

It cannot be accepted that a Member State should apply provisions of the Union regulations in an incomplete or selective manner so as to render certain aspects of Union legislation, which it has opposed to or which it considers contrary to its national interest, abortive. Practical difficulties which appear at the stage when a Union measure is put into effect cannot permit a Member State unilaterally to opt out of fulfilling its obligations. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between the advantages and obligations following from its adherence to the Union brings into question the equality of Member States before Union law and creates discrimination at the expense of their nationals. This failure in the duty of solidarity accepted by Member States by the fact of their adherence strikes at the very root of the Union legal order.<sup>126</sup>

Therefore, the failure to implement a regulation triggers the same infringement proceedings as the failure to implement a directive.

Since the implementation of EU policies is carried out predominantly via legal means, when converting a piece of EU legislation into the national legal order, a Member State has to decide which legislative measure is the most suitable for implementation purposes. The State needs to choose between the primary, delegated and administrative acts. The primary legislation provides the strongest legal basis but is the most costly, especially in terms of parliamentary time, and in addition, it does not allow the introduction of very precise or technical solutions. Parliamentary primary legislation barely comprises procedural norms: it contains substantial regulations which need to be complemented by the secondary/procedural piece of legislation anyway.

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<sup>126</sup> Case 128/78 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1979] ECR OJ 00419, Case 68/88 *Commission of the European Communities v Hellenic Republic* [1989] ECR OJ 02965



Secondary legislation is believed to work better for those EU laws which have a detailed and sectoral character. They require very precise, very often technical, enabling acts into the domestic legal order which can be better achieved through, for example, governmental orders. The governmental agencies possess wider knowledge and understanding of sectoral policies, therefore, they are believed to be better equipped for providing efficient and suitable legal solutions for implementation tasks. Furthermore, the legislative process of delegated acts is much less elaborate than the one perceived for primary bills, which significantly accelerates the process of implementation.<sup>127</sup> Administrative acts can also facilitate technical matters and their enactment is the quickest but their low position in the hierarchy of legal acts may result in the growth of uncertainty with regard to administrative solutions as the administrative acts are easily replaced or changed.<sup>128</sup>

The process of conversion of the law also suggests some linguistic considerations. National drafters need to decide whether the terminology used in Union legislation requires explanation or re-definition. The problem is especially visible when EU legislation is to be translated into a European language other than the language of the first enactment.<sup>129</sup>

The next phase in EU law implementation is the phase of practical implementation.

At this point, the responsibility for the success of the undertaking predominantly rests on the national public administration's shoulders. The execution and enforcement of the vast majority of EU legal acts fall within the competence of central governmental departments and agencies as well as local administration bodies, which is why the efficiency of those structures is of paramount importance. Although the characteristics of public administration

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<sup>127</sup> In Italy, in the significant number of case, very slow legislative procedure was responsible for failures with implementation. Therefore the executive has been empowered with broader legislative competence in order to bypass time inefficient parliamentary procedures. Siedentopf (n 47) 45 – 47

<sup>128</sup> More on the issue: Xanthaki (n 124), J.D.N. Bates, 'The Conversion of EEC Legislation into U.K. Legislation (1989) 10 Statute Law Review

<sup>129</sup> Xanthaki (n 124) 90-92

and its relationship with the recipients of its actions determine the effectiveness of EU law at the local level to a large extent, one has to be very cautious while generalising about the specificity of public administration in a Member State.<sup>130</sup> Since the distinction between provisions of EU origin and those of parliamentary or governmental origin becomes blurred, in particular at the lower administrative levels, civil servants tend to apply both kinds of provisions in the same manner. In principle, the better the domestic system, the faster the absorption and execution of EU provisions.<sup>131</sup>

The subsequent variable, which has an impact on the effectiveness of implementation, is the manner of cooperation between national public administrations and interest groups and individuals. In general, two administrative styles have been distinguished in legal writing: “legalistic”, which is associated with the German model of administration and “pragmatic”, which is believed to be characteristic of common law countries. In France for example, the administrative style sits somewhere in between: it is partially legalistic – the process of legal transformation is usually done with a high level of scrutiny.<sup>132</sup>

Knill recognises two general, conceptual types of state. The first one is called ‘state-led society’: the state leads its citizens via intervention and control, where the pattern of interactions between administrative institutions and societal actors are formalised and rigid as based on codified codes of conduct. This category of state is believed to be typical of France and Germany, however, one can draw a conclusion that, generally, states with strictly formalised administrative systems fit into this category. It is also the case in Poland, where proceedings before all of the administration organs are ruled by the appropriate legislation. The second category is ‘society-led state’, meaning: the state where political influence is based on social values rather

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<sup>130</sup> Siedentopf (n 47) 58

<sup>131</sup> Siedentopf (n 47) 59

<sup>132</sup> Siedentopf (n 47) 50 -60

than on the “forcible contest of the state” and it is believed to be characteristic of the United Kingdom.<sup>133</sup>

For the first category of states, the adaptation to the new EU requirements may require greater state involvement in the inclusion of society into the new legal programmes, especially non-coercive ‘performance-oriented regimes’.<sup>134</sup> The reason for this is that society might be reluctant to enter on the path usually due to complicated and tiresome proceedings. Therefore, the adaptation of a more open and recipient-oriented approach by the national administration in Member States devoted to particularly authoritative interaction with society has the potential to produce better results as far as ‘performance-oriented regimes’ are concerned. It remains to be seen what kind of administrative attitude towards potential participants in the new EU regimes is expected from administration officials in Poland, and it remains to be seen whether the fact of having administrative law codified renders the administrative procedures, which precede the registration of names of traditional or regional products, particularly unapproachable.

According to Sztompka, societies in general can be divided into two categories: societies based on trust and societies which are built on suspicion or cynicism. For the development of a society based on trust, it is vital that the following conditions are fulfilled: normative certainty - that is legitimisation of rules regulating social life, transparency of social organisations, stability of social order, and responsibility on the part of public authorities, understood as consequent and predictable imposition and execution of obligations imposed on subjects whilst maintaining the dignity and autonomy of the individual citizen. Cultures based on mistrust or cynicism appear when the aforementioned conditions are absent.<sup>135</sup>

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<sup>133</sup>Ch. Knill, ‘Implementing European Policies: The Impact of National Administrative Traditions’ (1998) 18 *Journal of Public Policy* 22

<sup>134</sup>Knill (n 133) 22

<sup>135</sup>J. Garlicki, *Demokracja i integracja europejska* (Adam Marszałek, Toruń 2005) 197 - 211

And yet, what is worth emphasising here is the fact that mere categorisation of national administration as falling under a particular administrative style or capacity does not completely settle the implementation performance. The correlation between the implemented policies and the capacity of the administration to be more credible ought to be supported by an empirical inquiry into the individual Member State.<sup>136</sup>

When a particular department is willing to implement the policy in question, the whole process is usually carried out quickly and efficiently, while a reluctant department will not be duly engaged in the implementation process, which might result in delays or failures in implementation. Whenever the policy executed in the legal act is not unpopular, or ideally it shares some degree of acceptance with the general public, the chances of efficient implementation increase.<sup>137</sup>

Additionally, the incompetence of administration officials is not easily judged. Incompetence is not an objective characteristic of a person or structure. It is quite often the incompatibility of the task and the person assigned to perform it. While implementing a new programme, the vast majority of Member States cannot provide sufficient funds to train the new personnel who would be responsible for street-level implementation. This is why the personnel who already handle other tasks will be deployed to implement new programmes. As a result, a person trained and prepared to perform certain kinds of duties may prove to be inadequate to handle the demands of the new task.<sup>138</sup> That is why effective implementation implies the correct allocation of tasks, and it is crucial that there is a sensible employment policy, based on meritocratic values.

Nevertheless, the Union has no power to harmonise the administrative law of Member States and, additionally, there is no Union legislation, except non-

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<sup>136</sup> Siedentopf (n 47) 60-64

<sup>137</sup> Bates (n 49) 115

<sup>138</sup> E. Bardach, *The Implementation Game. What Happens after a Bill Becomes a Law* (Cambridge MIT Press, Cambridge 1977) 74

binding guidelines and recommendations,<sup>139</sup> which could be applicable in the domains of public administration and administrative law all across the European Union.<sup>140</sup> That is why the Court of Justice and the Council of the European Union, in their respective areas of competence, have provided guidelines to public institutions in order to prevent their encroachment on individuals' rights guaranteed by the Treaties.<sup>141</sup> For example, the ECJ established that the protection of freedom of movement creates an obligation on the part of administration organs to give reasons for decisions restricting this freedom and gives rights to judicial review of such decisions.<sup>142</sup> Furthermore, the State is liable to reimburse the individual for the damage suffered as a result of the breach of EU provisions.<sup>143</sup> The Council also has its say: it has issued resolutions addressed to Member States and the Commission on administrative performance:

- The Council Resolution of 16 June 1994 on the Development of Administrative Cooperation in the Implementation and Enforcement of Union Legislation in the Internal Market.<sup>144</sup>
- The Council Resolution of 29 June 1995 on the Effective Uniform Application of Union Law and on the Penalties Applicable for Breaches of Union Law in the Internal Market.<sup>145</sup>
- The Council Resolution of 8 July 1996 on Cooperation Between Administrations on the Enforcement of Legislation on the Internal Market.<sup>146</sup>

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<sup>139</sup> e.g. Council Resolution 01/07/1994 of 16 June 1994 on the development of administrative cooperation in the implementation and enforcement on Community legislation in the internal market OJ C 179; Council Resolution 22/07/1995 of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market OJ C 188; Council Resolution 01/08/1996 of 8 July 1996 on cooperation between administrations for the enforcement of legislation on the internal market OJ C 224

<sup>140</sup> Graver (n 51)

<sup>141</sup> Graver (n 51)

<sup>142</sup> Case 222/86 *Union nationale des entraineurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097

<sup>143</sup> Joined Cases C-60/90 and C-9/90 *Andrea Francovich and others v Italian Republic* [1991] ECR I-5357; Case C- 167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith* [1999] ECR I-623

<sup>144</sup> Council Resolution 01/08/1996 of 8 July 1996 on cooperation between administrations for the enforcement of legislation on the internal market OJ C 224

<sup>145</sup> Council Resolution 01/08/1996 of 8 July 1996 on cooperation between administrations for the enforcement of legislation on the internal market OJ C 224

The Council resolutions, even though they are silent on their binding force, constitute an important step in the legislative process in building the future shape of Union law and policy. Resolutions are declarations of intentions expressing essentially the will of the Council.<sup>147</sup> In this case, they express the need to develop more unified administrative law across the Union. Even though an administrative code of conduct could lead to greater harmonisation of the European Union as a whole, Member States would rather object. The reason for the Member States' refusal to accept unified administrative law is the fear of the state losing its vital discretion in deciding on its internal matters.

### **1.9. responsibilities of the New Member States – 2004 enlargement**

Ten Central and Eastern European States (CEES) joined the EU in 2004. It was the first time the European Union had accepted such a significant number of new members. Eight of them had belonged to the former Soviet bloc. Hence, not surprisingly, the biggest and at the same time the most noteworthy enlargement in the history of the European Union was widely discussed in the academic literature.

In general, the CEES were presented as immune to Europeanisation for the simple reason that their way of functioning was believed to be still rooted in centrally planned operational systems.<sup>148</sup> The CEES states seemed to be unable to provide law and order, security of property rights, and predictability in both the rule application and implementation of policy because of unstable governments, corruption and an unreliable judiciary.<sup>149</sup> In a paper entitled “Adaptation of the Legal System of Candidate Countries – The Case of Baltic States” a gloomy image of candidate countries was presented. For the Baltic States, the accession was perceived as a techno-legal problem, whereas Poland, according to the author, “with an exalted sense of national pride” and an unrealistic view of its place in the world would require “a huge element of

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<sup>146</sup> Council Resolution 01/08/1996 of 8 July 1996 on cooperation between administrations for the enforcement of legislation on the internal market OJ C 224

<sup>147</sup> L. Senden, *Soft Law in European Community Law* (Hart Publishing, Portland 2004) 205

<sup>148</sup> Bieber (n 8) 400

<sup>149</sup> V. Bunce, ‘Postsocialism’ 128 in: V. Tismaneanu (eds.) *Between Past and Future. The Revolutions of 1989 and Their Aftermath* (CEUPRESS, New York 2000)

guided political reorientation” in order to be fully Europeanised. According to the author, in all of the States, however inefficient, corrupt public bureaucracy was heavily lagging behind the modern and efficient public administrations of the western world. The independence of the judiciary was meaningless as a result of it being composed of Soviet era judges. The law-drafting technique was treated as something secondary. Moreover, the distorted mentality of university teachers and judges who train future lawyers and civil servants needed to be changed first before the new generation of Western inspired personnel could be ready to work in the altered reality. At the same time industries would be deeply reluctant to conform to the higher technical and safety standards of the EU.<sup>150</sup> The author suggests that only the hard work carried out by Western or Western oriented experts in the field of Union law could bring satisfactory results.

Following Emmert<sup>151</sup>: Do Central and Eastern Countries really pose such an unprecedented threat to the rule of law in the European Union? Is that threat truly bigger than that posed by other ‘difficult’ Members like Italy, where the EU is formally widely supported but largely ignored on a day-to-day basis, or the United Kingdom, where European law is conscientiously implemented but the idea of the Union is strongly contested? Or is it just more of the same – New Member States following the Old ones’ example will simply negotiate their place in the new environment with regard to their own best national interest without creating devastating erosion of the organisation?

Before accession, however, all candidate countries had to make sure that they would be able meet the Copenhagen criteria<sup>152</sup> complemented by the Madrid criterion.<sup>153</sup> Under the Copenhagen criteria, the candidate countries were obliged to demonstrate the existence of:

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<sup>150</sup> Ch. Boye Jacobsen, ‘Adaptation to the Legal Systems of Candidate Countries – The Case of the Baltic States’ (2001) 8 DUPI Working Paper, Copenhagen

<sup>151</sup> F. Emmert, ‘The Fifth Enlargement. More of the Same?’ 487 in: Bermann (n 8)

<sup>152</sup> [http://ec.europa.eu/enlargement/enlargement\\_process/accesion\\_process/criteria/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm) URL correct as of 1 May 2012

<sup>153</sup> [http://ec.europa.eu/enlargement/enlargement\\_process/accesion\\_process/criteria/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm) URL correct as of 1 May 2012

1. stable institutions that guarantee democracy, the rule of law, human rights and respect for minorities;
2. a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; and
3. the full adoption of the *aquis communautaire*.<sup>154</sup>

The additional criterion introduced by the European Council in Madrid 1995 imposed on the candidate countries the obligation to put in place all administrative and judicial structures indispensable for efficient enforcement and implementation of the *aquis*.<sup>155</sup> This new criterion put the emphasis on the capacity of candidate countries to comply effectively with the obligations they accepted in order to accede to the European Union.<sup>156</sup>

The criteria presented above were aimed at building mutual trust between the Union and the ten CEES. And yet, more importantly, they were aimed at an improvement in the understanding of the *aquis*, evaluation of the two legal regimes – domestic and Union – in an effort to identify the areas of discrepancy between them, and finally, alteration or derogation of conflicting norms.<sup>157</sup> Even though the manner of transposition of the *aquis*, in terms of choosing the type of national implementing measures, pertain to states, the Member States remain obliged to apply the most appropriate, effective and suitable legislative tool for securing full transposition of legislation and achievement of its goals.<sup>158</sup>

Going back to the additional requirements prepared for the accession countries, one more special legal solution needs to be mentioned. The Act concerning the conditions of accession of the New Member States contained provisions which vested unprecedented repressive powers in the Commission.

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<sup>154</sup> [http://ec.europa.eu/enlargement/enlargement\\_process/accesion\\_process/criteria/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm) URL correct as of 1 May 2012

<sup>155</sup> [http://ec.europa.eu/enlargement/enlargement\\_process/accesion\\_process/criteria/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm) URL correct as of 1 May 2012

<sup>156</sup> P. Nicolades, 'Enlargement of the EU and Effective Implementation of Community Rules: An Integration-Based Approach' available at: <http://aei.pitt.edu/540/01/99w04.pdf> URL correct as of 1 May 2012

<sup>157</sup> Xanthaki (n 124) 92

<sup>158</sup> Xanthaki (n 124) 97-100



According to the wording of Article 38 thereof, the Commission could apply ‘appropriate measures’ in an effort to compel the offending State to follow the commitments undertaken during accession negotiations. Moreover, the provisions of this act enabled the Commission to bring action against a non-compliant State without having to turn to the ECJ.<sup>159</sup>

However, alongside the coercive measures that are stronger than those applied to the so called Old EU Members, an elaborate system of soft means has also been adopted. New Member States received financial and technical support via pre-accession funding and twinning programmes.<sup>160</sup> The most important measures came from three programmes: PHARE,<sup>161</sup> ISPA<sup>162</sup> and SAPARD.<sup>163</sup>

The PHARE programme provides financial and technical assistance for economic and political transition. The programme is geared towards strengthening public institutions, promoting convergence with the *acquis communautaire*, and promoting economic and social cohesion.<sup>164</sup> The instruments of ISPA provide assistance in the two EU priority fields of environment and transport, and are aimed at helping the candidate countries to catch up with EU environmental standards; upgrading and expanding links with trans-European transport networks; and familiarisation with the policies, procedures and the funding principles of the EU. The focus of the SAPARD

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<sup>159</sup> Act concerning the conditions of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L236/33

<sup>160</sup> T. A. Börzel and others ‘Recalcitrance and Inefficiency. Why do Member States (Not) Comply with European Law?’ available at: [http://www.jean-monnet-coe.keio.ac.jp/workingpapers/tobias\\_hoffman\\_01.pdf](http://www.jean-monnet-coe.keio.ac.jp/workingpapers/tobias_hoffman_01.pdf) URL correct as of 1 May 2012; more: [http://ec.europa.eu/enlargement/archives/pdf/press\\_corner/publications/twinning\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/press_corner/publications/twinning_en.pdf) URL correct as of 1 May 2012

<sup>161</sup> Council Regulation (EEC) 3906/89 of 18 December 1989 on economic aid to the republic of Hungary and the Polish People’s Republic [1989] OJ L 375/11

<sup>162</sup> Council Regulation (EC) 1267/1999 of 21 June 1999 establishing an instrument for structural policies for pre-accession [1999] OJ L161/73, modified by Council Regulation (EC) 2382/2001 establishing an instrument for structural policies for pre-accession [2001] OJ L323/1

<sup>163</sup> Council Regulation (EC) 1268/1999 of 12 June 1999 on Community support for pre-accession measures for agriculture and rural development in the applicant countries of Central and Eastern Europe in the pre-accession period [1999] OJ L161/87

<sup>164</sup> [http://ec.europa.eu/enlargement/how-does-it-work/financialassistance/phare/index\\_en.htm](http://ec.europa.eu/enlargement/how-does-it-work/financialassistance/phare/index_en.htm) URL correct as of 1 May 2012

programme is on agriculture and rural development, as well as on the implementation of the Common Agricultural Policy.<sup>165</sup>

Recent research conducted by Börzel revealed that the CEES do not belong to “the group compliance laggards”. These States present a medium level of non-compliance, they have triggered fewer infringement proceedings than the Old Members, and have demonstrated a stronger eagerness to settle infringement cases.<sup>166</sup> The result of that research provides comforting evidence that the 2004 enlargement has not threatened the whole existence of the European Union by introducing lower democratic standards or unacceptable negligence of the rule of law. The whole idea of the European Union seems to suffer more because of the existence of discrepancies between the countries with reference to, for example, the current financial crisis.

#### **1.10. summary**

This chapter discussed what measures could be undertaken under European Union law which could safeguard its successful effectuation. What becomes apparent is the fact that despite the existence of various and elaborate mechanisms developed by scholars, the ECJ and the EU Institutions, there is still a significant gap which can be called the ‘grey zone’ of effectiveness. This zone – the everyday practice of law performed by Member States – often remains beyond the reach of the Institutions. The latter lack prerogatives, with small exceptions. For example, inspections made under competition law, lack personnel and financial resources to check whether the actions of Member States remain in compliance with EU law. The Commission is often unaware of infringements or negligence on the part of Member States until after the complaint has been filed. In consequence, the existence of this grey zone weakens the Union law and slows down European Integration. It seems that there is room for research investigating the practical effectiveness of EU law at

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<sup>165</sup> [http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/sapard\\_en.htm](http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/sapard_en.htm) URL correct as of 1 May 2012

<sup>166</sup> Börzel (n 100) 35

a local level, and such research may reveal more underlying effectiveness problems and may help to develop a cure for them.

## **Chapter Two**

### **The relationship between effectiveness of policy and effectiveness of law**

Chapter One was devoted to the effectiveness of Union law. It was shown that despite the elaborate mechanisms available under EU law, there is still the grey zone as far as effectiveness is concerned. This chapter will present effectiveness studies undertaken within the framework of political sciences and jurisprudence scholarships, and will seek to explore whether political sciences or certain issues in jurisprudence may help diagnose why problems with effectiveness occur, and whether improvement is possible to achieve.

The political sciences section will discuss implementation and will also present models of perfect implementation and methods of implementation analysis, namely top-down and bottom-up implementation approaches.

The jurisprudence section will introduce the sociology of law and jurisprudence, both of which recognise that pure black-letter law analysis leaves questions about the practical operationalisation of law unanswered.

#### **1. The effectiveness of policy and the effectiveness of law**

In order to present the two sets of literature revolving around the issue of the effectiveness of Union law/policy, the author wishes to introduce a distinction between the legal side of Union activities and the policy side of those activities. The legal dimension relates to the classical function of law and legal organs, such as securing the observance of legal rules. It has been developed with regard to the fundamental principles of EU law, sources of law and their characteristics, issues of transposition, application, and coercive measures securing compliance. This dimension is evaluated by standards of compliance with specific norms, for example regulations or directives, and has been discussed in previous chapters of this thesis. When the analysis is made from the policy point of view, the establishment of policy, its justifications and

fulfilment of its goals and achievement of desired outcomes becomes the subject of evaluation.

Given that Union activities are both law and policy oriented, two approaches to legal and political research on the effectiveness of the whole Union system have emerged. Narrowing the gap between these two areas of research could prove to be fruitful for a better understanding of the overarching term 'compliance' as well as of the concept of the effectiveness of Union activities. Compliance with policy, treated as antithetical to the compliance with law, can lead to overlooking the multidimensional and interrelated architecture of the EU and result in a failure to understand that compliance and effectiveness are not synonymous.

The term effectiveness will be understood as the practical effectiveness of the EU laws/policies, that is, as the 'law in action' not the 'law in books'.<sup>167</sup> In other words, effectiveness means 'putting into effect' the laws and policies agreed by EU policy-making institutions.

Nicolaides<sup>168</sup> stated that a purely legal understanding of the concept of effectiveness refers to the concept of transposition of EU law into a national legal order. Transposition as such still constitutes a part of the process of giving effect to a certain policy. Therefore, assessing the correctness of transposition may not provide any information on the social changes that followed the transposition process. Practical effectiveness embraces the actions of the Union Institutions as well as the application of Union law by the agencies of national administration, national enforcement mechanisms, and finally, the attitude and behaviour of individuals who are affected by the law. Hence, the terms 'transposition', 'application' and 'enforcement' will be perceived only as phases in achieving practical effectiveness. Transposition is a conversion of Union legislation to the national legal system.<sup>169</sup> Application

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<sup>167</sup> A. Sarat, 'Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition. (1985) 9 Legal Studies Forum' 23

<sup>168</sup> Nicolaides (n 56)

<sup>169</sup> P.M. Haas, 'Compliance with EU directives insights from international relations and comparative politics' (1998) 5 Journal of European Public Policy 18

includes the practical steps taken by relevant state authorities to put implemented legislation into effect.<sup>170</sup> Enforcement means “bringing those responsible for non-compliance into line”.<sup>171</sup> And yet application and enforcement come into play when EU legislation has been implemented, and they involve concrete measures undertaken by national authorities. It is suggested that in the European Union context the term “implementation” of law and policy does not necessarily equate to putting it into effect in all cases, and the lack of effectiveness does not always imply an improper implementation. In consequence, as far as the food quality schemes are concerned, the lack of effectiveness does not necessarily mean non-compliance of the Member State. In other words, for example, a small number of registered product’s names do not necessarily indicate that the law on geographical indications has not been implemented<sup>172</sup> in a Member State; therefore, it does not mean that the Member State is in breach of EU law. The Member State might have put the regulations properly in place by creating a regulatory environment necessary for their existence, however, their effectiveness has not been achieved because of the presence of other than legal factors obstructing the occurrence of desired social changes.

On the other hand, political science places a much greater emphasis solely on the process of implementation, for example variables which may affect policy outcomes, political behaviour in addressing the accomplishment of policy objectives, interactions between multiple actors in public and private institutions, and conditions for perfect implementation and implementation models.<sup>173</sup>

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<sup>170</sup> Nicolaidis (n 56)

<sup>171</sup> D. Matthews, ‘Enforcement of Health and Safety Law in the UK, Germany, France, Italy’ (1993) 18 Economic & Social Research Council Working Paper, London: National Institute of Economic and Social Research 2

<sup>172</sup> It needs to be reminded again that EU regulations are not subjected to implementation in general as they enter national legal order without the need to be translated onto the legal ground. Nevertheless regulations may include implementing norms which need to be followed by Member States.

<sup>173</sup> N. Ryan, ‘Unravelling Conceptual Developments in Implementation Analysis’ (1994) 54 Australian Journal of Public Administration 65-67

The importance of policy implementation is evident. The policy process does not end with the delivery of sets of documents which are administered easily, in a neutral way. Firstly and almost inevitably, every attempt at policy implementation triggers the need to interpret the political programme before it can be put into practice. Secondly, even if the policy is easily interpreted it may not be implemented, or it may not produce the desired results at all, or it may produce results which were not intended. In both cases an 'implementation gap' may open up.<sup>174</sup> As stated above, the intentions of policy-makers are not easily turned into action. Political programmes predominantly produce outputs such as guidelines, laws, inspections, procedures, and outcomes, which are social changes that follow the introduction of outputs. The gap between outputs and outcomes constitutes the essence of the implementation deficit.<sup>175</sup>

Nevertheless, the gap between the two types of effectiveness analysis, namely the effectiveness of laws and of policies of the EU, is believed to be caused by the growing amount of the EU legislation, the study of which has become a separate discipline in itself. Lawyers have started to look at the *aquis* as though it was an autonomous entity. The European Union cannot be defined by pure law or policy on account of its highly elaborated character, but it is simultaneously driven by legal and political forces, in particular by the body of legislation, the ECJ's jurisprudence, common policies and decision-making.

Union policies contain at least three elements: certain goals and objectives, implementing instruments and measures, and institutions or agencies responsible for the implementation of those instruments. At the same time the Union imposes legal obligations on the Member States to provide appropriate instruments and institutions to implement these legal acts fully and successfully.<sup>176</sup> The Union legislation more and more frequently penetrates the national administrations by stating how the domestic structures should be

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<sup>174</sup> M. Winter, *Rural Politics. Policies for Agriculture, Forestry & The Environment* (Routledge, London 1996) 55

<sup>175</sup> Winter (n 174) 56

<sup>176</sup> Nicolaides (n 56)

organised, suggesting for example the creation of separate authorities to monitor the activities of regulators and operators.<sup>177</sup>

## **1.2. instrumentalism and legisprudence**

Wide discussion on the practical effectiveness of law has been marked with the emergence of the instrumentalist movement in legal sciences. Instrumentalism dates back to the early 20<sup>th</sup> century. It operates in the wider context of the realist scholarship, and it serves as a starting point for the utility principle and theory of modern legislation. It was then that Roscoe Pound advocated that instead of being formal, law ought to recognise the needs of society and respond to contemporary social determinants.<sup>178</sup>

The existence of the gap between how law should perform and how it actually performs was, however recognised very early on by the theorists of law. Austin, for example, enunciated the existence of a clear discrepancy between the logical, coherent, hypothetical legal system and the actual legal system of a particular state.<sup>179</sup> Also Pertażycki's theory of law as a psychic experience grew out of his dissatisfaction with the inability to explain the reality of law via tools delivered by, for example, positivism or idealism in law. He claimed that the reality of law cannot be found in the illusionary world of words.<sup>180</sup> Petrażycki also distinguished between the living law and law in books. The latter – binding law – is placed in abstract reality as a normative phenomenon, it establishes social institutions. The living law is the kind of law which is expressed by people's behaviour – this law influences directly the people's

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<sup>177</sup> Graver (n 51); For example the directive on transit of natural gas, Article 21, requires the Member State to designate a “competent authority which must be independent of the parties to settle expeditiously disputes and art 22 “to create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid abuse of a dominant position”. in:

S. Andersen, European Integration and the Changing the Paradigm of Energy Policy. The case of natural gas liberalisation. Arena Working Papers 99/12

<sup>178</sup> R. Pound, *Social Control through the Law* (Archon Books, New York 1942)

<sup>179</sup> J.E. Bickenbach, ‘Empiricism and Law’ (1985) 35 University of Toronto Law Journal 96

<sup>180</sup> R. Sandurska, ‘Jurisprudence of Leon Petrażycki’ (1987) 32 The American Journal of Jurisprudence 65



decisions. The living law is motivational, it provides a stimulus to behave in a certain way.<sup>181</sup>

Whereas Bentham advocated the importance of the utility principle, meaning the law should serve its purpose, he was also concerned with providing the science of legislation. For him, law was a tool which could serve as a facilitator of social reform. Therefore, he advocated the need to establish two kinds of jurisprudence – ‘expository’ and ‘censorial’. In order to serve its purpose the distinction between the two must ensure that a piece of legislation produced by an expositor is in fact the law and as such remains neutral. Whereas a censor, having to reform the law, must be clear about the objective of the legislation.<sup>182</sup> The law is effective not only when it overcomes resistance but also when it prevents confrontation, when the subsequent social choice of an individual matches the a priori hypotheses and disposition of a legal norm.<sup>183</sup>

Instrumentalists recognise the importance of the social environment in which law functions. Law is a tool in the hands of legislators, predominantly governmental bodies, via the creation and implementation of which certain social changes are to be achieved. When enacting law, legislative authorities have that goal in mind – making the desired social change happen.<sup>184</sup>

Having said that, it is worth emphasising that the need for instrumental law is increasing thus instrumental lawmaking becomes more and more common. These phenomena are triggered by the emergence of goal-oriented policies, very often put on the legislators' agenda by various interest groups. In addition, the rise of new challenges in social reality demands law to accommodate this changing reality. However, the ever increasing complexity of social realms poses a challenge to legislation for which achievement of its desired aims

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<sup>181</sup> A. Podgórecki, ‘Unrecognized Father of Sociology of Law: Leon Petrażycki. Reflections based on Jan Górecki’s Sociology and Jurisprudence of Leon Petrażycki’ (1980-1981) 15 *Law and Sociology Review* 191-192

<sup>182</sup> H.L.A Hart, *Essays on Bentham Jurisprudence and Political Theory* (OUP, Oxford 1982) 2

<sup>183</sup> Sarat (n 167 ) 25

<sup>184</sup> K. Van Aeken, ‘Legal Instrumentalism Revisited’ 68 in: J.L. Witgens, *Theory and Practice of Legislation. Essays in Legisprudence* (Ashgate, Aldershot 2005)

grows in difficulty.<sup>185</sup> Hence the development of “legisprudence”, that is the science of lawmaking, calls for attention.<sup>186</sup>

The beginning of legisprudence dates back to the 1950s in America, where legal realism started growing in importance. Cohen, in his work entitled ‘Towards Realism in Legisprudence’, advocated the need for “*facts* – concerning the effectiveness of law in operation”, that is, scientific measuring geared towards the delivery of evidence on the efficacy of their actions both for policy-making activities and for legislative undertakings. This measurement should be done in an effort to render the whole process of policy-making more rational as well as to stop socially harmful policies from being perpetuated. Ideally, scientific measuring should be conducted constantly and in many forms, as for example prognostic, diagnostic or evaluative studies, as only then can the pathways of widely understood policy-making be illuminated.<sup>187</sup>

Legisprudence and instrumentalism are interlinked. Instrumentalists were conducting research projects aimed at determining how statutes should be formulated so they could most effectively achieve their desired function, and how new political programmes could be made more effective. William Evan identified seven conditions of effective legislation, which implied that if the legislation conveying a political programme was enacted along with these conditions, it would be highly likely to produce desired results.

Evan’s<sup>188</sup> conditions for effective legislation are as follows:

1. The source of new law ought to be authoritative and come from a respected body.
2. New legislation should represent continuity and remain compatible with existing institutionalised values.

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<sup>185</sup> Van Aeken (n 184) 78

<sup>186</sup> Van Aeken (n 184) 78

<sup>187</sup> J. Cohen, ‘Towards Realism in Legisprudence’ (1949-1950) 59 Yale Law Journal 886 – 889

<sup>188</sup> M. Travers, *Understanding Law and Society* (Routledge, Oxon 2010) 3-5

3. There should be some point of reference or evidence that similar legislative measures worked in the past.
4. The new law ought to be implemented quickly to minimise resistance towards new measures.
5. The enforcement agents must themselves be committed to the behaviour required by the law.
6. There should be positive rewards to follow from compliance, not just negative sanctions.
7. Those who might benefit from the new legislation need to be equipped with effective means to enforce their rights; addressees of the legislation, when executing their rights, ought to act collectively rather than individually.

Nevertheless, legal scholars were reluctant to include the problem of legislation in their study. Their hesitation stemmed from the fact that legislation is perceived as belonging to the realm of politics, therefore it should be dealt with by political scientists.<sup>189</sup> Legislation is a matter of policy, which means it is a matter of choice. Choices, by their nature, are bound to be subject to discussion and as such are not permanent, whereas law is ‘just there’. It represents reality and it is dictated by the transcendent norm reproduced through the law of the sovereign.<sup>190</sup>

The construction of law leaves no room for discussion about its usefulness,<sup>191</sup> whereas legisprudence starts from the assumption that no legal system is (or

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<sup>189</sup> Bickenbach (n 179) 95: Jurisprudence deals with description of the law, juriprudists aim at producing an abstract and analytic reconstruction of the principles and notions essential to the law such as right, obligation, sanction, person, act etc... It also deals with concept such as what the law is and what it ought to be.

<sup>190</sup> Positive tradition sees law as a series of commands made by the sovereign – that is that entity which receives habitual obedience from most members of the society: Bickenbach (n 179) 96

<sup>191</sup> L.J. Wintgens, ‘Legisprudence as a New Theory of Legislation’ 5, in: L.J. Wintgens (ed.) *The Theory and Practice of Legislation. Essays in Legisprudence* (Ashgate, Aldershot 2005)

even can be) perfect, but it can be 'perfectible.'<sup>192</sup> Legisprudence is there to solve a social conflict via legislation. Bearing in mind that the outcomes of legislation can only be predicted to a certain degree, its previous and post factum examination is desirable to increase its effectiveness.<sup>193</sup>

The science of legislation observes that we live in an administrative state which is shaped by policies implemented by administrative agencies.<sup>194</sup>

Moreover, the theory makes a distinction between law and legislature, claiming that law is much more of an abstract entity and in a sense a fundamental category – it is a definite set of rules governing human conduct, whereas legislation consists of the initiation by the legislature of policies or programmes for the achievement of particular results. These programmes are established by particular legislative actions and continue to function until modified or replaced by other legislative initiatives. Legislation, apart from establishing programmes, also delivers implementation mechanisms. Hence, legislature prepares statuses only and delegates implementation responsibilities over to agencies, which in consequence means that a significant bulk of legislation governs the behaviour of implementing agencies on top of establishing rules of conduct for private persons. In other words, law and legislation overlap, some legislation may include law but it does not have to be the case, it is possible to find a piece of legislation which does not regulate human conduct at all.<sup>195</sup>

Since legislation is seen here much more as a device that is to be used to achieve social results, the kind of legislation that has the potential to be the most effective needs to be examined. The theory introduces the concept of external versus internal, and transitive and intransitive legal acts. Internal acts are directed to agencies and regulate their behaviour, external acts are meant for the agencies as well but they concern the behaviour of private parties.

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<sup>192</sup> I.B. Flores, 'The Quest for Jurisprudence: Constitutionalism v. Legalism' 32, in: Wintgens (n 191)

<sup>193</sup> *ibid*

<sup>194</sup> E.L. Rubin 'Law and Legislation in the Administrative State' (1989) 89 Columbia Law Review 369

<sup>195</sup> Rubin (n 194) 372 -377

Transitive acts on which mechanisms must be applied provide clear rules for the agency, considering that these rules are perceived as necessary facilitators for achieving desired effects. Intransitive acts empower the agency to develop implementing rules. And finally, the legislation ought to include some performance standards which will serve as a point of reference while assessing the implementing agency results. In addition, these standards constitute a basis for the control exercised by the legislature over the agency and implementation mechanisms.<sup>196</sup> In the case of the food quality system performance, standards could be perceived as an unnecessary encroachment upon the freedom of individual parties, harmful rather than increasing efficiency.

This theory strongly emphasises that focusing on the judiciary when assessing the effectiveness of law is faulty. There is a tendency to focus on the role of courts when talking about the effectiveness of law, yet the courts stand at the receiving end of rendering the law effective. The desired situation is that courts do not come into play because the law is obeyed. As Cohen noticed, “[...] obedience to legislative policy does not necessarily await the judicial green light. Legislation calling for a ‘blackout’ during an air-ride does not have to be litigated before it is obeyed.”<sup>197</sup>

Courts are not perceived as performing an implementation function. Rather they perform a supervisory role, acting as restitution institutions whenever law has been breached, they do not act when putting legislation into practice.

Initially, the emergence of instrumentalism was welcomed with great hopes and appreciation that social progress would be reached through the indigenous qualities of law. Even though the movement was widely criticised because of the close cooperation with government, some of its developments cannot be denied their validity. As the idea of a welfare state deteriorated, instrumentalism had been subjected to ever growing criticism, and finally discredited. The critique was fuelled partially by the fear of converting law

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<sup>196</sup> Rubin (n 194) 381- 391

<sup>197</sup> Cohen (n 187) 888

into a dictatorship mechanism as used in the communist bloc countries, and partially by effectiveness issues.<sup>198</sup>

In the 1950s, a limited number of effectiveness studies were conducted and they revealed that law did not often secure its intended outcomes. And yet following Van Aeken, the problem with effectiveness studies is of that nature that scholars tend to focus on ineffective regulations much more than on those which work well. This in consequence forms an impression that the ratio of ineffective to effective laws is overwhelmingly high. Therefore, more empirical research is needed to support or overthrow the presupposition that instrumental laws are unsuccessful. In response to the former charge against instrumentalism, Podgórecki states that the drive behind social engineering determines its character. It cannot be assumed that any desire to achieve a given social change is unethical, as social transformative action is very often required.<sup>199</sup>

### **1.3. the reconciliation of law and policy**

Even though the reconciliation of the law and policy-oriented research of the effectiveness of Union law has been advocated for a long time now, the dialogue between lawyers and political scientists seems to be difficult. According to Weiler, the gap between the two bodies of knowledge and the two research approaches can be justified to some extent, but he still postulates that the combined approach to European study could shed more light on the vastly complicated European processes.<sup>200</sup> The implementation of policy is predominantly carried out through law and involves and influences government policies, governmental agencies, regulatory organisations and programme clientele.<sup>201</sup> Those two elements – law and policy – simultaneously determine the implementation outcome. It is a commonly known truth that court decisions and legislative and administrative rules do not translate

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<sup>198</sup> Van Aeken (n 184) 72

<sup>199</sup> A. Podgórecki, *Social engineering* (Carleton University Press, Carleton 1996)

<sup>200</sup> Weiler (n 22) 46

<sup>201</sup> W.H. Clune III, 'A Political Model of Implementation and Implications of the Model of Public Policy, Research, and the Changing Roles of Law and Lawyers' (1983-1984) 47 Iowa Law Review 49

automatically into desired actions. Regardless of the importance of legal obligations, compliance with policy cannot be rashly assumed.<sup>202</sup> Therefore, the omission of political and social factors influencing implementation of law could lead to erroneous conclusions about whether the correct transposition of, for example, a directive fulfils the requirement of full compliance.

In her recent study, Mastenbroek suggests that ‘domestic politics’ needs to be brought to researchers’ attention which, combined with insight into internal administrative and legal problems, has the potential to provide a deeper exploration of a higher number of variables determining the actual scope of the Member State’s compliance. As she stated, “the laws in the books are a useful starting point of research but the really interesting question is to what extent these are given effect”, as compliance is a lot more than transposition.<sup>203</sup>

Moreover, the results of political ideas are predominantly transformed into either: 1) programmes binding on a State or 2) legal rules, which is probably the most common situation.<sup>204</sup> The establishment of a programme without any legal underpinning could lead to a difficulty in legitimisation of the enforcement measures applied afterwards. The danger is that the legal act, without an elaboration of it in the form of a programme, could be interpreted contrary to its spirit and the drafters’ aims.

## **2. Implementation**

The next stage of putting the law or policy into practice is converting ideas into real life experience. The aim of implementation analysis is to investigate the success or failure of implemented programmes by observing differences between the intended and actual outcomes supported by the evaluation of findings. For Pressman and Wildavsky, the meaning of implementation is to carry out, accomplish, fulfil, produce, and complete. Implementation is “a

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<sup>202</sup> M.G. Yudof, ‘Implementation Theories and Desegregation Realities’ (1981) 32 *Alabama Law Review* 443

<sup>203</sup> E. Mastenbroek, ‘Research agenda section’ (2005) 12 *Journal of European Public Policy* 1116

<sup>204</sup> Siedentopf (n 27) 5

process of interaction between the setting of goals and actions geared to achieving them.”<sup>205</sup>

According to Clune, implementation is a process of attempting social changes through law. These desired social changes require a “finely tuned” legal policy composed of detailed planning, targeting, oversight, and control.<sup>206</sup>

Goggin sees implementation in the following terms: it is a problem solving activity that involves both administrative and political behaviour. The manner and style of implementation are determined by the implementing decisions as well as the actions which were undertaken between the adoption of the plan and the moment when it is more or less successfully introduced into the target environment.<sup>207</sup>

Bardach presents an interesting view on the implementation process as playing out numerous political and bureaucratic games. In other words, implementation is carried out by players whose goals might not be congruent with the objectives of the policy. Therefore, it is important to investigate the reasons behind the actors’ actions, including those who are not willing to play or those who insist on changing the rules of the game.<sup>208</sup>

Mazmanian and Sabatier have defined implementation in a very comprehensive manner. According to them:

The process of implementation is the carrying out of a basic policy decision, usually incorporated in a statute but which can also take the form of important executive orders or court decisions. Ideally, that decision identifies the problem(s) to be addressed, stipulates the objective(s) to be pursued and, in a variety of ways, ‘structures’ the implementation process. The process normally

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<sup>205</sup> J.L. Pressman and A. Wildavsky, *Implementation. How Great Expectation in Washington Are dashed in Oakland or, Why It’s Amazing That Federal Programmes Work At All* (University of California Press, Berkley, Los Angeles, London 1983) XXI-XXIII

<sup>206</sup> Clune III (n 201) 51

<sup>207</sup> M.L. Goggin, ‘The “Too Few cases/Too Many Variables” Problem in Implementation Research’ (1986) 39 *Western Political Quarterly* 330

<sup>208</sup> Bardach (n 138) 56



runs through a number of stages beginning with the passage of the basic statute, followed by the policy outputs (decisions) of the implementing agencies, the compliance target groups with those decisions, the actual impacts – both intended and unintended – of those outputs, the perceived impacts of agency decisions, and, finally, important revisions (or attempted revisions) in the basic statutes.<sup>209</sup>

In summary, implementation is a process which follows the enactment of law and policy aimed at achieving the objectives of the policy via a variety of means. The means can be found in legal underpinning of the political programme or policy guidelines. They can also result from negotiations between different actors involved in the implementation process.

Implementation needs an object; it cannot be placed in a vacuum. The policy is that object. Only after the programme is agreed on can room for implementation be made, as the existence of a programme signifies the conversion of hypothetical political assumptions into governmental action. In addition, the programme is a system in which all elements are interdependent and form a causal chain. Failure at one stage may hamper, or at least delay, the implementation. Therefore, a successful implementation is a process of achieving the targets represented by the subsequent links in the chain in an effort to obtain the desired results. One link has to be completed in order to move on to the next one.<sup>210</sup>

Certain steps in the causal chain of implementation can be executed only when the consent of the participants involved in giving effect to the policy is given. The situation which requires such consent is called a decision point. Consent expressed by an individual participant is called clearance.<sup>211</sup>

Following Pressman and Wildavsky, the processes of implementation should be followed by evaluation. Implementation provides the experience which is

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<sup>209</sup> P. Sabatier and D. Mazmanian, 'The conditions of effective implementation: a guide to accomplishing the policy objectives' (1979) 5 Policy Analysis 481-504

<sup>210</sup> Pressman (n 205) XXIII

<sup>211</sup> Pressman (n 205) XXIV

interrogated by the evaluation in an effort to “make sense of what is happening”. These scholars claim that the analysis of implementation should not be separated from evaluation because it is the latter which provides the solution to the malfunctioning of the former, by determining not only what went wrong but also how to improve programme performance. Moreover, the evaluation should be conducted continuously for changing circumstances may alter the political background of the implementation. Therefore, the functioning of a programme in an altered environment requires a fresh perspective on its performance.<sup>212</sup>

The implementation researchers also stress that the characteristics of the implementation process and implementation products should not be confused. What is important for the implementation researcher is to draw a line which separates the implementation performance from its consequences.<sup>213</sup> Bardach emphasises that the difference between implementation output and outcomes ought to be investigated separately and successful outputs should not be too easily classified as successful outcomes.<sup>214</sup> However, the implementers have a tendency to talk about outputs which are more easily measurable by, for example, statistical tests or financial reports. Summarising, a successful implementation does not equal programmatic success.<sup>215</sup> Therefore, the emergence of an implementation gap is almost inevitable.

A helpful way to consider the issue of implementation is to examine a number of important preconditions for the perfect policy. Drawing upon the concept of ‘perfect administration’ introduced by Hood<sup>216</sup> in his study on the limits of administration, Hood and other implementation theorists like Pressman, Wildavsky or Gunn helped us identify the preconditions of achieving a completely effective implementation of public policies. Following Gunn,<sup>217</sup>

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<sup>212</sup> Pressman (n 205) XV – XVIII

<sup>213</sup> Goggin (n 207) 330

<sup>214</sup> Bardach (n 138) 4

<sup>215</sup> Goggin (n 207) 330

<sup>216</sup> L.A. Gunn, ‘Why is Implementation So Difficult?’ (1978) 33 *Management in Services in Government* 169-176

<sup>217</sup> Gunn (n 216) 169-176

this theoretical concept performs a very practical function. It helps one to think more systematically about the reasons for implementation failures and about approaches to the implementation processes. The concept comprises ten conditions necessary for the achievement of perfect implementation.

1. The circumstances external to the implementing agency do not impose crippling constraints.

For example some physical or political obstacles to effective implementation such as unusual weather, political party activists or trade unions remain outside the sphere of control of administrators, and they may undermine implementation performance.

2. Adequate time and sufficient resources are made available to the programme.

This means that results should not be expected too soon, especially when changes in attitudes and behaviours are involved. In the case of funds, neither should there be a shortage of funds for hiring new staff, nor should the money be expected to be spent in an unrealistically short period of time.

3. At each stage of the implementation process the required combination of resources is made available.

It is advisable that certain flexibility be present in managing all the resources. Additionally, implementers should be able to prepare 'back-up' means in advance, regardless of their kind, to secure the most crucial elements of a programme in case of serious setbacks to implementation. However, ascertaining when exactly sufficient funds have been allocated to an undertaking constitutes a considerable challenge. Mazmanian and Sabatier provide a sensible indication of what should be financed in order to get the task done. The implementing agencies should have the funds to hire the new staff necessary to administer and monitor the implementation, to engage in the research and development necessary to critically examine information about the progress in implementation, and, in some cases, the funds necessary to

develop and apply alternative implementation strategies, when the one already utilised would prove to be ineffective.<sup>218</sup>

4. The policy which is to be implemented needs to be based upon a valid theory of cause and effect.

Policies are sometimes ineffective because they are based on a flawed understanding of a problem. That is why implementers apply inadequate cures to remove the causes, not because their policy execution is faulty but because the initial diagnosis of the condition is incorrect. An example to illustrate this point is the introduction of policies aimed at revitalising rural economies which are geared towards agricultural producers rather than towards other social actors like agro-farmers, who might generate more profit for a given rural area.<sup>219</sup>

5. The relationship between cause and effect is direct and there are few, if any, intervening links.

The shorter the chain of causality, the better it is for the implementation process. In other words, the fewer the links in the chain, the higher the probability of successful implementation. Pressman and Wildavsky argue that the greater the number of decisions required by different actors at different points in the implementation process, the more likely it is that the policy will fail. The case is evident as far as agricultural policies are concerned, where the fulfilment of the objectives of agricultural policy may require the involvement of a number of ministries, local administration which may be state-run or private inspection bodies. In situations like this the complicated relation of dependencies and autonomies or quasi-autonomies of individual institutions may seriously hamper the whole process of smooth policy implementation. Furthermore, as a result of the bargaining power of every organ involved in the implementation, the policy might easily lose its previously planned shape and

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<sup>218</sup> Sabatier (n 209) 488-489

<sup>219</sup> Winter (n 174) 57

become 'customised' to the strongest actor's needs during the implementation process.<sup>220</sup>

6. Dependency between implementing agencies must be minimal.

Although such a situation constitutes a favourable condition for a successful implementation, its occurrence is highly unlikely. An intervening network of local authorities, commissions, voluntary associations or organised groups is bound to appear.

7. A complete understanding of an agreement upon the objectives persists throughout the implementation process.

In theory, the objectives of the policy which is supposed to be implemented should be clearly defined, understood and agreed upon throughout the organisation. In practice, the objectives of programmes are often difficult to identify or clarify because they are couched in vague terms. Ergo, the risk of goal displacement may emerge. The original objectives of the programme might become substituted by unintended objectives and the implementation process would become seriously impeded.

8. It is possible to specify the perfect sequence of the tasks to be performed by each participant.

Again, the perfect sequence of the tasks to be performed is unattainable. However, the better the implementation agencies are organised, the higher the probability that the implementation is successful. Moreover, a clear delegation of responsibilities allows the identification those who fail to act when action is required.

9. There is perfect communication between and co-ordination of the various elements or agencies involved in the programme.

Perfect communication and co-ordination are unattainable; it suffices to say that undistorted communication and co-ordination render the implementation

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<sup>220</sup> In Poland Ministries which can be involved in the implementation of agricultural policies are: Ministry of Agriculture and Rural Development, Ministry of Environment, Ministry of Regional Development, Ministry of Sport and Tourism.

process much more feasible. Implementers ought to devote closer attention to final recipients of the programme in order to establish if the information received by them corresponds to that information which has been sent to them. The myth that implementers exercise “determinant control over the policy implementation is called the ‘noble lie’” and it states that the implementation process can be determined by the intentions and direction of policy-makers.<sup>221</sup> This concept is difficult to defend in the face of the existence of a plethora of variables modifying the outcomes of implementation, like for example the *vis maior*, typically ascribed to natural phenomena.

10. Those in authority can demand and obtain perfect obedience.

This condition can be achieved either in totalitarian regimes or in a much disciplined body, for example the army. In real life, no administrative system can secure perfect obedience for the benefit of those to whom the instructions are issued. Resistance may result from inter-agency rivalry or bargaining over competence issues whenever the responsibilities of implementing agencies happen to overlap or when the policy itself is radical, therefore objected to by the recipients themselves.<sup>222</sup>

It is self-evident that obtaining compliance differs among various target groups. Some groups may be more willing to change while others may strongly resist. According to Mazmanian and Sabatier, when the changes are difficult to attain, the application of greater legal and political resources has the potential to stimulate desired outcomes. For example, providing extensive training for the implementing officials in order to improve the quality of their interaction with stakeholders, which would enhance their degree of managerial and political skills, has the potential to render the programme objectives more attainable.<sup>223</sup>

In the European Union, according to Nugent, the failure of Member States in implementing the law does not exclusively constitute the reason why the

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<sup>221</sup> R F. Elmore, ‘Backward Mapping: Implementation Research and Policy Decisions’ 20 in: W. Williams, *Studying Implementation* (Chatham House Publishers Inc., New Jersey 1982) 20

<sup>222</sup> Winter (n 174) 60

<sup>223</sup> Sabatier (n 209) 485

implemented programmes have not been effective, as the lack of programme effectiveness could also be caused by:

- The character of the policy in question: some EU policies by their nature are very difficult to administer, for example the Common Fisheries Policy;
- The budget for administrators/inspectors/controllers which has been allocated to a certain scheme: national governments are not always willing or able to finance additional posts for new officials whom the effective implementation of policy area requires;
- A degree of proficiency of the national officials in performing their duties: national officials are very often overwhelmed by rapidly changing EU rules, therefore, they struggle with accurate administration of the bulk of the legislation;<sup>224</sup>
- A rapid proliferation of national inspection or controlling structures into private, quasi-private or quasi-public agencies weakens central government control over all organisations directly or indirectly responsible for the implementation of EU laws.<sup>225</sup>

Besides drawing a line between implementation outcomes and output, an interesting taxonomy based on the success or failure of implementation performances can be found in the literature. The first type of performance is no performance at all, that is the situation where implementation does not exist. Another type of performance is when implementation is successful in theory only, whereas theoretical presuppositions fail to be met in practice – this is ‘paper implementation’. The next category is ‘adjusted implementation’, that is the situation in which primary goals have been deflected because of a series of accommodations adopted in order to resolve emerging conflicts. This kind of performance is called political implementation. The final type of implementation is a ‘coordinated’. This type is believed to be the most

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<sup>224</sup> Nugent (n 74) 277

<sup>225</sup> Nugent (n 74) 277

successful, predominantly owing to the fact that it is more administrative than political, which implies participants' political agreement on implementation aims, and allows actors to concentrate on the best implementation strategies to attain them.<sup>226</sup>

### **3. Evaluation**

Since implementation can take different forms and produce different results, the overall policy and implementation evaluation should not be abandoned.

The aim of that operation is to identify the changes caused by processes and the impact of governmental policies and programmes in the real world. And yet, this thesis recognises implementation as a process of putting policy into effect via certain means in order to produce desired results. Therefore, the evaluation of analysed law/policy will be carried out retrospectively here.<sup>227</sup> In other words, the results of the food quality schemes in Poland are of major interest for this thesis.

Even though evaluation is very important for the implementation research, it also has its drawbacks. The value of evaluation depends on the implementers, for example government officials, being willing to draw lessons from it in order to alter the course of policy or improve on achieved results. Who is conducting the evaluation and the nature of the relationship between the evaluator and the policy-makers is also paramount. Independent evaluators and academics, for example, should be free from bias and independent in presenting their findings but they may be denied access to sensitive information. Conversely internal evaluators can go deeper in their research and are usually better acquainted with internal politics but they may be forced not to divulge inconvenient information. Yet providing a different perspective on the process of implementation should at least deepen understanding of the functioning of the policy in question in real life.

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<sup>226</sup> Goggin (n 207) 330

<sup>227</sup> C. Pollitt, 'Occasional excursions: a brief history of policy evaluation in the UK' (1993) 46 Parliamentary Affairs 353



## **4. Top-down and bottom-up approach to policy implementation**

### **4.1. the top-down implementation approach**

Laws and policies are formulated by the ‘top’ – central government and parliament, and are implemented predominantly by the ‘bottom’ – local administration, all in order to achieve desired social changes – the fulfilment of the policy goals and objectives. Implementation scholarship has developed certain conceptual approaches to research on implementation; two amongst them have gained particular prominence. These two methods are referred to as the top-down and bottom-up approaches, respectively.

In short, the top-down approach focuses on the policy designers as the central actors in orchestrating and influencing the process of policy formulation and implementation. The bottom-up approach emphasises the role of the programme’s final recipients and service deliverers, namely local administration in the vast majority of cases.<sup>228</sup>

One of the first systematic studies of implementation conducted by Pressman and Wildavsky strongly contributed to the examination of the realisation or non-realisation of policy objectives, as well as laying a foundation for the top-down model of implementation analysis elaborated later. For Pressman and Wildavsky, implementation could only take place when the political programme had evolved from the ‘if’ stage of political promises and had been accepted by the policy-makers. In other words, top-down analysis starts from establishing the policy-makers’ intent which is usually expressed in a legal act, and then proceeds downwards through a sequence of steps in order to define the tasks and responsibilities of all implementers at each implementation level. When the process reaches the bottom, top-downers try to answer whether the outcome of the policy in question matches the original statement of intent.<sup>229</sup>

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<sup>228</sup> R. E. Matland, ‘Synthesizing the Implementation Literature: The Ambiguity-Conflict Model of Policy Implementation’ (1995) 5 *Journal of Public Administration Research and Theory* 145 - 174

<sup>229</sup> Elmore (n 221) 19

Mazmanian and Sabatier elaborated on the top-down approach in greater detail. They suggested favourable conditions for successful implementation. These are as follows:

- Clear and consistent legal objectives, providing both the standard of evaluation *and* important legal resources for the implementing officials, are expressed in the legal statute legitimising the political programme.
- The causal assumption, embodied within the policy, on how to effectuate social change needs to be valid.
- The implementation process needs to be legally structured and endowed with incentives as well as sanctions in order to overcome the resistance of those involved in programme delivery and keep administrative discretion within certain bounds.
- Implementing agencies must be skilled, dedicated and willing to give the implementing programme high priority.
- Interest groups receive support from the legislative and executive authority.
- Socio-economic environment would be subjected to significant changes.<sup>230</sup>

Top-downers also strongly emphasise the role of legal statutes in providing the blueprint for future implementation, against which the effects of implementers' actions should be evaluated. Therefore, the language of the statutes very often sets the beginning for top-down analysis. However, the focus on legal statutes and the requirement of unambiguous legal provisions has been criticised on a number of counts. Firstly, the legal language, especially language which legitimises the political programme, is very often purposely vague. The statute underpinning the political statement is a result of negotiations and bargaining among the policy-makers, lawyers and interest groups. Therefore, the vagueness of the statute intentionally creates ambiguity, which can cover the wider scope of terminological meanings, and can be reinterpreted according to changing circumstances.

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<sup>230</sup> P. Sabatier, 'Top-down and Bottom-Up Approaches to Implementation Research: a Critical Analysis and Suggested Synthesis' (1986) 6/7 Journal of Public Policy 23-24

Secondly, the focus on the statutes as the starting point leads to undervaluing the circumstances preceding the formulation of the legal act. The understanding of those actions may provide very important insights into the broader policy objectives, understanding of which enables future implementers to construe the legal act or political programme according to its spirit. A purely linguistic interpretation of the law may not convey the intentions of its creators which, in consequence, could lead to its erroneous application by the legislature.

Another criticism of the top-down approach is the assumption that the control of policy-makers over political, technical and organisational factors influencing implementation is crucial and very often sufficient for effectuating the desired changes. Top-down ideologists run the risk of crediting everything that is happening at the bottom to mandated officials, denying the role of other actors, especially final recipients of the programme and other overlapping or conflicting policies. At the same time, they are reluctant to admit that implementation may be followed by unforeseen consequences beyond the control of top implementers.

#### **4.2. the bottom-up implementation approach**

Bottom-up models of implementation have opened a new avenue of enquiry around the issue of understanding the implementation. These models reject the top-down assumption that the outcomes of policy implementation can be controlled from above. *A contrario*, the bottom-uppers claim that what happens on the ground is very loosely related to what has been intended, decided or codified at the top. For bottom-up ideologists, investigating the role of the target clientele or service deliverers is a better way of looking at policy implementation. They claim that the focus on what actually influences actions on the ground rather than on how the expectations created at the top have been

met has much more realistic potential to explain what is actually happening to the implemented policy.<sup>231</sup>

According to Berman,<sup>232</sup> policy implementation occurs on two levels: the macro and micro level. The macro level is occupied by centrally located actors – very often governmental officials, who prepare programmes to be implemented by local administration. At the micro level, local actors negotiate with the assumptions and requirements of the central programme, which results in the development of their own version of the concept that has come from above. Hence, what is being implemented is the altered version of what has been intended.

Given the fact that the implemented programme is the outcome of the wishes and intentions of those at the top and the motives and possibilities of those at the bottom, the implementation research should start with an examination of service providers and should be geared towards their behaviour, motivations, goals and strategies.<sup>233</sup>

Weatherley and Lipsky put the emphasis on street-level bureaucrats as, according to them, they are responsible for the operationalisation of policy at the micro level, and their actions, skills and resources determine the way in which the policy will affect people.<sup>234</sup>

Hejn and Hull acknowledged that not only are mandated officials or civil servants responsible for delivering the policy to people, but public and private organisations also share this responsibility. They denied that all of the actors involved in the process of policy delivery come from a public structure based on an organisational hierarchy. Instead, they claimed that implementation is

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<sup>231</sup> K. Hanf, 'Regulatory structures: Enforcement as Implementation' (1982) 10 *European Journal of Political Research* 160

<sup>232</sup> P. Berman, 'The Study of Macro and Micro Implementation of Social Policy' available at: <http://www.rand.org/content/dam/rand/pubs/papers/2008/P6071.pdf> URL correct as of 1 May 2012

<sup>233</sup> C. Hull and B. Hejn, 'Helping Small Firms Grow' (1982) 10 *European Journal of Political Research* 188

<sup>234</sup> R. Weatherley and M. Lipsky, 'Street-level Bureaucrats and Institutional Innovation: Implementing Special Education Reform' (1992) 47 *Harvard Educational Review* 170-196

the outcome of the interplay between public and private sectors, very often competing or displacing one another. Therefore, these scholars identified a network of actors involved in the service delivery at the receiving end of the whole process and asked them questions about their goals, strategies, activities and contacts. Subsequently, those findings were applied further so as to uncover local, regional and national actors involved in planning, financing and executing the policy in question. This method of enquiry permits moving from street level implementers to the top level, in both public and private sector.<sup>235</sup>

Criticism of the bottom-up approach is centred on its particular interest in street level bureaucrats and service deliverers. Opponents claim that this method overemphasises the role of local autonomy and severely underestimates the power of policy-makers, which leads to a situation where democratically chosen authorities possess less authority than the local services that do not derive their power from the will of the community. Secondly, the bottom-uppers confuse the prescription to the implementation process with its description, justifying different implementation patterns via local idiosyncrasies. Following Sabatier, the bottom-up approach could benefit from including in its methodology the theory and legal factors upon which the programme has been built, which also structures perceptions, resources and the participation of affected actors apart from their subjective interests.<sup>236</sup>

One of the major attempts to combine the two perspectives has been made by Elmore, who proposed another conceptual model of approaching the problem of a successful implementation. Elmore proposed two distinguishable approaches to the implementation analysis: forward mapping and backward mapping. Forward mapping sits comfortably within the concept of a top-down approach, while backward mapping is, as the term suggests, entirely the

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<sup>235</sup> B. Hejn and C. Hull, 'Small Firm Employment Creation' 132, in: K. Hanf and T. Toonen, (eds.) *Policy Implementation in Federal and Unitary Systems* (Martinus Nijhoff, Dordrecht 1985) See also: The study of Swedish manpower training programmes allow the conclusion that program success depends only to a limited degree on central activities, but rather on the skills of specific individuals in the local implementation coalition which adopt policy to particular local conditions. In: B. Hejn, K. Hanf and D. Porter, 'Local Networks of Manpower Training in the Federal Republic of Germany and Sweden' 303-344 in: K. Hanf and F.W. Sharpf, *Interorganisational Policy Making: Limits to Coordination and Central Control* (Sage, London 1978)

<sup>236</sup> Sabatier (n 209) 35

reverse. Following Elmore, the solution to policy implementation problems could involve the future setbacks to policy implementation while the policy is being elaborated or when it is still in its embryonic phase before the implementers settle on a course of action. Policy-makers ought to think about the implementation of their policies in advance so as to improve the implementation results in the future. The implementation process should start from investigating the situation at the point where administrative actions meet the individual choices of the programme clientele. Instead of imposing the political intent, the investigation should start with “a statement of the specific behaviour at the lowest level of the implementation process that generates the need for a policy”. Only after that behaviour has been described should policy-makers proceed to establish the policy objectives. Having established, with the greatest possible precision, the ultimate target of political activities at their receiving point, the analysis should be taken upwards through the structure of implementing institutions. At the level of each institution, two questions should be asked:

1. What is the ability of this unit to affect the behaviour that is the target of the policy?
2. What resources does this agency require in order to affect the desired behaviour?

Even though policy-makers have a strong interest in effecting the implementation process and its outcomes, they are not the key actors who provide the means to implement the policy. Those who are present at the service delivery level of performance have a much greater ability to achieve the desired outcomes. Hence, discovering the closest point of contact and linking it to the problem in question constitutes a crucial point of the backwards mapping analysis. Henceforth, the analysis revolves around the issue of finding the most effective means of reaching the point of contact together with allocating resources to those contact points, which would enhance their ability to obtain the desired behaviour in the most effective

way.<sup>237</sup> Having done this, the policy-makers should be able to design the policy, which would be implementable with the greatest effect with regard to the resources available at the organisational level that is responsible for putting the policy into effect.

Both implementation approaches are not free from weaknesses. The bottom-up tendency to undervalue the legal underpinning of the policy in question deprives that policy of legitimisation and predictability, whereas the top-down tendency to disregard the role of service deliverers creates the risk of not exploring the process of implementation in depth. Moreover, the bottom-up assumption of the very broad discretion of street-level implementers is slightly exaggerated since every organisational unit placed higher in the hierarchical structure has the authority to apply a range of legal methods including sanctions to structure the implementation process at the lower level. The top-down preconception about the omnipresent regulatory power of legal statutes and enforcement proceedings underestimates the influence of individual interpretation of the provisions of the legal act enacted by administration officials, lawyers or judges. Needless to say, applying different approaches to implementation research is likely to give different results. Therefore, it is difficult not to agree with Sabatier<sup>238</sup>, who claims that the area of research and expectations towards results can interact better with one of the methods. Sabatier considered the top-down and bottom-up approaches but, following his argument, one can also try to justify the use of backward-mapping for specific types of research.

The top-down approach is believed to be more appropriate to research built on a coherent legal basis constituting a unified political programme, where the implementation is orchestrated by a defined public agency. Conversely implementation of a programme based on loosely connected legal acts, involving interplay between numerous public and private actors predominantly placed at the local level of service delivery and is aiming at discovering the

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<sup>237</sup> Elmore (n 221 ) 28

<sup>238</sup> Sabatier (n 209)

dynamics of different local situations, could be better investigated using the bottom-up research method.



## **Chapter Three**

### **Methodology**

This chapter justifies the research design and methodology adopted for this thesis, with particular attention given to the empirical field-work. This section explains what kind of methods, including empirical, have been used to conduct the project and why. The research questions are linked to the theoretical propositions identified in Chapter One and Two, that is, they relate to the concept of legal and political effectiveness.

#### **1. Research questions**

**RQ1: Has Poland successfully introduced the law on Geographical Indications and Traditional Specialities Guaranteed into its legal system according to the legal concept of effectiveness?**

- Has Poland complied with EU law requirements regarding the introduction of this law into the national legal system?

**RQ2: Has Poland successfully introduced the law on Geographical Indications and Traditional Specialities Guaranteed into its legal system according to the political concept of effectiveness?**

- Has Poland achieved the policy aims laid down in EU food quality regulations?

#### **2. The fieldwork research approach**

The major theme of this thesis is the practical effectiveness of Union law at the Member State level in general, and the practical effectiveness of the Union food quality regulations in Poland in particular.

In the case of food quality regulations, the effectiveness of the scheme does not only rely on the EU institutions and Member States, it also depends on individuals. Therefore, this study needs to go beyond a document-based implementation analysis and embrace the investigation of the reality within which the law operates. For the purpose of this work, practical effectiveness of law will be understood broadly as law being practically effective when it exerts an influence on political and social life outside the law.<sup>239</sup> Given the fact that this research attempts to explore social reality, the data collected during the research process will be viewed through the prism of qualitative research methods.<sup>240</sup>

The research will seek to explore the legal and political changes and adjustments which followed the introduction of food quality regulations into the Polish legal system. To give examples: 1) the removal of conflicting norms which could disable the proper functioning of new regulations, 2) the introduction of domestic legal acts supplementing the Union law, and 3) the establishment of new administrative bodies responsible for overseeing the law and policy execution process.

The initial part of the primary research presented in the next chapter, that is the legal analysis of the food quality regulations, has been based on documents. Then this legal analysis is applied to the wider context of practical functioning of the food quality regulations in the Polish reality. The views of both the European Commission and Polish Ministry of Agriculture on the functioning of the food quality regulations in Poland are also presented here. This will establish a platform that will serve as a point of reference for further critical discussion of the findings.

Subsequently, the stakeholder's participatory aspects will be studied. For this purpose, semi-structured interviews, including elite interviews based on two protocols designed specifically for each group of interviewees, have been

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<sup>239</sup> Snyder (n 73) 19

<sup>240</sup> A. Bryman, *Quality and Quantity in Social Research* (Routledge, New York 1988) 51-52  
See also: N. Gilbert (ed.) *Researching Social Life* (Sage Publications, London 1993)

applied. This particular *modus operandi* is justified by the voluntary character of the examined policy. In other words, following Barrett's division of public policies, one of the principal objectives of this programme is to encourage an innovative course of action, and not solely conformity and compliance.<sup>241</sup> Therefore, the willingness of actors to participate in the system is no less important than the conduct of the implementation process by national administration bodies, which consequently requires the researcher to take the perception and experience of participants into consideration.

### **3. From law to political programme**

The central theme for this research project is the effectiveness of a scheme being a part of the Common Agricultural Policy. The twofold character of the scheme seems to be clear. It is law on the one hand and policy on the other. Both aspects are equally important and attention will be given to both of them.

#### **3.1. studying and researching law**

Law is built from legal norms which form legal provisions, legal statutes, and bills or codes, which are hierarchically positioned and enforced with sanctions. The student learns about the sources of law and explores different legal disciplines. All this is perceived as a legal system or legal order which governs different aspects of social life. A legal system can be understood as a set of rules which are to be applied to certain addressees on a certain territory, but, at the same time, it can also be seen as a number of institutions which enact, enforce or interpret law. And yet, discussing law in terms of the collection of legal norms does not explain how law functions in the social reality, how it affects its addressees and how the latter organise their activities around legal regulations.<sup>242</sup>

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<sup>241</sup> S.M. Barrett, 'Implementation Studies: Time For A Revival? Personal Reflections on 20 Years of Implementation Studies' (2004) 82 Public Administration 255

<sup>242</sup> Travers (n 188) 3-5

For a person educated in the black-letter law tradition, the interaction of law and its social realm tends to be one-dimensional – law imposes its ways on its addressees and the latter are expected to respect it. In case of disobedience, coercion in the form of sanctions<sup>243</sup> will be triggered and those who are in breach will be brought to compliance. That model of legal education was predominantly based on acquiring knowledge about rules and principles governing the law of the land, various legal disciplines, procedures involved in bringing a case to court, and developing skills of legal reasoning. It was expected from a student to properly apply legal provisions to cases which were presented, as well as deconstruct legal provisions in order to extract legal norms from them. It was also expected to elaborate on the possible meaning of those norms in terms of their hypotheses, dispositions and sanctions. At the same time, many elements and factors are taken for granted, for example, the fact that law is there, or the fact that the society is aware of the existence of law and internalises at least some of its provisions.

And yet, with lawsuits piling up in courts, constant reforms of the legal system, police patrolling streets, and the existence of trade unions or non-governmental organisations, show that the relationship of the law with its addressees is neither easy nor smooth, and by no means one-dimensional. On the contrary, it is multi-levelled, highly interdependent, intertwined and cross penetrating. That is why studying the effectiveness of law, that is the reception of law by its final addressees, poses a real challenge. In order to find the answer concerning effectiveness it is necessary to go beyond the black-letter law domain. The following questions were asked:

- ‘Why having at hand so many powerful mechanisms is it so difficult for the European Union and for the Member State to guarantee the effectiveness of a piece of legislation?’
- ‘What can be done to improve the effectiveness of Union law at the recipient level?’

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<sup>243</sup> Widely on law and sanctions: H. Kelsen, *General Theory of Law and State* (HUP, Cambridge 1945)

- ‘Why the food quality system in Poland is ineffective even though the country is well-known for its rural traditions?’

Thinking in the black-letter law categories, the explanation of the weakness of Union legal rules at the local level can be seen as being caused by Member States’ non-compliance in the form of non-implementation, or mal-implementation of the law in question. And yet, in such a case, the non-compliance issue can be resolved by legal or political actions undertaken by the Commission.<sup>244</sup> Knowing that the Commission has never found Poland in breach of the food quality regulations and has never questioned the way they were implemented, it seems apparent that merely looking at the legal implementation may be inappropriate if the question about practical effectiveness is to be answered. Questions which are empirical in nature, not just conceptual, cannot be answered using traditional black-letter law techniques. Via the black-letter method, the specialist language and the technical content of law can be analysed, but the reality in which the law operates remains beyond the research methods available here. Hence, looking for the answer outside the scope of the black-letter law approach and even outside legal science as such is justified. The sociology of law and political sciences seems to point to a missing element here. Both sciences deal with what is happening after the bill becomes the law or, paraphrasing Puchala, what is happening in the ‘post-decisional’ reality.<sup>245</sup> The discovery of the operationalisation of law after the legal stage of implementation is completed, was the key to finding the answer concerning its practical effectiveness.

### **3.2. empiricism in law**

Legal science remains reluctant to adopt the empirical stance to study, centralising its attention on coherence, clarity, completeness, impersonality of

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<sup>244</sup> See Chapter One for the exhaustive explanations mechanisms available to the EU institutions for securing compliance of Member States with EU law.

the legal language or content of norms, whereas the use of empiricism is well rooted in both sociology and empirical studies.<sup>246</sup>

Empiricism in law, according to Austin, ought to be understood as an attempt to represent law as concerned with events that are empirical, that is events that are open to ordinary observation and at the same time they constitute a scientific field of study that can be delivered by methods of traditional logic.<sup>247</sup> Empiricism in law, however, has been treated for a long time with a certain amount of suspicion.<sup>248</sup> Legal scholars have been searching for a strong reason to accept that through observation one can learn things about law which cannot be learned from analysis of the values contained in the language. In addition, empiricism enhances the understanding of reality and allows elaborating on the future developments with a certain level of probability. Nonetheless, the tentative character of findings makes them prone to changes caused by ever-changing circumstances.<sup>249</sup> Having in mind one of the basic principles of a legal system – the certainty of law – it does not come as a surprise that legal scholars tend to avoid reformulating the law on the basis of the ever-changing social reality. Some have even postulated that law should not serve as a mere expression of pluralism when it is treated as an element of a “free market of values [where] the consumer is sovereign”.<sup>250</sup> It was the legal realism movement that conducted the first significant attempt to merge applied social science and legal scholarship.<sup>251</sup> Even though the realists started with an interest in quantitative methods, empiricism slowly developed towards the qualitative methods derived from social sciences.<sup>252</sup>

As early as the 19th century, Leon Petrażycki, a Polish forerunner of the sociology of law, advocated that “the true practice of civil law or any law is

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<sup>246</sup> H. Sacks, ‘The lawyer’s work’ in M. Travers and J. Manzano (eds.) *Law in Action Ethnomethodological and Conversational Analytic Approaches to Law* (Ashgate, Aldershot 1997) 34-50

<sup>247</sup> Bickenbach (n 179) 96

<sup>248</sup> For a concise presentation of the development of empiricism in legal scholarship see: M. Heise, ‘The Past, Present, and Future of Empirical legal Scholarship: Judicial Decision Making and the New Empiricism’ [2002] *University of Illinois Law Review* 819-850

<sup>249</sup> W.C. Whitford, ‘Critical Empiricism’ (1989) 14 *Law and Society Inquiry* 61-67

<sup>250</sup> Bickenbach (n 179) 108

<sup>251</sup> Heise (n 248) 822

<sup>252</sup> Travers (n 188) 35

not to be found in the courts, but altogether elsewhere. Its practitioners are not judges and advocates, but each individual citizen [...].”<sup>253</sup> Petrażycki stated that answering the question ‘what is’ should be approached differently than the question ‘what ought to be done’. For him, one scientific discipline with its rigorous methodological tools may prove to be insufficient or inappropriate in addressing both issues. Theoretical sciences are mostly focused on describing certain phenomena, while applied sciences strive to recommend or reject some means or measures as effective or ineffective in achieving the result.<sup>254</sup>

The Union food quality schemes are a very specific legal creation. It has been mentioned on various occasions that the system set up by the schemes is voluntary, and the understanding of its voluntary character constitutes a *sine qua non* condition to the correct perception of this research and adopted methods. First of all, food quality schemes are not just a normative law, they constitute a broad food quality policy which has been in place in the EU for approximately 20 years now.<sup>255</sup> The food quality schemes embrace both legal and political aspects, which cannot be looked at separately when talking about their effectiveness. Secondly, the food quality schemes are not like civil or criminal law that exists with or without the addressees’ consent. The reference to Petrażycki may prove to be useful here. He juxtaposed law to morality by comparing the two to water and champagne respectively. For example, civil law, like water, exists everywhere and it constitutes an inseparable part in the fabric of society, it cannot be removed from social life, it is there. The food quality system – champagne – appears in social life only if there is an appreciation and special demand for it. It is neither necessary nor crucial for the functioning of society as such. But it is possible that certain behaviour, serving champagne, even if not yet obligatory, may eventually become so. The

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<sup>253</sup> K. Motyka, ‘Law and Sociology: Petrażyckian perspective’ in: Michael Freedman (ed.) *Law and Sociology. Current Legal Issues* (OUP, Oxford 2006) 119-140, More of Petrażycki: L. Petrażycki, ‘Law and Morality’ (HUP, Harvard 1955) in: A. Podgórecki (ed.) *Sociology and Jurisprudence of Leon Petrażycki* (University of Illinois Press Urbana, Chicago, London 1975)

<sup>254</sup> Podgórecki (n 181) 188

<sup>255</sup> Council Regulation (EC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, Council Regulation (EC) No 2082/92 of 14 July on certificates of specific character for agricultural products and foodstuffs

social structure, which may be more or less receptive to certain changes, plays a very important role here.<sup>256</sup>

### **3.3. studying effectiveness**

Effectiveness studies based purely on the politico-legal implementation analysis put the emphasis on the implementation phase as being crucial for the success or failure of the analysed programmes, without paying sufficient attention to the roles played by the programme's final recipients,<sup>257</sup> who, by their acceptance or rejection of the policy, determine its actual outcome. As far as the food quality schemes are concerned, bearing in mind their voluntary character, undervaluing the programme's final recipients could constitute a major limitation of the research and, in consequence, undermine its credibility. Therefore, the experience and expectations of the food quality schemes' participants as well as the scheme awareness and the views of officials will complement the document-based research on the practical effectiveness of the law and policy in question.

Both elements of the research will be investigated via combining the top-down and bottom-up approaches to implementation analysis, which will be discussed in the next paragraph.

Being aware of diverse analytical approaches to politico-legal implementation analysis, the researcher has chosen the implementation theory as the theoretical framework for the thesis. This theory allows the researcher to conduct a legal and political study of implementation within the framework of one academic exercise. The implementation studies conducted so far have illustrated factors explaining the gap between the policy objectives and practical implementation. Very few research projects provide broad insights

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<sup>256</sup> Podgórecki (n 181) 193 - 195

<sup>257</sup> Siedentopf (n 27) 5



into the day-to-day political behaviour of EU law and policies after they become the ‘law of the land’.<sup>258</sup>

Both legal and political analysis of implementation can be conducted by merging two approaches developed by political sciences, that is the top-down and bottom-up investigation.

These two approaches have relied upon the following research methods as investigative tools: unstructured discussion, structured interviews, document analysis, participant observation and field observation.<sup>259</sup>

The author intends to combine the two, which will allow her to investigate the legal underpinning of the EU food quality policy and will also highlight the importance of final recipients – the clientele of political programmes, whose willingness to mobilise the law is crucial for its effectiveness. It is necessary to recognise the fact that no single model can be perceived as being fully comprehensive and generally accepted as far as the politico-legal processes in question are concerned.<sup>260</sup>

### **3.4. top-down and bottom-up implementation approach in research**

The top-down approach is built on the assumption that “policy is formulated at the ‘top’, this then being translated into instructions for those who will implement the policy at the bottom.”<sup>261</sup> For this analysis, four issues are central:

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<sup>258</sup> Except comprehensive study Making European Policies work, carried out in the 1980s. by H. Siedentopf, J. Ziller, *Making the European Policies Work. The implementation of Community Legislation in the Member States. Comparative Synthesis .Vol I and Vol II* (Sage Publications, London 1988)

<sup>259</sup> R.K. Yin, ‘Studying the Implementation of Public Programmes’ 44, in W. Williams (ed.) *Studying Implementation. Methodological and Administrative Issues* (Chatham House Publisher, Inc. Chatham 1983)

<sup>260</sup> Siedentopf (n 47) 3

<sup>261</sup> T. Younis, I. Davidson, ‘The study of implementation’ 14 in: T. Younis (ed.) *Implementation in Public Policy* (Dartmouth Publications, Aldershot 1990)

1. To what extent were the actions of implementing agencies and programme clientele consistent with the procedures sketched in the policy decision?
2. To what extent were the objectives attained over time?
3. What were the principal factors affecting policy outputs?
4. How was the policy reformulated over time on the basis of experience?<sup>262</sup>

But the legal basis of the policy needs to be considered first, since certain characteristics of legislation in underpinning the programme also exert influence over the final outcome.

To start with, the purpose behind the enactment of a legal act should be established. The majority of legal acts are provided with a preamble which expresses the intentions of the legislator and allows implementers to understand its spirit. The Union regulations can be accompanied with guidelines for implementation, the purpose of which is to clarify the terms which have been used, and to elaborate certain provisions perceived by drafters as vague. The guidelines can also provide additional information on procedural aspects of the legal act, and they do not have to be limited to a substantial part of an item of legislation. Secondly, if the legal act requires further transposition or reception into the Member State's legal system, it obligates the Member State to either achieve certain objectives or introduce required changes into its legal system or administrative structure. Therefore, the role of the researcher drawing on the top-down method of implementation analysis is to examine whether the actions of implementing agencies and the programme clientele were consistent with objectives and procedures sketched in the legal act legitimising the political programme, and to what extent and by what means were the objectives included in the legal act attained. Once the examination of the legal reception of the food quality regulations into the Polish legal system is completed, it is intended to investigate the post-

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<sup>262</sup> Ryan (n 173) 66

implementation reality with attention focused on street-level bureaucrats and the programme clientele.

The major criticism towards the top-down method of analysis has arisen on the grounds that it is reluctant to accept the influence exerted by target groups and ‘street-level’ bureaucrats on the implementation outcome, and it puts too much emphasis on the roles and strategies of the central implementing agencies.

Criticism of the top-down analysis provided the basis for developing the second equally prominent theoretical perspective on implementation, namely the bottom-up approach. The development of the second method of implementation analysis resulted in the formulation of the following issues:

1. The focus of attention should be put on street-level bureaucrats rather than on government activities as well as on those responsible for the production of outcomes on a day-to-day basis.<sup>263</sup>
2. Policy should be perceived as a facilitator of implementation rather than as a mechanism providing control over the process.
3. The success or failure of the policy objectives is of lesser importance than the investigation of the capacity of implementation actors to influence the behaviour of target groups.<sup>264</sup>

The major criticism of the bottom-up approach was its diminution of the importance of elected officials in order to privilege the target groups and street-level implementing agencies, and the significance of the perception of implementation as an interaction between actors more than the resolution of problems related to the implementation of government policies.<sup>265</sup>

Despite the criticism of the two approaches, both of them provide useful and valuable guidelines for implementation researchers. In the case of

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<sup>263</sup> J.E. Lane. ‘The Concept of Implementation’ (1983) 86 *Statsvetenskaplig Tidskrift* 22

<sup>264</sup> Ryan (n 173) 67 - 68

<sup>265</sup> Sabatier (n 209) 35-36

implementation research of European Union law, the carefully chosen and mixed elements of top-down and bottom-up analysis can allow the researcher to fully investigate the elaborate process of putting European Union law and policy into effect, since the legal and practical implementations of the Union legislation are equally important, and neither of them can be neglected.

### **3.5. implementation of legislation**

Correct implementation of the Union legislation is a prerequisite for the subsequent success of practical effectiveness. Therefore, an investigation and evaluation of the process of reception of European Union law into the Member State's legal system ought to constitute an opening chapter of the research on the Union law implementation. This stage of research, which derives from the top-down implementation approach, was based on document analysis and elite interviews. According to the top-down method, law and policy-making as well as all actions that take place on the top level, need to be discussed in order to assess implementation. That is why the document-based analysis, supplemented with elite interviews, was the starting point of the research. The subsequent research steps were based on the bottom-up approach.

Following the philosophy of the bottom-up approach, the capacity of implementing actors to influence the behaviour of target groups as well as attitudes, perceptions and expectations of the programme clientele, are the cornerstone for the analysis. For this research project, street-level bureaucrats and target recipients are paramount. The voluntary character of the food quality schemes imposes an obligation on the researcher to uncover the motives and intentions of agricultural producers who, by expressing their will to mobilise the food quality law, determine the existence of the schemes outside the purely legal reality. During this stage of the research, data has been collected by using semi-structured interviews with street-level bureaucrats as well as the programme clientele.

#### **4. Interviews and transcription**

The semi-structured interviews with street-level bureaucrats and producers are applied to the bottom-up phase of the research and are based on intentionally devised protocols customised for each group of interviewees. This particular technique allows an investigation of the stakeholders' perceptions, motives and attitudes towards the food quality schemes.

The choice of semi-structured interviews as an investigation technique is justified for two reasons. Firstly, the researcher has already created a set of questions based on the literature review and a pilot study conducted at the beginning of the research process. These are worth exploring further in a real life context. Secondly, the researcher appreciates the conversational and flexible character of this type of interview which does not only have the potential to encourage a respondent to speak discursively, but allows further questions to be asked and discussed. Semi-structured interviews conducted in the bottom-up-based stage of research are divided into three categories on the basis of the participants involved, that is: producers who have registered names of their PDO/PGI/TSG products to date, producers who have a potential to register their products' names, and Marshals of Voivodeships responsible for registering foodstuffs on the national List of Traditional Products (LTP).

The interviews were recorded digitally. However, previous experience with pilot interviews showed that recording the conversation may not be welcomed by administration officials. In these instances, the researcher took notes during and immediately after the interview in order to convey the course of interview as diligently as the standard of research requires. Before the interview started, respondents were informed about the nature of the research and its implications. They were also informed about the time frame designated for the interview. Subsequently, they were asked to fill in the interview consent form devised to guarantee the interviewee's agreement on the researcher's right to use the transcripts for scholarly purposes.

Since the interviews were conducted in the researcher's mother tongue, the problem with miscommunication between the interviewer and interviewees was minimised. It was intended to adopt the language register appropriate for each group of respondents. The agro-producers valued a less formal language register, while administration officials appreciated an academic discourse.

#### **4.1. interviewing sample**

The protection of names for products within the food quality schemes is predominantly dependent on their geographical origin so the author decided to base the choice of the representative sample on the area from which these products come. The administrative division of Poland proved to be very helpful in that matter. Poland is currently divided into sixteen provinces known as voivodeships, which predominantly cover historical and geographical areas of the country, with a few minor exceptions.

As far as interviews with producers of products bearing protected names were concerned, the choice of interviewees did not give rise to any potential issues. At the time of the interviews, products with protected names from the following voivodeships had been registered: the Voivodeships of Mazovia, Lower Silesia, Silesia, Greater Poland and the Voivodeship of Lesser Poland, so the researcher decided to conduct interviews with respondents manufacturing their goods in these provinces. In order to be able to capture the full picture of the registration process and the post-registration reality, the author intended to interview not only agro-producers but also members of consortia who had acted on behalf of producers during the registration proceedings.

In the case of the second group of interviewees, that is producers with registration potential, the choice of the sample was based on the number of products listed on the List of Traditional Products. The List of Traditional Products register functions in each of the sixteen voivodeships in Poland, however, the number of product names entered in the register varies from voivodeship to voivodeship. Therefore, in order to provide a representative

sample, it was decided to interview producers from areas where the number of products listed was high, medium and low: the Voivodeship of Silesia – 101, the Voivodeship of Łódź – 48, the Voivodeship of Lesser Poland – 18, and the Voivodeship of Mazovia – 8.

There was another interesting aspect beyond the choice of the sample here. The number of registered products in the abovementioned voivodeships was counterintuitive. The researcher's expectation was that typically rural voivodeships should have registered larger number of traditional products, but it proved not to be the case. The biggest number of registrations came from the industrial part of Poland that is Silesia where all of the coal mines and iron plants are located, whereas Lesser Poland - far less industrialised managed to register half as many traditional products as Silesia. Hence this information supported the choice of those particular geographical areas as it suggested that the number of registrations of traditional products is not merely the result of the rural character of a given locale. Administration officials who were interviewed came from the chosen voivodeships, that is voivodeships of Silesia, Łódź, Mazovia and Lesser Poland.

## **5. Limitations**

A general limitation of any qualitative research lies in its unique character, in other words, a qualitative study cannot be repeated because the social reality, which has been investigated, changes constantly. Therefore, the findings of the study may have limited applicability to future situations. Moreover, interviews as such are not free from deficiencies. For example, the interviewees, especially the representatives of the government or public administration, may want to put things in the best light; all data is affected by when and where it is collected and by the circumstances of collection. Interviewees may provide the researcher with incomplete information due to forgetfulness.

Being aware of such deficiencies, the author took certain steps in order to overcome some of the limitations. All interviewees were provided with a set of questions for their attention before the date of the interview. Additionally, the

purpose, nature and ethics of the research were duly explained. The author conducted the interviews in places chosen by recipients in order to create the best circumstances for the collection of data.

## **6. Pilot study**

The main part of the empirical research was preceded by a pilot study. The pilot study was based on elite interviews aimed at testing the methodological approach and exploring the field. The interviews were conducted with the intention of broadening the author's knowledge and understanding of the food quality law in Poland, and of discussing the current situation of the food quality schemes as a new set of rules in the legal order. The interviews were to provide information concerning the problems that food producers face while applying for protection under the food quality schemes, problems with the execution of the law, and the possible future of these regulations in Poland.

As far as methodology is concerned, the pilot study confirmed that the choice of the top-down and bottom-up approach was appropriate. Various actors involved in giving effect to law from the top to the bottom level ought to be included in such a research project. Conducting elite interviews allows one to establish the necessary network relationship with the key factors involved in the process of implementing the law and policy on the food quality systems. This has the potential to facilitate a substantial part of the research in the future. The people who were interviewed are professionals dealing with the food quality law in Poland on an everyday basis, and are responsible for the implementation, performance and enforcement of the respective regulations. Those interviews also confirmed the importance of street-level bureaucrats and the producers themselves.

The gathered data allowed the researcher to identify a set of contentious issues accompanying the process of introduction and operationalisation of the law and policy on food quality in Poland. Moreover, the researcher has been introduced to the specificity of the functioning of the food quality schemes in



Poland on various levels, such as government, local administration and programme clientele level.

The pilot interviews were conducted in April 2008 and the interviewees were:

- The Head of the Unit for Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed in the Polish Ministry of Agriculture;
- Vice-President of the Department for Promotion, Quality of Food and Ecological Agriculture in the Ministry of Agriculture;
- Vice-President of the Department for European Law in the Office of the Committee for European Integration; and
- A specialist on Geographical Indications in the Department for European Law in the Office of the Committee for European Integration.

The findings of the pilot interviews were as follows: the Ministry of Agriculture was working pro-actively on the development of food quality schemes in Poland. The Ministry organised conferences and workshops for the interested parties and also launched a two-year, Poland-wide programme called ‘Authenticity under Control’<sup>266</sup>, and a six-year (2007-2013) programme focused on the development of rural areas, as a part of which agricultural producers may apply for funds on registration of a product name under the food quality schemes. Even though the Ministry is encouraging and supporting the producers, the current situation of food quality schemes in Poland does not look promising for a number of reasons:

1. The producers find it difficult to cooperate for the common good,<sup>267</sup> for example, they cannot agree on one recipe that is to be presented in

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<sup>266</sup> The programme was targeted at producers, wholesale and retail sellers, restaurateurs, and consumers. The character of that programme was predominantly informative. Producers could learn how and why register their products; while consumers were taught why registered products differ from unregistered ones.

<sup>267</sup> It is worth emphasising that, unlike some Italian or French, Polish producers of regional food are very small manufacturers who are unable to go beyond a small local market alone, since their production capacity is very limited

the specification or they are unwilling to reveal the recipe for their products;

2. They are reluctant to subject their products to voluntary control;
3. They are often intimidated by the fact that ministerial officials are the first point of contact in food quality matters, not civil servants from a lower (closer to them) administrative level;
4. There is an insufficient number of registered product names on the market, and
5. In the case of one protected name of a cheese, the local authorities are very unwilling to fight against the trade in counterfeit products since it causes discontentment among regional restaurant owners, who are undersupplied by the 'registered' producers.

All the findings, stemming from the literature, pilot interviews and the specificity of the food quality schemes in Poland, were used to create formal protocols for semi-structured interviews in order to collect empirical data.

The researcher has also given two presentations on the evolution of the law on Geographical Indications in the European Union as well as the role played by the law in question in the Common Agricultural Policy. The presentations met a warm reception especially from the representatives of the Polish food producers and Polish governmental agencies that are interested in enhancing Poland's potential in the European market of quality produce.

## **7. Fieldwork**

The main research section took place a year after the pilot study was conducted. Before embarking upon this phase of the study, the methodology was agreed on to the effect that the semi-structured interviews were chosen as a research tool. The researcher carried out a three-month field research in Poland, from August to October 2009, when the main bulk of interviews were conducted. According to and deriving from the assumptions described above, in the *interviews and transcription* and *interviewing sample and analysis* section, the researcher conducted 45 interviews as follows:

- Thirteen with the producers who have had their product names registered as the Protected Designation of Origin (PDO), Protected Geographical Indications (PGI) or Traditional Specialities Guaranteed at the EU level;
- Five with those who have applied for the PDO, PGI, or TSG protection;
- Sixteen with producers whose product names have been registered as traditional products on the List of Traditional Products run by the Ministry of Agriculture;
- Four with clerical workers of Marshals' Offices responsible for running the List of Traditional Products;
- Two with the Ministry of Agriculture officials;
- One with an inspector of a major certification body;
- One with a worker of a local administrative advisory unit for farmers;
- One with an official in the Department for European Law in the Office of the Committee for European Integration;
- One with the chairperson of the Institute of Brand for Poland (Instytut Marki Polskiej); and
- One with a former president of AgroSmak foundation – a charity which financially supported the quality food producers and facilitated the application process.

The interviews were semi-structured and supported with a question protocol. The manner in which the protocol questions were formulated was influenced by the perception of implementation as a process where legal and political aspects supplement one another in the effort to introduce the adopted plan into the target environment.<sup>268</sup>

The researcher used the following two different protocols. The first was designed for the PDO/PGI or TSG producers who have their product names registered. This protocol was also adapted respectively to the producers who have applied for protection. The second protocol was devised for interviews with producers who placed their products on the List of Traditional Products. In order to improve credibility of answers the researcher presented the same

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<sup>268</sup> Goggin (n 207) 330

set of questions to administrative officials as to producers who have already registered their products as PDO/PGI/TSG.

In total, 45 interviews were conducted, 41 were digitally recorded, while the participants of the remaining four did not give their consent to being recorded. In those cases, notes were duly taken during and after the interviews in order to secure the information from escaping the researcher's memory. The researcher used the same protocol as in the case of recorded interviews, which means that respondents were presented with the same set of questions as the other respondents representing the same group of interviewees.

The initial number of interviews was planned to be 25. However, while gathering the data, new interesting research avenues opened up, which triggered the need to investigate the experience and expertise of other participants in the field, not only agricultural producers and administration workers from the Marshals' Offices. The researcher found it valuable to include in the study the opinions of individuals who were directly or indirectly involved in shaping the food quality system in Poland as a whole. Those interviews supplemented the subjective experience of agricultural producers with a more objective perspective on the food quality system, which helped the researcher to immerse in the system and see a broader picture of it. This move confirmed the assumption presented by Hejn and Hull who said that private organisations share implementation responsibilities with public bodies, mandated officials and civil servants. They rejected the idea that it is only officials who deliver policy to the public.<sup>269</sup>

Prior to embarking upon the fieldwork, the researcher expected to encounter difficulties, especially from officials from the governmental and local administration level. Reality disproved those apprehensions. All of the officials approached were very open and willing to talk, none of them objected to being recorded.

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<sup>269</sup> Hejn and Hull (n 235) 83

Gaining the trust of the producers proved to be the biggest challenge. Almost every telephone enquiry directed to the producers with regard to their participation in the research project was rejected. The initial choice of that particular communication channel proved to be unsuccessful, which triggered the need to change the communication strategy. The researcher decided to meet potential participants in person. To do so, she attended various food fairs and festivals and spoke to agricultural producers, informing them briefly about her research project and asking about the opportunity to talk to them over the phone in the near future. Producers seemed to value this personal contact. In their opinion, contrary to an anonymous conversation on the phone, that form of contact was much more trustworthy. Having spoken personally to potential research project participants, the vast majority of them agreed to being interviewed.

In the case of a small number of producers, the researcher had to involve a third party as a mediator, whose help facilitated the process of obtaining participants' permission to be included in the project. The third party was either the administration worker responsible for managing the List of Traditional Products or the official from the Ministry of Agriculture, who with regard to the character of their duties, had known the agricultural producers personally and had already gained their trust. The role of the third party was to provide a given producer with basic information about the researcher as well as to inform them about the importance of their participation in the research project. In the end, only two out of all food quality producers approached categorically refused to participate.

The need to apply more time-consuming methods to get participants' consent for the involvement in the research project affected the time the researcher initially planned to devote to the fieldwork. Instead of a two-month, the research trip became a three-month undertaking. Owing to the very good relationship with the participants, it can be said, though, that further research should not be hampered by any reluctance to share more information with the researcher.

The researcher was also given an opportunity to work for the European Commission, Food Quality Department, from March 2010 to August 2010 and from January 2011 to July 2011. During that time the researcher was dealing with applications for registration of PDOs, PGIs and TSG names from the EU and from non-EU states, as well as was involved in preparation of “The Impact Assessment”<sup>270</sup> of the food quality schemes. The researcher was involved in various proceedings, for example, in the first publication, that is the first examination of a new request, requests for amendments and objections. Products’ names personally scrutinised were as follows: Darjeeling (PGI/IN: tea), Χαλλούμι [Hallumi] (PDO/CY: cheese), Καλαμάτα [Kalamata] (PDO/EL: olive oil), Isle of Man Queenies (PDO/UK: scalpos), New Season Comber Potatoes (PGI/UK: potatoes), Armagh Bramley Apples (PGI/UK: apples), Traditional Farmfresh Turkey (TSG/UK: Turkey), Pomazánkové máslo (TSG/CZ: diary spread), Tepertős pogácsa (TSG/HU: bakery product), Φασολια Βαηλίες Φεγεογ [Fasolia Vanilies Feneou] (PGI/EL: beans), Ξυρά Σύκα Ταξιάρχη [Xira Syka Taxiarchi] (PDO/EL: dried figs), Spalt Spalter (PDO/DE: hoops), Stromberger Pflaume (PDO/DE: plums), Jagnięcina podhalańska (PGI/PL: lamb), Štajersko prekmursko bučno olie (PGI/SL: oil).

The experience enriched and deepened the researcher’s knowledge of the food quality schemes and allowed to discover legal nuances of the food quality regulations, as well as political effects of decisions made by the Commission on acceptance or rejection of a registration request.

## 8. Case study

The multi-variable character of the study led the researcher to the conclusion that the most appropriate way to analyse the collected data and prepare a recommendation concerning food quality legislation and policy in Poland would be the case study approach. This particular research method allows exploration of complex issues and situations by elaborating on complex

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<sup>270</sup> EC Staff Working Paper, *Impact Assessment Report on Geographical Indications – Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes* (Brussels, 2010)

causality of the subject studied. The case study method is particularly preferred when the research question posed is a 'how', 'why' or 'what' type of question in the exploratory sense of the word, when the researcher has little or no control over investigated events, and the focus of the research is on a contemporary phenomenon.<sup>271</sup> Case studies can be used to investigate individual, group, organisational, social or political phenomena, that is why they are widely applied to disciplines such as psychology, sociology or political science investigations.<sup>272</sup> This method derives its strength from the ability to draw from a variety of evidence, for example documents, interviews, observations and artefacts.<sup>273</sup>

For the purpose of this study, the effectiveness of the food quality schemes in Poland has been treated as a case in point. In other words, this thesis will adopt a single-case design with one embedded unit of analysis. Following Yin, the single-case design is preferred when a theory has been specified before embarking upon the field-work, the case is unique, and the case is representative, revelatory and longitudinal.<sup>274</sup> As far as this thesis is concerned, all expectations for the single-case design have been fulfilled. The theory has been formed to justify the interview protocol designed to test the models of perfect implementation of policy and the effectiveness of law. The case is unique and revelatory as at the time of writing no comprehensive qualitative research had been done on the law on food quality schemes in Poland, the case is representative as it investigates giving effect to the voluntary legal system of an EU country and, therefore, can be applied respectively to similar legal systems in the EU. The case can be perceived as longitudinal as the main empirical research section has been preceded by the interview-based pilot study.

Case studies allow the researcher to identify indicators that best represent a theoretical concept the researcher intends to measure by detailed consideration of contextual factors over a smaller number of cases than in the statistical

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<sup>271</sup> Yin (n 259) 2

<sup>272</sup> Yin (n 259) 4

<sup>273</sup> Yin (n 259) 11

<sup>274</sup> Yin (n 259) 47-53

methods.<sup>275</sup> This case study is expected to answer questions about the effectiveness of food quality legislation in Poland. Within the case study, it is intended to test theoretical models of perfect implementation of law and policy, taking into consideration the issue of final recipients of the law and policy in question.

The case study method is not free from weaknesses. One of the most common criticisms is that this research method approach is prone to 'selection bias'.<sup>276</sup> Being aware of this danger, the choice of sources has been motivated by the need to establish conditions under which desired outcomes might occur, and mechanisms under which they may occur rather than the need to produce evidence for early assumptions which have been included in the interview protocols.

Having read a certain number of interviews, it has become apparent that the presentation of findings derived from interviews ought to be based on the structure of points provided in the introduction and the following section on functionalism. It was intended to formulate a description of the setting in which the law operates to facilitate further theoretical discussion and, most importantly, in search of answers to formulated research questions.<sup>277</sup> The use of this technique should enable information to be extracted, thus highlighting the conditions that need to be in place for the food quality system to be effective at a local level.

One more theory influenced the perception of effectiveness of law and policy – this is functionalism. Functionalism discussed law in action versus law in the books.<sup>278</sup> That is why, due to its practical approach, it developed a very pragmatic perception of effectiveness. Law, according to functionalists, ought to respond better to societal problems, needs to rely on causal inference, and

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<sup>275</sup> A. L. George and A. Benett, *Case Study and Theory Development in the Social Sciences* (MIT, Cambridge, Massachusetts 2005) 8 - 19

<sup>276</sup> George and Benett (n 274) 22

<sup>277</sup> H. J. Rubin and I. S. Rubin, *Qualitative Interviewing. The Art of Hearing Data* (Sage Publications, London 2005) 201

<sup>278</sup> R. Michaels, 'The Functional Method of Comparative Law' (2005) 87 Duke Law School Research Paper



needs to consider the political, cultural and economic context within legal institutions.<sup>279</sup> In addition, law for functionalists exerts an impact on society and society influences law via its feedback.<sup>280</sup>

All these factors matter for the practical effectiveness of food quality schemes. The law cannot be assessed separately from its social functioning. This law is supposed to answer societal needs, it is free from the obligation to join. It is very susceptible to social feedback. Its success or failure depends on social reception, therefore, the reception of the law on the ground must be considered. That is why the model developed by Evan, a scholar who perceived law via the prism of practical effectiveness, seemed to be appropriate to evaluate the schemes in question.

In assessing the effectiveness of the schemes, the three elements such as law, policy, and post-implementation reality must be considered, hence the choice of the model that covers them all.

For the purpose of this research, the political sciences approach to implementation has been adopted, that is, the implementation of law is perceived as a process. That process does not end with the adoption of all necessary legal measures, but it moves further to the management of that law in order to secure its proper functioning in the post-implementation reality. In other words, the legal implementation is not the final stage in the process of ‘giving effect to the law’.

The whole case study including the empirical data is presented around several points in order to draw a comprehensive picture of the process of putting the law into effect. Those points were based on assumptions presented in top-down and bottom-up implementation methods. These points also represent a ladder on which subsequent implementation phases sit. To recall the top-down implementation approach advises that any evaluation of the implementation

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<sup>279</sup> Ch. A. Whytock, ‘Legal Origins, Functionalism, and the Future of Comparative Law’ (2009) 6 Brigham Young University Law Review 1879 - 1906

<sup>280</sup> Travers (n 188) 45

process should start from a legal act and its preamble which underpins a given programme. Then the logical corollary ought to be an investigation of a regulatory environment into which a new legal act will be introduced. That investigation should allow one to determine if there are existing collisions or conflicts between the law which has been introduced and the pre-existing regulations, which may render the implementation of the former ineffective. Subsequently attention should be given to implementing agencies and their prerogatives which are linked with their new tasks.

The bottom-up approach on the other hand puts a strong emphasis on the final recipients, public or private actors who influence the implementation process. The bottom-up approach advises to study the final recipients' expectations towards the new law and how those expectations were met in practice.

Hence the starting points were:

1. The law which is to be implemented – EU food quality regulations;
2. The national legal environment;
3. Implementing agencies and their tasks;
4. Practical functioning of the EU food quality schemes in Poland;
5. The role of final recipients in putting the schemes into effect;
6. Evaluation of effectiveness.

Both academic literature and official documents allowed for further elaboration on issues potentially influencing the effectiveness of the food quality schemes. For example political justification and historical development of the law on geographical indications, or the wording of the regulations or food quality traditions in Member States facilitate understanding of the problem therefore they also appear in the discussion.

Information on the practical functioning of the schemes in Poland was predominantly based on interviews. Hence the first strata of structure was to answer questions proposed in the protocols, that is for example knowledge of the schemes gained by the participants or financial support available to them. The second strata of structure – subsections proposed by the researcher in the presentation of the case study – emerged from the answers given by the

participants. The answers pointed to inspections, the existence of various food quality schemes in the Member State or the behaviour of the European Commission officials.

The interviews delivered a significant amount of data which demanded to be extracted from transcripts in a structured way. For that purpose the researcher decided to apply the design of the interviews' protocols. Each protocol contained a number of questions which were aimed at acquiring knowledge on the motives or perceptions of the schemes by the final recipients. In addition semi-structured interviews allowed for uncovering tacit knowledge about a given situation which cannot be obtained from official sources. As a result the structure based on protocols could be supplemented by new themes, claimed by the vast majority of respondents, to be vital for the schemes' effectiveness, such as for example: producers' groups, specification or the coexistence of various food quality schemes.

The final structure of the presentation of the case study, including interviews, was based on the points provided below.

1. The law which is to be implemented – EU food quality regulations;
  - 1.1. a dispute over Geographical Indications before the WTO;
  - 1.2. Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed – the EU level;
  - 1.3. the practical operation of food quality schemes in Member States with strong food quality traditions.
2. The national legal environment:
  - 2.1. Poland's pathway to EU membership – agricultural perspective;
  - 2.2. pre-existing legal solutions and changes that followed the introduction of the schemes;
  - 2.3. national food quality schemes.
    - 2.3.1. the List of Traditional Products;
    - 2.3.2. 'Quality Tradition';
    - 2.3.3. 'Meet Good Food'.
3. Implementing agencies and their tasks;

4. Functioning of the EU food quality schemes in Poland – the post-introduction stage:

4.1. knowledge about the schemes gained by participants;

4.2. motivations of participants;

4.3. availability of advice and financial support;

4.4. participation in the scheme:

4.4.1. producers' groups;

4.4.2. specification;

4.4.3. inspections;

4.4.4. enforcement;

4.4.5. coexistence of food quality schemes;

4.4.6. the European Commission.

5. Effectiveness

The analysis which followed presentation of the empirical data was done in such a way as to answer the research questions and to comment on findings as well as evaluate the effectiveness of food quality schemes in Poland.

Protocols were based on the top-down and bottom-up implementation approach, have been designed in such a way as to facilitate the collection of data on extra-legal factors which determine political effectiveness, mostly, in essence, participants – their knowledge, motivations, perception, benefits, and so forth, – but also various implementing agencies, and policy makers.

The interviews protocols were as follows:

***Producers who have already registered their products as Geographical Indications or Traditional Specialities Guaranteed***

***1. Participants' knowledge about the scheme.***

- How were participants informed about the scheme?
- How did they evaluate the manner in which information about the scheme had been delivered?

*2. Motivations of participants.*

- What motivated actors to apply for Union protection?

*3. Availability of advice and financial support.*

- What advice and financial support, if any, was available to potential recipients?
- Was the available advice and support sufficient?
- Was there any bias in the advice and financial support so that some recipients were more or less likely to respond than others?

*4. Participation in the scheme.*

- Was the scheme easy to embark upon in terms of being administratively easy?
- Did other factors, apart from administrative, exist which rendered participation in the scheme (un)appealing?
- Once started, has the scheme been managed and administered efficiently? Do producers still encounter obstacles of, for example, legal, administrative or of a different nature which render making use of the food quality schemes more difficult? What kind of obstacles do they encounter?
- Have they benefited from the scheme?
- How have they benefited from the scheme?
- If given the opportunity would they choose to participate in the scheme again?

***Producers who have entered their products on the List of Traditional Products (LTP).***

*1. Participants' knowledge about the scheme.*

- Do potential recipients know about the GI/TSG scheme?
- Do they understand the idea of the GI/TSG scheme?

*2. Motivations and attitudes of participants towards potential future GI/TSG registration*

- Do participants consider applying for GI/TSG protection of their products?
- What is the rationale and motivation behind the actors' choice.
- What might motivate them to act differently?

3. *Availability of advice and financial support*

- What should be done in order to recruit potential applicants to the GI/TSG scheme?
- Is sufficient advice and financial support available for potential applicants?
- Are respective administrative organs capable of providing sufficient incentives for potential applicants in order to encourage their participation in the GI/TSG scheme?

After presenting a story of the food quality legislation in Poland through the points indicated above, the data will be analysed according to the top-down and bottom-up implementation methods of a political programme.

This section discusses methodological justification for the studies of effectiveness. It also shows the logic behind the data collection and presentation, and emphasises that the research project is focused on practical effectiveness which differs from implementation analysis and black-letter law studies.

## **Chapter Four**

### **Case study: Implementation of European food quality schemes in Poland**

This chapter constitutes the case study of the effectiveness of European food quality schemes in Poland. Its presentation will follow the structure proposed in the methodology section, as follows:

1. The law which is to be implemented – EU food quality regulations;
  - 1.1. a dispute over Geographical Indications before the WTO;
  - 1.2. Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed – the EU level;
  - 1.3. the practical operation of food quality schemes in Member States with strong food quality traditions.
2. The national legal environment:
  - 2.1. Poland's pathway to EU membership – agricultural perspective;
  - 2.2. pre-existing legal solutions and changes that followed the introduction of the schemes;
  - 2.3. national food quality schemes.
    - 2.3.1. the List of Traditional Products;
    - 2.3.2. 'Quality Tradition'
    - 2.3.3. 'Meet Good Food'.
3. Implementing agencies and their tasks;
4. Functioning of the EU food quality schemes in Poland – the post-introduction stage:
  - 4.1. knowledge about the schemes gained by participants;
  - 4.2. motivations of participants;
  - 4.3. availability of advice and financial support;
  - 4.4. participation in the scheme:
    - 4.4.1. producers' groups;
    - 4.4.2. specification;
    - 4.4.3. inspections;
    - 4.4.4. enforcement;

4.4.5. coexistence of food quality schemes;

4.4.6. the European Commission.

## 5. Effectiveness

This structure is based on the top-down and bottom-up implementation approach which starts from robust analysis of a legal underpinning of a given programme , and ends with programme participants.

This structure also allows the use of two sets of data. Information provided in points one to three is predominantly based on documents. Data derived from interviews is added where available and appropriate. Information which is provided in points four and five, however, is mostly based on interviews conducted with the research participants.

### **1. Law which is to be implemented – EU food quality regulations**

This section will explain the evolution of the Common Agricultural Policy, and place EU food quality schemes into this broader political framework, and against the principles of national treatment under WTO law. Subsequently, the 1992 and 2006 EU quality regulations will be presented in some detail along with Poland's engagement with these as a result of accession to the European Union in 2004.

It is important to know the source, origin, political setting and aims and goals of the implemented schemes. Identification of these factors will allow the evaluation of achieved outcomes of the schemes, and by so doing will allow verification of whether mechanisms employed for the effectuation of the schemes were appropriately chosen by implementing agencies.

The Common Agricultural Policy has been chosen as a starting point for further deliberations, the food quality schemes being established as within this policy.

The policy regulating the sector of agricultural production was one of the first national policies to be subjected to the Union regulations arising from the



Treaty of Rome, called the Common Agricultural Policy (CAP).<sup>281</sup> The basic objectives of the early CAP were:

- Better agricultural productivity securing stable access to affordable food;
- Fair standard of living for farmers;
- Improvement in agricultural productivity through technical progress and development of more rational production systems that would employ resources more effectively.<sup>282</sup>

The emphasis put on an increase in production was at the time justified by a difficult economic situation and commodities undersupply in the post-war era. In order to improve the situation in the agricultural sector, the Union developed a very wide range of supportive measures to achieve a dynamic intensification of farming. New methods of production were introduced, such as mechanised equipment and chemical fertilising<sup>283</sup>, which were accompanied by intervention purchases, import tariffs, export subsidies and price support in almost all categories of produce.<sup>284</sup>

All the factors mentioned above rendered the CAP very successful in meeting its objectives. The Union trading position has changed considerably, from being the world's largest importer of agricultural products to the world's second largest exporter of agricultural commodities.<sup>285</sup> The increase in production achieved reached such a high level that the Union market became over-saturated. In order to sell commodities abroad, the EU had to subsidise agricultural production<sup>286</sup> to maintain competitive export prices<sup>287</sup> and secure

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<sup>281</sup> 'The Common Agricultural Policy Explained' available at: [http://ec.europa.eu/agriculture/publi/capexplained/cap\\_en.pdf](http://ec.europa.eu/agriculture/publi/capexplained/cap_en.pdf) URL correct as of 1 May 2012

<sup>282</sup> 'The European's Union Common Agricultural Policy: Pressures for Change – an overview' available at: <http://www.ers.usda.gov/publications/Wrs992/Overview.pdf>, URL correct as of 1 May 2012

<sup>283</sup> H Nilsson, 'What are the possible influences affecting the future environmental agricultural policy in the European Union? An investigation into the main factors' (2004) 12 Journal of Cleaner Production 462

<sup>284</sup> S. Weyerbrok, 'Reform of the European Union's Common Agricultural Policy: How to reach GATT compatibility?' (1998) 42 European Economic Review 376

<sup>285</sup> Economic Research (n 153)

<sup>286</sup> The CAP budget costs amounted to for about 70 percent of all EU expenditures in 1996. See: Economic Research (n 153)

<sup>287</sup> *ibid*

farmers' incomes.<sup>288</sup> Only certain types of commodities (e.g. milk, sugar or beef) were subsidised. As a result, farmers stayed in those areas of production where demand had become stagnant, which in consequence led to chronic surpluses followed by intervention purchasing. This is why constant expenditure on farming caused budgetary crises.<sup>289</sup> Additionally, the intensive production processes that were implemented had a powerful impact on the natural environment.<sup>290</sup>

For the Union policy-makers, the need to redefine European agriculture became clear. Rural areas could no longer be perceived only as a productive space, but also as a consumptive space making all kinds of new demands. Recently, water supply, natural habitats, tradition, recreation, culture and the historical context of land use have been perceived as equally important.<sup>291</sup>

The CAP has been reformed several times<sup>292</sup> in the light of a new direction – the so-called *European Model of Agriculture* according to which:

European agriculture as an economic sector must be versatile, sustainable and competitive and spread throughout Europe (including less favourable mountainous regions). It must be capable of maintaining the countryside,

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<sup>288</sup> European Commission (n 280)

<sup>289</sup> Economic Research (n 153)

<sup>290</sup> According to Nilsson, agriculture predominantly caused: “the loss of biodiversity due to the degradation of habitats and the loss of genetic diversity with the spread of monoculture strains; soil degradation through erosion, loss of fertility, salinisation and desertification; air pollution from the use of fossil fuels and pesticide sprays; the effect on water quality and availability as aquifers are depleted, surface and ground waters are contaminated by pesticide and fertiliser run-off, eutrophication and sediment pollution from soil erosion; and the effects on our own health through nitrate contamination of drinking water, pesticide residues in the environment (food, air, water), and bacterial contamination of meat.” See: Nilsson (n 282) 462

<sup>291</sup> G. Van Huylenbroeck and G Durand, (ed.) *Multifunctional Agriculture: A New Paradigm for European Agriculture (Perspectives on Rural Policy and Planning)* (Ashgate, Hampshire 2003) 1-2

<sup>292</sup> Currently farmers are receiving decoupled support payment, not production premiums as previously. They are encouraged to explore the market to satisfy consumer's expectations because their payments are not dependent, with certain exceptions on current production decisions. See: T. Josling, ‘Presidential Address The War on *Terroir*. Geographical Indications as a Transatlantic Trade Conflict’ [2006] *Journal of Agricultural Economics* 359

To be eligible for payments, environmental, food safety, and animal health and welfare standards have to be met. Farmers who fail to do this will face reductions in their payments. See: E. Schmid and F. Sinabell, ‘On the choice of farm management practices after the reform of the Common Agricultural Policy in 2003’ (2007) 82 *Journal of Environmental Management* 332

conserving nature and making a key contribution to the vitality of rural life, and must be able to respond to consumer concerns and demands regarding food quality and safety, environmental protection and the safeguarding of animal welfare.<sup>293</sup>

The expectation to redefine the rules governing the agricultural sector also came from EU citizens for whom the quality of products was becoming more and more important. Consumers started demanding that products intended for consumption fulfil certain hygiene, health and dietary standards, which is why much more attention has been paid to production methods and the origin of food. The rising importance of recognised high quality food has also proven to be beneficial for producers, who, by aiming at quality production or diversified output, have found an alternative to increasingly less profitable subsidy-based food production.<sup>294</sup>

In order to help farmers meet new challenges, the Union has introduced, voluntary food-quality schemes into its legal system, accompanied by quality symbols, commonly referred to as ‘logo’, which constitute complementary elements of enacted reforms, that is organic farming<sup>295</sup> and Geographical Indications and Traditional Specialities Guaranteed. Farmers have been given the opportunity to maximise the value of agricultural output by capitalising on the established product reputation among consumers, and, at the same time, contribute to preserve local traditions, diverse agricultural production, and respect for the environment.<sup>296</sup> It can be said that the food quality regime has become a part of the CAP objectives aimed at improvement in the competitiveness of the agricultural sector.

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<sup>293</sup> H.J. Westhoeck, M Van den Berg and J.A. Bakkes, ‘Scenario development to explore the future of Europe’s rural areas’ (2006) 114 *Agriculture, Ecosystems and Environment* 8

<sup>294</sup> Nilsson (n 282) 465

<sup>295</sup> More on organic farming please see: T. Backer, A. Staus, ‘European food quality policy: the importance of geographical indications, organic certification and food quality insurance schemes in European countries’ (2009) 10 *Estey Centre Journal of International Law and Trade Policy* 111 - 130

<sup>296</sup> M. Will and D. Guenther ‘Food Quality and Safety Standards as Required by EU Law and the Private Industry’ A Practitioners Reference Book. 2<sup>nd</sup> edition 2007 available at <<http://www2.gtz.de/dokumente/bib/07-0800.pdf>> URL correct as of 1 May 2012

In addition, to facilitate the functioning of the schemes new rules on the state aid have been proposed. According to Article 107 of 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, be incompatible with the internal market”. The prohibition from the Article is not complete, though, as derogation has been foreseen in paragraph 3 of the Article. The aid may be considered to be compatible with the internal market if it stands for:

- Aid granted to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
- Aid granted to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

Such other categories of aid as may be specified by a decision of the Council on a proposal from the Commission.

Apart from general principles of the competition policy in the Union, there are specific norms which were enacted to respond to the specific needs of the agricultural sector. Having in mind the particular nature of the latter which results, amongst others, from structural and natural disparities between various agricultural sectors and the need to bring agriculture closer to the market

economy, the Commission adopted new comprehensive Union Guidelines for state aid in the agricultural sector that entered into force on January 1, 2007.<sup>297</sup>

Among other aspects of state aid, the guidelines take particular account of recent developments in agriculture those are: improvement in the quality of agricultural products, preservation of the natural environment, and traditional landscape in the countryside. For regional and traditional products, the guidelines provide that aid is granted in order to encourage the production and marketing of quality agricultural products.<sup>298</sup> Guidelines require, though, that such support should remain in line with Article 32 of Regulation (EC) No 1689/2005, introducing specific support measures for farmers willing to participate in food quality schemes.<sup>299</sup> State aid can also be allocated to technical support for agricultural producers aimed at improvement of efficiency and professionalism in agriculture. Regardless of the legal basis, the preference in granting the aid should be given to farmers or small and medium enterprises rather than to large companies.<sup>300</sup>

Within the framework of state aid for agriculture, traditional or regional production may be granted financial support. Financial aid can also be granted to quality production. According to the Annex to Council Regulation (EC) No 1698/2005 of September 20, 2005 on Support for Rural Development by the European Agricultural Fund for Rural Development (EAFRD), the maximum amount of support for farmers who take part in food quality schemes is EUR 3,000, and the support can be granted for a maximum of five years (in the 2007-2013 programming period). This support is paid after the first year of adherence to the system as a motivational payment, and the amount of money depends on fixed charges of the participation in the scheme.

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<sup>297</sup> Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007-2013 OJ C 319/1 OJ C 319/1

<sup>298</sup> Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007-2013 OJ C 319/1 OJ C 319/1

<sup>299</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) OJ L 277/1

<sup>300</sup> Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007-2013 OJ C 319/1 OJ C 319/1

Another legal entitlement to grant indirect aid to producers of traditional products is the Council Directive No 92/83 on the Harmonisation of the Structures of Excise Duties on Alcohol and Alcoholic Beverages. Pursuant to this directive, a Member State may “apply reduced rates or exemptions for certain products of regional or traditional nature.”<sup>301</sup>

Even though the Union puts a lot of emphasis on specific food quality nowadays, it should be mentioned that only thirty years ago, after the famous *Cassis de Dijon*<sup>302</sup> case, the Commission believed that there was no need to develop specific food regulations except those required for the protection of public health.

Prior to the point at which the first regulations on quality agricultural production came into force, the Union food law had concentrated on the obligations enshrined by Article 3<sup>303</sup> of the Treaty of Rome, ensuring the free movement of foodstuffs throughout the common market.<sup>304</sup> At the Union level, only the rules governing the sector of quality wines had been codified.<sup>305</sup> However, since the *Cassis de Dijon*<sup>306</sup> case, the need to discuss the future of food law in the European Union has grown in importance. Delivering the judgement, the European Court of Justice stated that by introducing fixed rules for regulating food standards, in this case the minimum alcohol content of a spirit, Germany had rendered the sale of a well-known spirit from another

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<sup>301</sup> Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages OJ L 316/21

<sup>302</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

<sup>303</sup> Article 3 of The Treaty of Rome:

For the purpose set out in Article 2 [establishing the common market, emphasis added], the activities of the Community shall include, as provided by this Treaty and in accordance with a timetable set out therein:

- (a) the elimination as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect

<sup>304</sup> R. O'Rourke, *European Food Law* (Sweet & Maxwell, London 2005) 3

<sup>305</sup> Council Regulations (EEC) No 817/70 of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions, OJ L 99, no longer in force. (EEC) No 338/79 of 5 February 1979 laying down special provisions relating to quality wines produced in specified regions, OJ L 54, no longer in force. (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions, OJ L 84, no longer in force.

<sup>306</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

Member State impossible, therefore, it had infringed the principle of the free movement of goods.<sup>307</sup> In other words, Member States were obligated to recognise the need for equivalent food standards to prevent creating trade barriers between them in the future.<sup>308</sup>

The judgement resulted in the Commission's Communication presenting its stand on the future of food law. According to the Communication, the idea of developing very detailed regulations on the composition and characteristics of foods was rejected because:

It would be "neither possible nor desirable to confine in a legislative strait-jacket the culinary richness of European countries". Legislative rigidity concerning product composition prevents the development of new products and is therefore an obstacle to innovation and commercial flexibility. The tastes and preferences of consumers should not be a matter for regulation.<sup>309</sup>

The only aspects of food law which, according to the Commission, should have been regulated were:

- Protection of public health;
- Consumer protection;
- Fair trading; and
- Public controls.<sup>310</sup>

Although the Commission was determined to restrict the scope of food legislation to the above mentioned issues, the ever deepening financial crisis, over-saturation of the market, the strong need to reduce surpluses as well as

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<sup>307</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

<sup>308</sup> B. O'Connor, *The Law on Geographical Indications* (Cameron May, London 2004) 125, For recent, comprehensive academic study on Geographical Indications please see: D. Gangjee, *Relocating the law of Geographical Indications* (Cambridge University Press, Cambridge 2012)

<sup>309</sup> Commission of the European Communities to the Council and to the European Parliament 'Completion of the Internal Market: Community legislation on foodstuffs' COM (85) 603 final, Brussels, 8 November 1985, 9

<sup>310</sup> Commission of the European Communities to the Council and to the European Parliament 'Completion of the Internal Market: Community legislation on foodstuffs' COM (85) 603 final, Brussels, 8 November 1985, 6

strong pressure from small-scale producers of typically local products to introduce some form of protection from industrial farmers,<sup>311</sup> as well as consumer demand for products with certain specific characteristics, safe, environmentally friendly food<sup>312</sup> led to the adoption of two regulations on food quality, that is Regulation (EEC) 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs,<sup>313</sup> and Regulation (EEC) 2082/92 on certificates of specific character for agricultural products and foodstuffs.<sup>314</sup>

These regulations covered three types of products: Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed.<sup>315</sup> It was inspired by the existing national systems, for example the French *Appellation d'Origine Contrôlée* and the Italian *Denominazione d'Origine Controllata*,<sup>316</sup>

At present, the system is codified in the following:

Council Regulation (EC) No 510/2006 of 20 March, *on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*<sup>317</sup>

Council Regulation (EC) No 509/2006 of 20 March, *on agricultural products and foodstuffs as traditional specialities guaranteed*.<sup>318</sup>

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<sup>311</sup> O'Connor (n 307) 127

<sup>312</sup> The result of EU-wide public opinion poll showed that: 91% of EU citizens polled wanted EU agricultural policy to provide safe food, 89% wanted it to protect the environment and sustainability for 79% stable and fair farmers' income was important. See: O'Rourke (n 303) 117

<sup>313</sup> Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1992] OJ L 208/1

<sup>314</sup> Council Regulation (EEC) No 2082/92 of 14 July 1992 on certificates of specific character for agricultural products and foodstuffs [1992] OJ L 208/9

<sup>315</sup> [http://ec.europa.eu/agriculture/foodqual/quali1\\_en.htm](http://ec.europa.eu/agriculture/foodqual/quali1_en.htm) URL correct as of 1 May 2012

<sup>316</sup> [http://ec.europa.eu/agriculture/foodqual/quali1\\_en.htm](http://ec.europa.eu/agriculture/foodqual/quali1_en.htm) URL correct as of 1 May 2012

<sup>317</sup> Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L 93/12

<sup>318</sup> Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed [2006] OJ L 93/1



The above regulations, however, are not applicable to wines and spirits, except wine vinegar.<sup>319</sup> Wines and spirits are covered by Council Regulation (EC) No 1493/1999, 17 May 1999, *on the common organisation of the market in wine*.<sup>320</sup>

### **1.1. a dispute over Geographical Indications before the WTO**

The challenge was initiated by the US in June 1999. The US opened an enquiry into the alleged lack of protection for the US trade marks and GIs in the EU. Specifically, the US contended that Union regulations discriminated against the US producers by requiring that a foreign government adopted the equivalent to the EC system of GI protection. The US based its claim on the principle of the national treatment which holds that foreign nationals should be subjected to the same or better rules as domestic nationals, therefore, the level of protection should not be differentiated on the basis of nationality.<sup>321</sup>

The US claimed that foreign GI owners did not have the same access to the EU system as domestic producers because of elaborated obstacles that had been put in place by the EU. The foreign GI, in order to be registered in the EU, needed to meet the following criteria:

- the name for which the application was sent ought to be protected in the country of origin;
- the foreign government was expected to, on the basis of reciprocity, grant the protection to the EU GIs;
- the foreign government ought to scrutinise the GI application regarding consistency with the regulations before it could be sent to the Commission;
- the foreign government was expected to issue a declaration as to whether the inspection structure would meet the Union requirements;

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<sup>319</sup> Article 1 (EC) No 510/2006 loc, cit

<sup>320</sup> Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine [1999] OJ L 179, more legal acts on wines: <http://www.food.gov.uk/multimedia/pdfs/euwineregs.pdf>

<sup>321</sup> T. Josling, 'What's in a Name? The economics, law and politics of Geographical indications for foods and beverages' available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=922267](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922267) URL correct as of 1 May 2012, See also: J. Hughes, 'Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications' (2006) 58 Hastings Law Journal 299 - 386

- the foreign government must provide the objection procedures by accepting applications for opposition, and examining oppositions for the consistency with regulations and forward the opposition to the Commission.<sup>322</sup>

The consultations failed to resolve the disagreement. The dispute led to the setting up of the Dispute Settlement Panel which in April 2005 ruled rather in favour of the US, which won on the certain grounds that the EC regulation was inconsistent with Article 3.1 of the TRIPS Agreement:<sup>323</sup>

- with respect to the equivalence and reciprocity conditions, as applicable to the availability of protection for GIs;
- with respect to the application procedures, insofar as they require examination and transmission of applications by governments;
- with respect to the requirements of government participation in the inspection structures under Article 10 [EC 2081/92 – emphasis added],<sup>324</sup> and the provision of the declaration by government under Article 12a(2)(b) [EC 2081/92 – emphasis added],<sup>325</sup> and
- with respect to the objection procedures, insofar as they require verification and transmission of objections by governments.

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<sup>322</sup>European Communities – Protection of Trademarks and Geographical Indications for Agricultural products and Foodstuffs. Compliant by the United States. WT/DS174/R, 15 March 2005

<sup>323</sup> Article 3.1. TRIPs Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, The Paris Convention (1967), The Berne Convention (1971), The Rome Convention on the Treaty on Intellectual Property in Respect of Integrated Circuits.

<sup>324</sup> Article 10 (EC) No 2081/92, 1. Member States shall ensure that not later than six months after the entry into force of this Regulation inspection structures are in place, the function of which shall be to ensure that agricultural products and foodstuffs bearing a protected name meet the requirements laid down in the specifications.

<sup>325</sup> Article 12 (EC) No 2081/92

1. Without prejudice to international agreements, this Regulation may apply to an agricultural product or foodstuff from a third country provide that:

- The third country is able to give guarantees identical or equivalent to those referred to in Article 4,
- The third country concerned has inspection agreements equivalent to those laid down in Article 10,
- The third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products for [sic!] foodstuffs coming from the Community.

2. If a protected name of a third country is identical to a Community protected name, registration shall be granted with due regard for local and traditional usage and the practical risk of confusion.

The Panel stated that producers whose countries do not have a GI system, under which their governments accept, examine, transmit and verify the GI applications, are disadvantaged in comparison with those producers whose governments are expected to introduce the GI system into their legal systems if they wish to participate in the EU GI system. The Panel noted that the expectation to establish an equivalent system of protection to the one functioning in the Union was unjustified since non-EU Member States were not under an obligation to comply with Council regulations. Furthermore, according to the Panel, the Union never sufficiently proved that only governmentally monitored inspections were capable of providing effective monitoring of GI compliance with the regulations.<sup>326</sup>

Therefore, the Panel suggested that the EU should bring its regulation into conformity with the TRIPS<sup>327</sup> agreement and amend regulation 2081/92 so as to allow foreign nationals to obtain protection for their GI products in the EC without the intervention of their government in the process and without their government having to establish equivalent protection for the EU GI products.<sup>328</sup>

The EU regulations were perceived by external actors as posing a threat to competition among agricultural producers. Indeed, the Council introduced the legislation because GI protection began to be perceived as an effective tool in making its agriculture more diversified and profitable, and in enhancing its strength as a competitor in the international arena.

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<sup>326</sup> European Communities 'Protection of Trademarks and Geographical Indications for Agricultural products and Foodstuffs. Complaint by the United States' WT/DS174/R, 15 March 2005

<sup>327</sup> For an academic discussion on Geographical Indications in TRIPS please see: I. Caboli, 'Expanding the Protection of Geographical Indications of Origin under TRIPS: "Old" Debate or "New" Opportunity?' (2006) 10 Marquette Intellectual Property Law Review 181 - 203

<sup>328</sup> European Communities 'Protection of Trademarks and Geographical Indications for Agricultural products and Foodstuffs. Complaint by the United States' WT/DS174/R, 15 March 2005

## **1.2. Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed – the EU level**

The EU food quality legislation includes two regulations which describe three categories of names of agricultural products and foodstuffs: Protected Designations of Origin (PDO), Protected Geographical Indications (PGI) and Traditional Speciality Guaranteed (TSG) – Regulation. These schemes enable agricultural producers, food processing manufacturers, and so forth, to protect their products by registering names under which the products are marketed.

The two regulations are: Council Regulation (EC) No 510/2006 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, and Council Regulation (EC) No 509/2006 on Agricultural Products and Foodstuffs as Traditional Specialities Guaranteed.

In accordance with Regulation No 510/2006, PDO and PGI are the names of a region, a specific place, or in a limited number of cases the name of a country, with small exceptions,<sup>329</sup> used to describe an agricultural product and foodstuff.<sup>330</sup>

The application for the PDO/PGI protection ought to be lodged by a group of applicants, which is understood to be any association of producers or processing manufacturers working with the same agricultural product or foodstuff, irrespective of its legal form. In exceptional situations, a single natural or legal person can be treated as a group.<sup>331</sup> Firstly, the person has to be the only producer in a defined area who is willing to submit an application, and secondly, the delimited geographical area has to possess characteristics that

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<sup>329</sup> The term can be registered even if it does not refer to a geographical region but is strongly associated with such, e.g. French Reblochon cheese. See: Josling (n 320)

<sup>330</sup> Article 2, (EC) 510/2006, loc. cit.

<sup>331</sup> Article 5, (1) (EC) No 510/2006, loc. cit.

clearly differentiate it from other adjacent areas.<sup>332</sup> These conditions must be fulfilled cumulatively.

The application for the PDO or PGI shall include at least the name of the product for which the request for registration has been lodged, the name and address of the applicant group, the specification of the product,<sup>333</sup> any appropriate specific rules concerning packaging and labelling, and the description of the link between the product and its geographical environment or origin.<sup>334</sup>

The implementing rules to Regulation (EC) No 510/2006 provide important requirements for the name. For example, the name can be registered only in languages which are or were used to describe the product. It is important that the name, for which the request has been filed, has been in use in commerce or in common language.<sup>335</sup> In its interpretative note, following the case '*Fior di latte – Appennino meridionale*', the Scientific Committee said that the name has to be in use at the time the application for registration is lodged.<sup>336</sup>

The application is addressed to the Member State in which the geographical area is situated. The Member State in question is responsible for scrutinising whether the application is justified and meets the conditions of the regulation. If that is the case the application document is forwarded to the Commission, which shall decide within twelve months between publishing the name in the Official Journal of the European Union (Series C) or rejecting the application. After the publication, anyone with a legitimate interest, including other Member States or third countries, is eligible to object to the registration within

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<sup>332</sup> Article 2, Commission Regulation (EC) No 1898/2006 of 21 December 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 510/2006, loc. cit.

<sup>333</sup> For legal issues linked with specification please see: G.E. Evans, M. Blakney 'The Protection of Geographical Indications After Doha: Quo Vadis? [2006] Journal of International Economic Law 1 – 40, G. Anania, J.C. Bureau, 'The negotiations on agriculture in the Doha Development Agenda Round: current status and future prospects' (2005) 32 European Review of Agricultural Economics 539 – 574

<sup>334</sup> Article 5(2), (EC) 510/2006, loc. cit. For legal issues related the link and delimitation of the production area please see: D. Gangjee, 'Melton Mowbray and the GI Pie in the Sky: Exploring Cartographies of Protection' (2003) 3 Intellectual Property Quarterly 291 - 307

<sup>335</sup> Article 3, (EC) No 1898/2006, loc. cit.

<sup>336</sup> Internal document of the Commission.

six months.<sup>337</sup> If no objections are made, the product's name is entered in the Register of Protected Designations of Origin and Protected Geographical Indications.<sup>338</sup>

According to the regulation, the name is protected against any practice liable to mislead the consumer as to the true origin of the product, *inter alia*:

- any direct or indirect use of the registered name by a product not covered by the registration;
- any usage which is wrong, erroneous, improper, or an imitation whether for laudable or fraudulent purposes; or
- evocation, that is, when the use of the one name makes the reader think of the other.<sup>339</sup>

Even though the name can be registered only in languages used to describe the product, protection is granted not only in the language of the application but also in translation, even if the true origin of the product is indicated or accompanied by the expression 'style', 'type', or 'method' etc.<sup>340</sup> This means that the registered name can only be legally used for products which comply with all the requirements listed in the specification. For example, the use of names such as Parma Ham or Welsh Beef for products made in Poland, that is, outside the defined geographical area in the respective specification, would be considered an infringement of the regulation.

The final registration of the name of a product does not mean that the whole struggle around the designation has ended. From the moment of registration, producers who want to use the registered name are obligated to subject their

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<sup>337</sup> Article 6, (EC) No 510/2006, loc. cit.

<sup>338</sup> Article 7(6) (EC) No 510/2006, loc. cit.

<sup>339</sup> "a situation where the term used to designate a product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected" (C-87/97 Gorgonzola, para. 25)

<sup>340</sup> Article 13(1) (EC) No 510/2006, loc. cit.

product to controls conducted by certification bodies.<sup>341</sup> These certification bodies are responsible for verifying the product compliance with the specification. Non-fulfilment of specification requirements may lead to cancellation of the registration.<sup>342</sup> In principle, however, the name should be protected as long as the link between the product and the geographical area exists. The example of an expiry of the link is the case of Newcastle Brown Ale, previously registered as a PGI. The applicant delimited the brewery process to a certain geographical area at a certain point and after having obtained the registration, decided to move the brewery outside the borders of the area. Since the production no longer took place in the geographical area, the applicant made use of the entitlement expressed in Article 12 of Regulation (EC) No 510/2006 to cancel the registration, as the use of the name no longer fulfilled the requirements set out in Article 2 of the said legal act. The Commission accepted the request and deleted the name from the Register of Protected Designation of Origin and Protected Geographical Indications.<sup>343</sup> From the moment the registration was cancelled, the producer of a former PGI could use the name to market a product produced outside the area without the risk of being found to have committed an infringement of the regulation in question.

Products affixed to the PDO sign have to be produced, prepared and processed in a defined geographical area and their quality or other characteristics should essentially be determined by natural/geographical factors such as climate, soil and so forth, and by human factors such as local know-how. Whereas the PGI sign is for products produced in the indicated area, but not necessarily prepared and processed there, the link between the product and the area may not be based on the product's physical or chemical properties but can be based on its reputation,<sup>344</sup> which, nonetheless, has to be demonstrated by the applicant.

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<sup>341</sup> According to the Article 10, (EC) No 510/2006, the Member State shall designate the competent product certification bodies, and make sure that any operator is entitled to be covered by a system of official controls.

<sup>342</sup> Article 12 (EC) No 510/2006, loc. cit.

<sup>343</sup> Commission Regulation (EC) No 952/2007 of August 2007 cancelling a registration of a name in the Register of protected designation of origin and protected geographical indications (Newcastle Brown Ale (PGI))

<sup>344</sup> L. Bently and B. Sherman, *Intellectual property* (OUP, Oxford 2001) 969

The right to use a protected name to market a product is only granted to the product that complies with the specification. The specification should include at least the following:

- the name of the product;
- detailed description of the product including raw materials and, if appropriate, its physical, chemical, microbiological or organoleptic characteristics;
- the definition of the geographical area and evidence that the product originates from there;
- a description of the packaging and labelling of the product, if necessary; and
- a justification of the existence of the link between the defined geographical area and the quality or characteristics of the product (PDO) or the area and specific quality or reputation of the good (PGI).

Finally, the specification ought to provide information on the names and addresses of the product certification bodies and any other requirements laid down by the Union or national provisions.<sup>345</sup>

Generic names<sup>346</sup> cannot be registered either as the PDO or PGI. The name is considered generic when it has lost its geographical connotations and has become the common name of an agricultural product or foodstuff, even though the name relates to the place or region where the products were originally produced or marketed.<sup>347</sup>

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<sup>345</sup> Article 4, (EC) No 510/2006, loc. cit.

<sup>346</sup> D. Gangjee, 'A Sharper Image of Generic Use through the Lens of *Feta*' (2007) 172 European Intellectual property Review

<sup>347</sup> In addition to the definition of genericity, the regulation provides with criteria which should be taken into account when conducting a test for generic status of a name which is to be protected. According to the wording of the Regulation the following need to be taken under consideration:

- a) the existing situation in the Member States and in areas of consumption;
- b) the relevant national or European Union laws.

The provided criteria have been evaluated by the ECJ on several occasions. The most important contribution has been made in the *Feta* judgment which was also supplemented by the Scientific Committee evaluation on the genericity claim. The criteria mentioned in the Regulation can be broken down as follows:

- situation in the Members State in which the name originates;
- existing situation in other Member States;
- consumption patterns;
- perception of the designation among consumers; and
- national and European Union legislation



On the other hand, the name that has been registered cannot become generic.

Homonymous names cannot be registered unless they are unlikely to mislead the consumers as to the true identity of the product.<sup>348</sup> The registration of the name of a plant variety or animal breed as PDO or PGI is not allowed by Regulation 510/2006 either.

Since it is the name that is protected, the legislator decided to regulate the coexistence of PDOs and PGIs and trade marks.<sup>349</sup> If the name of the product has been registered as a PDO or PGI, it is not possible to grant protection to a trade mark which corresponds to the same category of products. This prohibition enters into force at the moment of lodging an application to the European Commission. Such trade marks registered posterior to GI are invalidated. When a trade mark has been applied for, registered or established in good faith on the Union territory, prior to the date of protection of the PDO

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It is required that in the relevant territory no significant part of the public should still consider the name as a geographical indication. Here two elements are of significant importance – 'the relevant territory' and 'the relevant public'. Moreover these two elements ought not to be considered separately.

The term territory shall comprise both: the country of origin as well the other Member States, whereas 'the relevant public' may include: consumers, producers, restaurateurs, importers, exporters etc. all in relevance to a particular feature of a product. In the case of Feta the ECJ gave priority to the situation in the country of origin, however, a closer read of the text of the judgment justifies the claim that prioritising the country of origin does not constitute the ever-binding rule. It is rather the concept of public which may determine the territory. In other words, if the relevant public is predominantly located in the country of origin then the situation in that country might exert demonstrable effect on the public's perception, therefore the situation in the country of origin may be considered decisive. However, it is also possible for the situation to occur where the vast majority of the relevant public is located outside the country of origin, e.g. when a product is predominantly made for export or its production or consumption is wider outside the country of origin rather than within that country. Given the specificity of GI products the genericide analysis, in a significant number of cases, might be weighted in favour of home country producers.

When considering the second criterion, the nature of the relevant national or European Union laws should be examined. Not every national or European Union legislation is of consequence. Regulations which do not intend to govern industrial property rights may not be treated as decisive when establishing genericity. For example the legislation focusing on veterinary, sanitary or customs matters even if using the name which has applied for protection may not be considered as confirming a genericide claim. These kinds of regulations, in the vast majority of cases, use the name for clarity reasons and should not be used to construe the meaning of IPR's law. A contrario a national regulation, international agreement or EU legislation aimed at preserving the name of a product or its specific character falls under the category of IPR's law and might be used when conducting a genericity test.

<sup>348</sup> Article 3, (EC) No 510/2006, loc.cit.

<sup>349</sup> For an academic discussion on coexistence on GIs and trademarks please see: D. Gangjee, 'Quibbling Siblings: Conflict between Trademarks and Geographical Indications' (2007) 82 Chicago-Kent Law Review 1253 - 1294

or PGI, the coexistence of the two, even for the same category of products, is admissible.

The regulation foresees an objection procedure as well. The Commission's decision to register the PDO or PGI can be objected to by any Member State other than the one applying for registration or by a third country, within the time-limit of six months from the date of publication of the name proposed for the registration in the Official Journal of the European Union, 'C' series. The objector, together with submitting a duly substantiated statement of objection has also to demonstrate a legitimate interest in objecting to the registration.<sup>350</sup>

Any natural or legal person, established in, or residing in a Member State, should forward their statement to the Commission via the Member State. A natural or legal person from a non-EU country can lodge the statement of objection either directly to the Commission or via the national authorities of the country concerned.<sup>351</sup>

The grounds for admissibility of objections are listed in Article 7(3) of Regulation (EC) No 510/2006 and they are as follows:

- non-compliance with the conditions referred to in Article 2;
- the name proposed would be contrary to paragraphs 2, 3 and 4 of Article 3;
- the registration of the name proposed would jeopardise the existence of an entirely or partly identical name or of a trade mark or the existence of products which have been legally on the market for at least five years preceding the date of the publication provided for in Article 6(2); or
- it can be concluded that the name for which registration is requested is generic within the meaning of Article 3(1).

Non-compliance with Article 2 means non-compliance with the definition of designation of origin, or geographical indication. The possible lack of conformity with the PDO or PGI definition would come into play when, for

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<sup>350</sup> Article 7, (EC) No 510/2006, loc.cit.

<sup>351</sup> Article 7, (EC) No 510/2006, loc, cit.

example, a name had been registered for a product, the quality or characteristics of which would not be attributable to the area (PDO), or for a product, the quality, reputation or characteristics of which would not be linked to its origin. With regard to the name, the requirements of Article 2 are that: the PDO or PGI should be a name of a region, place or country. It can also be a traditional geographical or non-geographical name which has been used to describe the product. Non-compliance with Article 2 would manifest itself in the name not being in use to describe a given product.

The name proposed for the registration could be generic, could conflict with the name of a plant variety or animal breed, could be wholly or partially homonymous to the already registered name, or such an indication could be liable to mislead the consumer as to the true identity of the product in the light of the trade mark's renown and the length of time it has been used.

The registration of the proposed name would jeopardise the existence of an entirely or partially identical name or of a trade mark or the existence of a product which has been legally on the market for at least five years preceding the date of the publication.

If the objection is inadmissible, the Commission registers the name. If, however, the Commission's services find the objection admissible, they will invite the interested parties, that is, the applicant and the objector(s), to seek agreement between themselves. The parties have six months for appropriate consultations. After that time-limit the applicant ought to inform the Commission of the result of the consultation, that is if an agreement has been reached or not. The Commission's actions depend on the outcome of the talks.

If the agreement between the parties has resulted in an introduction of minor amendments, the Commission will register the name. If the amendments do not fall into the category of minor changes, as defined in the 'implementing rules', the Commission should repeat the scrutiny once more, and then make a decision to either register the name or reject the application.

If the parties have not reached an agreement, the Commission will take a decision in line with Article 15(2)<sup>352</sup>, having regard to traditional and fair usage of the name and the actual occurrence of the risk of confusion on the part of the consumer. At this stage the Commission exercises its authority within the framework of comitology rules. Coming to a decision in the framework of the comitology mechanism may also take place when the Commission rejects the application.

When the Commission adopts a regulation entering the name in the Register of PDOs and PGIs and no objection has been lodged, the comitology procedural mechanisms are not triggered.

Regulation (EC) No 509/2006 states that only names of products which possess features that distinguish them clearly from other similar products in the same category, can be registered as Traditional Speciality Guaranteed. Additionally, a name can be registered as traditional only if its usage in the Union market can be dated back 25 years.<sup>353</sup> Unlike the PDO and PGI, TSG products do not have to possess a reputation attributable to the place of origin. They need to be made from traditional raw materials, or possess a traditional composition, or be produced and/or processed in a traditional way.<sup>354</sup>

The applicant should prepare a specification for their product. The specification components are very similar to those set out in Regulation (EC) No 510/2006. The applicant has to provide the name for which the protection is sought and an indication of whether the registration is to be followed by reservation of the name or not. Furthermore, it should be defined and proved that the product is specific and traditional in character. Finally, the applicant also has to describe against what indications, how, and how often the specific character of the

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<sup>352</sup>Article 15, (EC) No 510/2006, loc. cit.

1. The Commission shall be assisted by the Standing Committee on Protected Geographical Indications and Protected Designations of Origin  
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/486/EC shall apply. The period laid down in Article 5(6) shall be set at three months.

<sup>353</sup>Article 2, (EC) No 509/2006. loc cit.

<sup>354</sup>Article 4, (EC) No 509/2006. loc cit.

product will be measured.<sup>355</sup> For example, if the specificity of a product is based on its taste, the applicant ought to explain precisely what kind of taste he or she has in mind: buttery, salty, sweet – rather than “unique”, “special” or “unforgettable” – and explain how the occurrence of that taste will be checked.

The applicant should also indicate if the TSG is to be registered with reservation of the name or not. It is important since this decision influences the scope of protection. The protection of the TSG with reservation of the name is broader. The reserved name cannot be used with any product that does not comply with the specification. In the case of the TSG registered without reservation of the name, compliance with specification is expected only from products that use the TSG logo. In other words, in the latter case the product that does not comply with the specification cannot be labelled as Traditional Speciality Guaranteed but can still be marketed under the registered name.

As far as TSGs are concerned, the registration of a name that contains either the name of an animal breed or plant variety is possible, on condition that it is not misleading in regard to the nature of the product.

The registration procedure and post-registration obligations remain similar to the ones established for the purpose of PDOs and PGIs, with respect to the specificity of Traditional Specialities.

The relationship between TSGs and trade marks has not been clearly established though. The Regulation states that it applies without prejudice to Union rules or national IP laws, in particular to provisions ruling the situation of Geographical Indications or trade marks. Therefore, it may not be possible to register a TSG with reservation of a name if such name has already been protected under the trade mark law. Having in mind the prohibition of using a reserved name with a product which does not satisfy the specification, the statement that such a name cannot be later registered as a trade mark seems to be substantiated.

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<sup>355</sup> Article 6, (EC) No 509/2006, loc. cit, Article 4, (EC) No 1898/2006, loc. cit.

Both Regulations (EC) No 509/2006 and (EC) No 510/2006 do not contain any provisions sanctioning violations of the protected names. The infraction proceeding has been left to Member States which are responsible for the introduction of legal mechanisms for the interested parties at the national level. In general, the following mechanisms can be available: civil proceedings, criminal proceedings, or measures provided by the administrative organs. The availability of legal routes may not be limited to one channel. Various ways to begin litigation of the infringement proceedings might be available to the interested parties, depending on background circumstances, for example: civil, criminal, or administrative. Hence, from the moment at which the GI system enters the internal legal order, the burden to render the system effective rests predominantly on Member States. Therefore, Member States are obligated by legislative and financial means to create all necessary regulatory tools and procedures for producers interested in participation in the quality schemes.<sup>356</sup>

### **1.3. the practical operation of food quality schemes in Member States with strong food quality traditions**

The production of regional specialities mobilises producers from certain geographical areas who, owing to joint entrepreneurship, are able to launch their products on the market and capitalise on them, whereas acting alone they would not be able to do so.<sup>357</sup> Moreover, protected quality products are predominantly sold at a higher premium than the non-protected equivalents, for example: *Toscano* oil is sold at a premium of 20%, and French chicken – *Poulet de Bresse* – has a market price four times higher than the regular market price. For countries such as France, Spain and Italy – leaders in the field – the products with registered names constitute a significant value for their economies. For example, in 2003, French Geographical Indications generated 19 billion Euro in value, in Italy 12 billion, in Spain 3.5 billion, and in Italy

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<sup>356</sup> European Commission Guide to Community Regulations, 'Protection of Geographical Indications, Designations of Origin and Certificates of Specific Character for Agricultural products and Foodstuffs. 2<sup>nd</sup> Edition, August 2004

<sup>357</sup> For a comparative study on Union and Non-Union GIs – Comté cheese in France and tequila in Mexico please see: S. Bowen, 'Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy' (2010) 75 Rural Sociology 209 - 243

alone approximately 300,000 people were employed in this sector.<sup>358</sup> In most cases, quality production is not as intensive as industrial farming, which is why there is a smaller risk of overproduction. Additionally, successful enterprises have the potential to mobilise the local community and stimulate the interest of a diversified set of players.<sup>359</sup> These activities and interests may be focused on preserving attractive landscapes and developing recreational opportunities or agro-tourism, which consequently enhance the affluence of the region concerned.<sup>360</sup> Controls over production processes and final products ensure the preservation of food quality. Preparing an application for registration requires a historical enquiry in order to prove the food origin or its traditional character in the case of TSGs. This kind of research broadens the knowledge of the interested parties, who very often rediscover the richness and uniqueness of their community and are then able to pass the knowledge on to the next generation.

Since food quality schemes are included in the Rural Development policy for the period 2007-2013<sup>361</sup> as an element to secure its main objectives, it can be said that the food quality schemes, in particular Geographical Indications, have been converted from being an almost neglected regulatory area into a valuable tool for achieving major goals of future European Agriculture, which are as follows:

- improved competitiveness of the agricultural sector;
- improved environment and countryside;
- improved quality of life in rural areas and diversification of the rural economy<sup>362</sup>.

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<sup>358</sup> [http://ec.europa.eu/trade/issues/sectoral/intell\\_property/argu\\_en.htm](http://ec.europa.eu/trade/issues/sectoral/intell_property/argu_en.htm) URL correct as of 1 May 2012, for an academic discussion on economic and cultural concerns about GIs please see: K. Raustiala, S. Munzer, 'The Global Struggle over Geographical Indications' (2007) 18 The European Journal of International Law 337 - 365

<sup>359</sup> Van Huylenbroeck (n 121) 74

<sup>360</sup> For an academic discussion on linking product and place please see: B. Libery, M. Kneafsey, 'Product and Place: Promoting Quality Products and Services in the Lagging Rural Regions of the European Union' (1998) 5 European Urban and Rural Studies 329 - 342

<sup>361</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) OJ L 277/1

<sup>362</sup> [http://ec.europa.eu/agriculture/rurdev/index\\_en.htm](http://ec.europa.eu/agriculture/rurdev/index_en.htm) URL correct as of 1 May 2012

The European Union has put considerable effort into positioning itself as a producer of added-value products by lobbying in the WTO on a wider protection for European products bearing food quality logos. The EU has prepared a list of approximately 40 names which the Union would like to reserve exclusively and retrospectively for its producers.<sup>363</sup> Among those products are: Feta, Parma Ham and Champagne. Internally, the European Commission General Directorate for Agriculture and Rural Development undertook a three-year EU-wide promotional campaign under the central theme 'Products with a Story'. The aim of that campaign was to encourage producers to use the Union food quality logo and to stimulate a demand for products with registered names among consumers. Unfortunately, the success of that undertaking was questionable. A survey of 1,000 people in five European countries revealed that only 17% of those who buy regional products have heard of Geographical Indications (even less about Traditional Specialities) and understood the concept of it.<sup>364</sup>

The food quality schemes are not free from weaknesses, which may undermine the whole venture of developing a strong sector of quality agricultural production. They include:

1. Consumers very often do not know that products with protected names exist; a survey of almost 2,500 consumers conducted across six EU Member States (France, Spain, the United Kingdom, Ireland, Finland, Greece) revealed that only consumers in the first two mentioned countries were aware of, and ready to buy, regional products, whereas

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<sup>363</sup> B. Goebel, 'Geographical Indications' available at: [http://www.wipo.int/meetings/en/2005/geo\\_pmf/presentations/pdf/wipo\\_geo\\_pmf\\_05\\_goebel2.pdf](http://www.wipo.int/meetings/en/2005/geo_pmf/presentations/pdf/wipo_geo_pmf_05_goebel2.pdf) URL correct as of 1 May 2012

<sup>364</sup> N. Parrot, N Wilson and J Murdoch, 'Spatializing Quality: Regional Protection and the Alternative Geography of Food'(2002) 9 European Urban and Regional Studies 254, See also: Green paper on promotion measures and information provision for agricultural products: a reinforced value-added European strategy for promoting the tastes of Europe. COM (2011)0436 final, Brussels, 14 July 2011



consumers in the rest of the polled countries had very limited knowledge of typical regional products<sup>365</sup>;

2. In countries with strong traditions of regional production consumers do not value European quality logos as much as the national ones<sup>366</sup>;
3. Except for wines and spirits, only a limited number of the most famous products are purchased by shops with the biggest selling capacity, that is by supermarket chains<sup>367</sup>, and
4. The producers of PDO/PGI or TSG products of limited market reach may not be benefiting from the food quality system at all because the premium they gain may prove to be insufficient to cover all the expenses of registration and inspection.<sup>368</sup>

In summary, the food quality system suffers from ineffectiveness for various reasons. The most prominent reason seems to be the lack of its recognition among customers. In the author's opinion, however, the Union has failed to recognise the importance of stakeholders' participatory issues which come into play before the system can be mobilised by agricultural producers. This research aims at shedding some light on what happens before product names are registered. What kind of conditions have to be in place in order to create the most conducive environment for the system to grow; how should the national and local authorities act in order to recruit a significant number of agro-producers willing to protect their products, and do producers need more incentives, information or help when starting legal proceedings?

This section presented a detailed analysis of the Union quality regulations and their political environment, namely the Common Agricultural Policy, as well as discussions concerning Geographical Indications in the WTO arena. The section was summarised by the introduction of a few general facts on practical

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<sup>365</sup> Green paper on promotion measures and information provision for agricultural products: a reinforced value-added European strategy for promoting the tastes of Europe. COM (2011) 0436 final, Brussels, 14 July 2011

<sup>366</sup> D. Rangnekar, 'The Socio-Economics of Geographical Indications A review of Empirical Evidence from Europe' UNCTAD-ICTSD Project on IPRs and Sustainable Development available at: [http://www.iprsonline.org/unctadictsd/docs/CS\\_Rangnekar2.pdf](http://www.iprsonline.org/unctadictsd/docs/CS_Rangnekar2.pdf) URL correct as of 1 May 2012

<sup>367</sup> Parrot (n 363) 255

<sup>368</sup> Parrot (n 363) 256

functioning of the quality schemes in the Member States with strong food quality traditions.

## **2. The national legal environment**

This point has been introduced into the research structure in order to get to know the target legal environment of the food quality schemes. Any programme, upon entry to a national legal system, starts interacting with it in many ways. The national environment can be conducive, neutral or inhibiting for such programme, depending on, for example: state performance, previous legal solutions or competing national norms. Hence the need to establish how these patterns of interaction between the national legal environment and the schemes look like, and what are the consequences for the programme's ultimate effectiveness.

### **2.1. Poland's pathway to the EU membership - the agricultural perspective**

For a better understanding of the environment into which the Union food quality schemes have been introduced, a historical retrospection will be used, and a few facts related to Poland's accession to the European Union will be presented.

Polish farmers were a social group that was mistrustful of the idea of accession to the European Union right from the start. This negative stance was caused by a number of decisions taken by the Polish government that influenced the wellbeing of farmers. When the government decided to lift the protection mechanism and expose its market to open competition, Polish farmers experienced impoverishment.

Already in 1991, when signing the *Europe Agreement Establishing Association between the European Communities and their Member States on the one part*

*and the Republic of Poland on the other part*,<sup>369</sup> in the agricultural sector, Poland agreed to lower custom duties by 10% and lift import quotas on agricultural products from the EU within five years. For industrial articles, custom duties were to be lifted within seven years from signing the agreement.

Having in mind the huge discrepancy between Poland's economy and Western European economies back then, the rapidity of liberating the market access for foreign production could not lead to a positive outcome. Poland did not manage to recover after the communist era, hence it could hardly compete with Western states, even when the protection periods of five and seven years had passed. In consequence, the trade balance for Poland with the EEC was deeply negative, and Poland suffered from a significant economic setback, which will be described in more detail later on.

Concerning the association of Poland with the Union, negative consequences for Poland outweighed the positive aspects. Even though the Agreement declared that the ultimate goal of association was granting Poland full membership of the Communities, for an ordinary citizen, the immediate negative effects of the Agreement weighted against the idea of closer integration with the EEC.<sup>370</sup>

As far as agriculture was concerned, the beginning of Poland's closer cooperation with the EEC was marked by significant disappointment on the farmers' part. Not only could Poland's agriculture barely compete with modernised and subsidised western production, the Polish government was seriously lagging behind in adopting national agricultural norms and regulations to Union standards, which further weakened Poland's export capabilities. In spite of Polish agricultural products being manufactured in a much less industrialised way, they did not get recognition as natural or healthy foods as they were not skilfully marketed. Imported products were cheaper because they were subsidised and also packed in an appealing way, which

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<sup>369</sup> <http://wits.worldbank.org/GPTAD/PDF/archive/EC-Poland.pdf> URL correct as of 1 May January 2012

<sup>370</sup> A. Doliwa-Klepacka, Z. M. Doliwa-Klepacki, *Członkostwo Unii Europejskiej* (Temida, Białystok 2008) 61-64

rendered them more attractive to consumers. In consequence, Polish farmers were significantly impoverished and developed a very strong resistance towards the idea of integration with the European Union.<sup>371</sup>

This negative ambience found its visible manifestation in 1998 when farmers staged a number of strong protests that took the form of road or railway blockades or spilling imported wheat over the railroads.<sup>372</sup>

In 2000, regardless of the difficult situation, the Polish government decided to further liberalise trade in the agricultural sector, exposing many sensitive areas to strong competition, for example the meat, wheat, fruit, and vegetable sectors. In 2002, trade in the fish sector was fully open. The trade balance between Poland and the EEC was still negative and unemployment soared, especially in rural areas. The number of farms was plummeting. In 2003 there were 2.030 million individual farms, in 2002 – 1.952 million and in 2003 – 1.852 million. When Poland started negotiations directly preceding the accession, agricultural issues were creating most controversies. The Community did not want to agree to grant direct payments to Polish farmers. Limits of production allocated to Poland in the milk sector were very low. In the end, the Community agreed on certain direct payments but only for farms bigger than 1 hectare. In Poland, approximately 1 million farms were smaller than 1 hectare.<sup>373</sup>

The effect of unsuccessful negotiations revolving around the agricultural sector transpired through opinion polls on the perception of the accession of Poland to the EU, conducted in 2000 by a major Polish polling agency. The residents of big cities were in favour, while the inhabitants of rural areas were mostly against.<sup>374</sup>

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<sup>371</sup> Doliwa-Klepacka (n 369) 90-92

<sup>372</sup> Doliwa-Klepacka (n 369) 90-92

<sup>373</sup> Doliwa-Klepacka (n 369) 120

<sup>374</sup> Doliwa-Klepacka (n 369) 104

And yet in 2003, in a national referendum, Poles opted for joining the EU. Still, supporters of the accession came from the industrial part of the country rather than from rural areas.<sup>375</sup>

Regardless of the difficult conditions in which Poland entered the Union, agriculture is said to have benefited from EU membership. The distribution of gains was uneven, though. Large or specialised farms gained much more than small ones – 40% of all payments went to 6% of farms. The number of self-reliant farms, that is farms focused on production that only satisfied their own needs, increased, which meant some farms could not sustain their presence in the market of produce any more and had to refocus their functioning from a market-oriented production to a private one.

The fact that only a small percentage of farms received up to 40% of all payments indicates that most likely only big and entrepreneurial farmers were able to apply for EU funds. Most of the financial support coming from the EU can be granted under condition that the recipient also invests in the undertaking that is supposed to be subsidised. For farmers, it very often means a modernisation of their farms, buying land or focusing on specialised production. At the same time, the increase in the number of self-reliant, non-subsidised farms may support the assumption that small agro-producers find participation in EU programmes or schemes too costly, too difficult or highly bureaucratised, and therefore daunting or even beyond their reach.

## **2.2. pre-existing legal solutions and changes that followed the introduction of the schemes**

According to Evan, new legislation should remain in conformity with the old law when regulating the same subject matter, or there should be some evidence that similar measures had worked in the past.<sup>376</sup> Hence information about pre-existing legal solutions could prove to be helpful to the effectiveness study

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<sup>375</sup> Doliwa-Klepacka (n 369) 105

<sup>376</sup> Travers (n 188) 3-5

since the old legal regimes may indeed significantly influence the functioning of new laws.

Indeed, before Poland entered the EU in 2004, a law regulating some aspects of traditional and regional production was already in force. Producers could have registered the names of products with unique qualities, that is, geographical indications, with the Polish Patent Office under the Act on Industrial Property.<sup>377</sup> In that legal act, geographical indications were defined as designations, referring directly or indirectly to the name of a city, town, region or country, which defined the product as coming from that place. Products were expected to have a specificity or quality attributed to the place of origin.

This system differed from the EU system. Its design was much closer to the concept of Geographical Indications established by the TRIPS Agreement, rather than to the categories introduced by Union legislation, namely PDOs, and PGIs. The system was not limited to agricultural production, it embraced all categories of products, for example arts and crafts. It also did not introduce any rules or conditions under which a product bearing a registered name could be checked against its declared characteristics.<sup>378</sup> Producers were not expected to deliver detailed information on their products' origin. The registration process was not costly and protection was granted for an indefinite period of time. No information on the history of the product, origin of ingredients or link between the products and the area was required. In addition, not only were producers or producers' groups entitled to lodge an application but also the organs of national administration could start the registration process.

Despite the flexible approach to registration, the interest shown by producers or governmental and local authorities in applying for the protection of traditional or regional products was marginal.<sup>379</sup> Additionally, producers of registered products did not derive benefits from registration. Furthermore, due to high

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<sup>377</sup> Ustawa, Prawo własności przemysłowej, 30.06.2000. Dz. U. 2003, Nr 119 poz. 1117

<sup>378</sup> M. Rzytki, 'Sprzedać produkt tradycyjny' 324 in: M. Gąsiorowski (ed.) *O produktach tradycyjnych i regionalnych* ( Fundacja Fundusz Współpracy , Warszawa 2005)

<sup>379</sup> Rzytki (n 377) 323

litigation costs, reported violations of protected products, even though notorious, remained unexecuted.<sup>380</sup>

Under that legislation, only a few products' names were registered, for example *Oscypek*, *Bryndza podhalanska*, *Bunc*. All of them were sheep and goat milk cheeses and all of them originated from the mountainous areas. The registration process was conducted by producers acting together with local administration authorities.<sup>381</sup>

Since little importance was placed on these Geographical Indications, and the Patent Office was by no means involved in the rural development policy, geographical indications were treated as an exotic relative in the Intellectual Property family rather than as a rightful member.

At the time of Poland's accession to the EU (2004), Poland had two sets of legislation attempting to regulate the Geographical Indications subject matter, namely, the already mentioned Industrial Property Act and the Council Regulations No 2081/92 and 2082/92. Both pieces of legislation overlapped and in a way conflicting with the registration procedure and scope of protection. Additionally, the EU Regulations were not fully effective as certain necessary national legal solutions rendering that law operational were still missing. Only in 2005 did the situation change and competence over the registration process of agricultural products and foodstuffs was attributed to the Ministry of Agriculture. Other geographical indication categories remained with the Patent Office.

Nevertheless, the transfer of responsibility for agricultural Geographical Indications to the Ministry of Agriculture emphasised a stronger political connotation of the food quality law with the Common Agricultural Policy rather than with Industrial Property. Traditional Specialities Guaranteed are not considered a part of the Intellectual Property family, hence the Ministry of

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<sup>380</sup> Rzytki (n 377) 324

<sup>381</sup> Rzytki (n 377) 324

Agriculture seemed to be a much better institution to deal with such types of foodstuff.

In Poland, food quality legislation in its current form has been introduced via: the Council Regulations (EC) No 509/2006 and 510/2006, the Commission Implementing Rules to the Quality Regulations 1898/2006,<sup>382</sup> 1216/2007<sup>383</sup> and the national law.

The EU food quality legislation obligates every Member State to introduce necessary legal measures foreseen by Council Regulation No 509/2006 and 510/2006. In theory however, in the case of regulations, there is no room for implementation. And yet, a number of regulations explicitly contain delegations for Member States to introduce new laws necessary for the regulations to function. In consequence, the implementation of these particular legal acts not only takes place in practice but is necessary. Only after a Member State fulfils its obligations stemming from delegations, can the regulations become fully operational.

In the case of the regulations in question these measures are as follows:

- adoption of laws, ordinances or administrative provisions guaranteeing that information about its origin will be provided for any product, and that a product will be labelled in accordance with the general rules laid down in Directive No 2000/13/EC<sup>384</sup> with respect to them originating from a defined geographical area;
- set up of procedures providing for amendments of the existing specification;

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<sup>382</sup> (EC) No 1898/2006, loc. cit

<sup>383</sup> Commission Reregulation (EC) No 1216/2007 of 18 October 2007 laying down detailed rules for the implementation of Council Regulation 506/2006 on agricultural products and foodstuffs as traditional specialties guaranteed. OJ L 275/3

<sup>384</sup> European Parliament and the Council Directive 2000/13/EC of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs OJ L 109/29



- establishment of a monitoring system for official controls in line with the Council Regulation (EC) No 882/2004<sup>385</sup> on the verification of compliance with feed and food law;
- establishment of a subsidiary system of checks ensuring compliance with the specification;
- codification of rules for the national phase of the registration procedure as well as a national objection procedure; and
- designation of competent authorities responsible for evaluating applications for registration or compliance with the specification.

In order to comply with the requirements set out in the Council Regulation No 509/2006 and No 510/2006, Poland established the necessary legal regime based on two major legal acts – the Act on Registration and Protection of Indications and Designations of Agricultural Products and Foodstuffs and on Traditional Products, and the Act on the Quality in Trade of Agricultural Products and Foodstuffs.<sup>386</sup> These legal acts covered the following issues:

- national phase of the registration procedure for PDOs, PGIs, and TSGs;
- national objection procedure;
- provisional protection of PDOs, PGIs and TSGs under the national law;
- changes to the specification; and
- official controls and competences of authorised inspection bodies.<sup>387</sup>

For the national registration procedure, the Act on the Registration and Protection of Indications and Designations of Agricultural Products and Foodstuffs and on Traditional Products<sup>388</sup> sets out in detail the requirements of

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<sup>385</sup> European Parliament and the Council Regulation (EC) 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules OJ L 119/1

<sup>386</sup> Ustawa o rejestracji i ochronie nazw i oznaczeń produktów rolnych i środków spożywczych oraz o produktach tradycyjnych. Dz. U. 2005, Nr 10 poz. 68; Ustawa o jakości handlowej artykułów rolno-spożywczych. Dz. U. 2005, Nr 187, poz. 1577

<sup>387</sup> According Polish law (Dz. U. 2005, Nr 187, poz. 1577) a producer has to provide all necessary information about a product on its packaging in such a way as to allow any interested party to trace the product's origin as well as give exhaustive information about the qualities of the product.

<sup>388</sup> Ustawa o rejestracji i ochronie nazw i oznaczeń produktów rolnych i środków spożywczych oraz produktach tradycyjnych, 17.12.2004, Dz. U. 2005, Nr 10, poz. 68

the application for registration of a product's name as the PDO, PGI or the TSG, and time limits for both the Ministry of Agriculture and the applicant, related to the whole process of national scrutiny of the registration request. The Act on Quality in Trade provides detailed rules for controls and control bodies.<sup>389</sup>

Pursuant to the Act on Registration and Protection of Indications and Designations of Agricultural Products and Foodstuffs, when the application fulfils formal requirements, the Minister in charge of the agricultural sector decides to enter the name into the national internal register. At the same time, the Minister forwards the application to the Council for Traditional and Regional Agricultural Products and Foodstuffs. That Council is an advisory body which gives opinions on the registration requests, which then supports the final decision taken by the Minister.

Once the name for which the registration is sought is entered into the internal register, the national objection procedure stage begins. Any interested party having a legitimate interest may lodge an objection against registration. The grounds for objection are the same as indicated in Regulations 510/2006 and 509/2006, including for instance non-compliance with the definition of the PDO, PGI or TSG. The objection proceedings involve the consultation period during which parties are requested to seek agreement amongst themselves. In the case where agreement cannot be reached, the Ministry decides the next course of action.

Having scrutinised both the application and the objection, and having consulted the Council for Traditional and Regional Agricultural Products and Foodstuffs, the Minister decides whether to forward the application to the European Commission or dismiss the registration request.

From the moment a favourable decision on forwarding the application to the Commission has been taken and published, the name for which the protection has been sought can benefit from a transitional national protection. That

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<sup>389</sup> Ustawa o jakości handlowej artykułów rolno- spożywczych, 29.09.2005, Dz. U. 2005, Nr 187, poz. 1577

transitional protection ceases to exist at the moment of registration or rejection of the name at the Union level. And yet, as long as the transitional protection lasts, the name for which the protection has been sought can be used to describe the product which complies with the specification.

Several additional technical administrative provisions providing more detailed information about the issues mentioned before, that is, the specification, the monitoring system, and so forth, have also been regulated.<sup>390</sup>

In addition, various changes to the national law have been introduced. Some of these changes took the form of derogations from general food safety norms foreseen for the benefit of traditional and regional products. For example, the new law on veterinary conditions for products of animal origin was introduced,<sup>391</sup> and the situation of already registered product names changed. Still, for the product registered under the old regime, no controls investigating the manufacturing process against the declared production method were conducted. In such circumstances, producers' freedom with methods of production, preparation or processing remained huge. Producers of products bearing registered names could be exempted from some of the Union norms regulating sanitary and veterinary standards of food production. The exemptions, if granted, allowed producers to maintain traditional production methods otherwise perceived as contrary to Union law.<sup>392</sup> Producers did not have to subject their establishments to all the controls foreseen for food producers, except for veterinary checks.

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<sup>390</sup> Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie stawek opłat za dokonanie niektórych czynności związanych z rejestracją nazw i oznaczeń produktów rolnych i Śródków spożywczych. 16.02.2005, Dz. U. 2005, Nr 36, poz. 323; Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie wysokości ryczałtowego wynagrodzenia, jakie przysługuje członkom Rady do Spraw Tradycyjnych i Regionalnych Nazw Produktów Rolnych i Śródków Spożywczych. 02.03.2005, Dz. U. 2005, Nr 41, poz. 389; Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie wniosku o wpis produktu na Listę Produktów Tradycyjnych. 22.03.2005, Dz. U. 2005, Nr 58, poz. 509; Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie świadectwa jakości potwierdzającego zgodność procesu produkcji produktu rolnego lub środka spożywczego ze specyfikacją. 27.05.2009, Dz. U. 2009, Nr 91, poz. 747

<sup>391</sup> Ustawa o wymaganiach weterynaryjnych dla produktów pochodzenia zwierzęcego. 29.01.2004, Dz. U. Nr 33, poz. 288

<sup>392</sup> Ustawa o wymaganiach weterynaryjnych dla produktów pochodzenia zwierzęcego. 29.01.2004, Dz. U. Nr 33, poz. 288

Another important issue is that the quality schemes also coexist with the EU regulations dealing with the hygiene of foodstuffs of animal and non-animal origins as well as with respective domestic legal acts.<sup>393</sup> To give an example, the uniqueness of traditional or regional products comes from their specific character, which sometimes involves obsolete means of production or usage of ingredients which are not common any more, or perhaps not allowed as far as food safety is concerned, (e.g. raw milk). Therefore, in order to allow the producers to manufacture their products legally, certain derogations have to be introduced into the law on the hygiene and safety of food, in order to create legal space for the Union food quality schemes.

These derogations can rely on the entitlement given by Regulations 852/2004 on the hygiene of foodstuffs,<sup>394</sup> 853/2004 laying down specific hygiene rules for foodstuffs<sup>395</sup> and on the entitlement granted in Regulation 2074/2005<sup>396</sup> which lays down implementation measures for certain products under Regulations 852/2004, 853/2004, 854/2004 and 882/2004.

Following the legal permission granted by EU law, the Minister of Agriculture and Rural Development has introduced several ordinances among which two are of major importance: the directive on recognition of marginal, local and limited agricultural production<sup>397</sup> and the directive on specific veterinary

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<sup>393</sup> Council Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs, OJ L 226/3; Council Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin, OJ L 226/22; Ustawa o bezpieczeństwie żywności i żywienia. Dz. U. 2010, Nr 136, poz. 914

<sup>394</sup> Council Regulation (EC) No 852/2004 of 30 April 2004 on the hygiene of foodstuffs. OJ L 139/1

<sup>395</sup> Council Regulation (EC) No 853/2004 of 29 April 2004 laying down specific rules on the hygiene of foodstuffs. OJ L 139/55

<sup>396</sup> Commission Regulation (EC) No 2074/2005 of 5 December 2005 laying down implementing measures for certain products under Regulation (EC) No 853/2004 of the European Parliament and of the Council and for the organisation of official controls under Regulation (EC) No 854/2004 of the European Parliament and of the Council and Regulation (EC) No 882/2004 of the European Parliament and of the Council, derogating from Regulation (EC) No 852/2004 of the European Parliament and of the Council and amending Regulations (EC) No 853/2004 and (EC) No 854/2004, OJ L 338/27

<sup>397</sup> Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie szczegółowych warunków uznania działalności marginalnej, lokalnej i ograniczonej. 08.06.2010, Dz. U. 2006, Nr 5 poz. 36, z późn. zmianami

conditions for the production of dairy products of traditional character.<sup>398</sup> These legal acts allow agricultural producers to apply less strict veterinary and sanitary conditions than those established for a typical industrial production. The introduction of these exceptions is crucial for allowing agricultural producers to process agricultural products at their farms without the need to invest significant funds in the adaptation of manufacturing establishments and modernisation of production lines. The need to modernise agricultural establishments could often render the whole undertaking unappealing and unprofitable.

One of these ordinances has been enacted specifically for the benefit of products' names which have already been registered as geographical indications under the Industrial Property Act: *Bryndza podhalańska*, *Oscypek*, *Redykolka*, and other cheeses indicated there, originating from the mountain region of Poland.<sup>399</sup> It allows the production of selected cheeses in wooden cabins, where shepherds have traditionally been making their cheeses for generations. Making these cheeses in these establishments has been intertwined with the region, its culture and the pasturing of sheep in *Podhale* over centuries.<sup>400</sup> The lack of permission for the shepherds to keep the production in wooden cabins would render the manufacturing process illegal, pursuant to the provisions of Regulations 852/2004 on the hygiene of foodstuffs. Part A, Chapter II, Article 1(a) of that regulation explicitly excludes absorbent or pervious floor and wall surfaces from being used in rooms where foodstuffs are prepared. *Bacówki* – wooden shepherds' cabins – are by their nature absorbent and pervious, which does not mean that conditions in those pose any danger to human health or life. Nevertheless, cheese producers are obliged to keep *bacówki* in the best hygienic condition possible. In order to secure that

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<sup>398</sup> Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie wymagań weterynaryjnych przy produkcji produktów mlecznych o tradycyjnym charakterze. 07.07.2010, Dz.U. 2006, Nr 17, poz 127, z późn. zmianami

<sup>399</sup> Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie wymagań weterynaryjnych przy produkcji produktów mlecznych o tradycyjnym charakterze 07.07.2010, Dz.U. 2006, Nr 17, poz 127, z późn. zmianami

<sup>400</sup> Publication of an application pursuant to article 6(2) of Council Regulation EC No 510/2006 on the protection of geographical indications and designations of origin for agricultural products of 'BRYNDZA PODHALANSKA' EC No PL/PDO/005/0450/18.02.2005, OJ L 2006 C 230/2

obligation, the shepherds need to subject their establishments and products to regular veterinary controls run by competent state authorities.<sup>401</sup> These ministerial directives also allow agricultural producers to maintain farmer status for VAT purposes which is much more favourable than the fiscal status of business entities.<sup>402</sup> Currently, at EU level, only two of the cheeses for which the derogation has been adopted are registered as PDO, those are *Bryndza podhalańska*<sup>403</sup> and *Oscypek*.<sup>404</sup>

But the case of one indication (registration procedure is ongoing), namely *Jagnięcina Podhalańska* (PGI) (Lamb's meat from the region of Podhale), revealed that national norms regulating issues concerning products of animal origin eliminate a certified producer's right to make any use of the registered denomination. In order to introduce meat to the market, an operator has to fulfil a list of conditions and needs to acquire a number of permissions. It usually means a farmer obtaining a butcher's licence for himself, or signing a contract for services with a licensed butcher who can use facilities, such as abattoirs, which have been accepted by veterinary inspection, in order to perform slaughtering. As most large-scale farmers can afford to build or rent an abattoir and pay a butcher for his services, small-scale producers often find meeting these requirements impossible due to the costs. If a farmer would like to obtain the said licence in order to be entitled to use it he has to convert his tax status from a farmer to a business entity, which again is a lot less beneficial for an agricultural producer. Therefore, a farmer who breeds lambs cannot sell the meat of animals which have been slaughtered on his farm. Such a farmer can only sell an animal to another operator, or have it destined strictly and exclusively for personal use. The law on products of animal origin clearly states that the meat of sheep slaughtered on a farm cannot enter the market regardless

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<sup>401</sup> Article 3 and 21 Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie wymagań weterynaryjnych przy produkcji produktów mlecznych o tradycyjnym charakterze. 07.07.2010, Dz.U. 2006, Nr 17, poz 127, z późn. zmianami

<sup>402</sup> Article 2(19) and 43(1), (3) Ustawa o podatku od towarów i usług. 29.10.2011, Dz. U. 2011, Nr 177, poz. 1054, Art. 2(19) and 43(1), (3)

<sup>403</sup> Commission Regulation (EC) No 642/2007 of 11 June 2007 registering a name in the Register of protected designation of origin and protected geographical indications *Bryndza Podhalańska* (PDO) OJ L 150/4

<sup>404</sup> Commission Regulation (EC) No 127/2008 of 13 February 2008 entering a designation in the register of protected designation of origin and protected geographical indications (*OSCYPEK* (PDO)) OJ L 40/5

of the way it is marketed, for example: as paid meals for tourists.<sup>405</sup> An operator introducing such meat to the market may face a fine from PLN 1.000 (GBP 200.00) to PLN 5.000 (GBP 1.000).<sup>406</sup>

Under these circumstances a farmer who is entitled to use a logo for a product with a registered name cannot actually benefit from participation in the scheme, because in the absence of the licences, he cannot sell a product that has been registered as meat. It is also doubtful that an animal can be marketed with a logo since it is unclear if the animal as such could be considered a subject of registration. If the logo could be used in association with meat only, considering that a product is to be registered as a PGI where production steps have not been limited to the area, the right to use the logo could be performed by any operator who is entitled to process an animal into meat.

Should this happen, the whole registration process started by lamb breeders would appear to be pointless. Negotiations with the Ministry of Agriculture aimed at finding a legal solution to the situation are ongoing. Nevertheless, the case of *Jagnięcina* shows how EU law can be obstructed by national law or even deprived of any factual effectiveness.

The case of *Śliwowica* (plum brandy), on the other hand, shows that even though there are derogations available in EU law, a Member State may not be willing to apply them. *Śliwowica* has been accepted by the Minister of Agriculture as a traditional product entitled to be placed on the List of Traditional Products, it has been recognised by the Minister of Culture as a cultural artefact and its label has been registered in the Patent Office as a figurative trade mark. Regardless of that recognition and legal protection of the label, *Śliwowica* cannot be legally introduced to the market. Its producers – farmers – have been fruitlessly lobbying for over a decade for introducing fiscal derogations from the currently binding law regulating the alcohol market.

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<sup>405</sup> Ustawa o produktach pochodzenia zwierzęcego. 16.12.2005, Dz. U. 2011, Nr 106, poz. 622

<sup>406</sup> Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie wysokości kar pieniężnych za naruszenia przepisów o produktach pochodzenia zwierzęcego. 26.05.2010, Dz. U. 2010, Nr 93, poz. 600

These farmers would like to produce *Śliwowica* and keep their farmer status at the same time rather than become market operators. They tried to prove to the government that they are willing and ready to maintain a very high standard of production and to deliver a product which fulfils all requirements linked to a product intended for human consumption. The group of producers together with the leader of the borough whence *Śliwowica* originates presented their legislative proposal, which could help regulate this special case. And yet, the government's stand remains unchanged – no derogations will be granted as far as alcohol production is concerned. On that account, the producers of *Śliwowica* stay in the grey zone and, under the risk of being accused of breaking the law, they keep on producing and selling the spirit. The infringement of prohibition of the introduction of alcohol on the market via different channels than the strictly defined ones is just one aspect of this case. The other aspect is the lack of any controls of this product, nonetheless intended for human consumption, according to binding norms and standards. The producers of genuine *Śliwowica* say that there are manifold market operators who use the *Śliwowica* brand to sell a very low quality product, and by doing so they tarnish the reputation of a genuine drink and, what is more important, they expose consumers' health to risk. *Śliwowica* is just one, yet the most famous example of unnecessary restrictions imposed on producers of alcoholic beverages.

The Polish legislator seems to overlook the fact that the introduction of food quality schemes to the national legal order should not be limited to fulfilling obligations laid down in Union regulations only, but should also embrace the introduction of other legal measures tailored for the purpose of effectuating the operationalisation of the food quality system at the Member State level. In the current situation, the same legal rules regulating sales, sanitary and veterinary requirements, with minor exceptions, are applicable to the entrepreneurial producers as well as to strong, well-established business entities with much more capital and experience in the market. This, in consequence, reduces already weaker competitiveness of the producers in comparison to the industrial ones.



## **2.3. national food quality schemes**

Another factor that seems to be important while talking about the functioning of the EU food quality schemes on the ground is the presence of the other food quality schemes in the same legal environment. If there are other food quality schemes, they ought to be presented as they may constitute a factor which, after further analysis, will prove to be beneficiary, impairing, or indifferent for the schemes in point.

In Poland, in fact, the EU food quality schemes coexist with national food quality schemes. Three of them are the most prominent: The List of Traditional Products, Quality Tradition, and Meet Good Food. There are also other schemes, though not as prominent as the three listed above: Our Culinary Heritage, Slow Food, and the European Chain of Culinary Heritage.

### **2.3.1. the List of Traditional Products**

This system was introduced together with the Union food quality schemes in the same legal act.<sup>407</sup> As for the Ministry of Agriculture, the system of the List constitutes a facilitator for the Union schemes, its presentation will go into details.

The List of Traditional Products is kept with the Minister for Agriculture, and the List contains information on an agricultural product or foodstuff of a traditional character, which allows identifying the product and the producer. A new entry to the List requires an application lodged with the Marshal of the Voivodeship from which the product originates. The Marshal scrutinises the application against its formal requirements and if the result of this scrutiny is positive, the Marshal forwards the application to the Ministry of Agriculture. Then the Ministry introduces the product to the List.

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<sup>407</sup> Ustawa o rejestracji i ochronie nazw i oznaczeń produktów rolnych i środków spożywczych oraz produktach tradycyjnych. 17.12.2004, Dz. U. Nr 10, poz. 67, 68.

The Marshal may reject the application if the product described in the application does not meet specific conditions. The product ought to possess unique features which come from the traditional production method that can be dated back at least 25 years.<sup>408</sup>

The product's name can be removed from the List if it has been registered as PDO, PGI or TSG, and when it is no longer possible to make the product with the characteristics claimed in the application.

To apply for an entry on the List of Traditional Products, the producer has neither to belong to a group of producers nor to be considered as a business entity in the eyes of the law. What is required is the producer's *ability* to manufacture the product. Therefore, it is obligatory to present the method of production in the application for registration.

### **2.3.2. 'Quality Tradition'**

The collective certification mark 'Quality Tradition' (PL: *Jakość Tradycja*)<sup>409</sup> has been initiated by the Polish Chamber of Regional and Local Products with the partnership of the Polish Association of Regions in order to highlight, promote and protect regional, local and traditional products of high quality.

It is a quality mark for natural food in Poland which, through highlighting the high quality of products in the food sector, is aimed at market development and support for producers by distinguishing them from industrial production in the case of primary and processed products. It is supposed to allow identification, recognition and appreciation with a special focus on regional, traditional and local products. Through this scheme, it should be possible to highlight to the consumers and other interested parties the best quality products with their local/regional characteristics.

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<sup>408</sup> Ustawa z dnia o rejestracji i ochronie nazw i oznaczeń produktów rolnych i środków spożywczych oraz produktach tradycyjnych. 17.12.2004, Dz. U. Nr 10, poz. 67, 68.

The 'Quality Tradition' scheme was recognised as a national food quality scheme by a Decision of 12 June 2007 of the Minister for Agriculture.

The Polish Chamber of Regional and Local Products is responsible for administering the system and is endowed with authority to grant the right to use the quality logo to interested producers. The logo is a registered collective certification mark, which the Chamber remains the proprietor of. In managing the system, the Chamber cooperates with the Association of Voivodeships (administrative regions). The rules on the use of the mark and the graphic symbol have been approved by the Chamber and the Association of Voivodeships and registered in the Polish Patent Office under the number Z-307821.

The scheme is open to everyone, individual farmers as well as companies, and is aimed at distinguishing high quality or traditional agricultural products and foodstuffs from the rest of the food products placed on the market. In order to participate in the scheme, a producer ought to provide evidence showing that:

- the raw materials come from organic farming practices or semi-intensive production holdings using good agricultural practices and animal breeding, excluding GMOs;
- the product matches much higher quality standards than those required by law;
- the product is unique due to its traditional means of production or usage of rare or traditional ingredients, plant varieties or animal breeds; or
- the product has a very high reputation among consumers, which makes it clearly distinguishable from other products of the same category.

For traditional products, the production method should have remained the same for the last 50 years. With regard to traditional plant varieties or animal breeds, they must have been present in commercial use before 1956.

In case there is more than one producer of the same product filing an application to obtain the Quality Tradition mark, each of the producers should be listed in the application.

The producer is expected to deliver a specification of a product against which the products will be controlled. The quality scheme foresees subjecting products to regular controls run by the certification bodies, accredited by the Polish Ministry of Agriculture, such controls are not free of charge. The producer also pays a fee for using the logo. The right to use the logo is granted for a period of two or three years, with a possibility of extension to another year. If the producer does not comply with the specification, the right to use the logo might be cancelled by the Chamber. Each producer is obligated to use the collective certification mark in combination with the name of the administrative Voivodeship (region) from which the product originates.<sup>410</sup>

### **2.3.3. 'Meet Good Food'**

Another national food quality scheme is 'Meet Good Food' (*Poznaj dobrą żywność*). The scheme was created by the legal act on quality of agricultural products and foodstuffs.<sup>411</sup> The scheme is managed by the Ministry of Agriculture and is open to all and only food producers or processing producers who function on the EU market. Participation in the scheme is voluntary and free of charge.

The main objective of this scheme is the enhancement of consumers' awareness of high quality products. Consumers are supposed to recognise agricultural producers of foodstuffs bearing the logo of the scheme as safe, healthy and composed of high quality ingredients, or manufactured in a way that respects the highest standards in food production.

The Minister for Agriculture grants the right to use the logo of the scheme on a product which fulfils the quality requirements. The use of the logo is conditioned under the fulfilment of very strict quality requirements prepared by the Scientific Committee for food quality. These requirements are listed in Article 13 of the said legal act. In addition, the use of the logo is limited in

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<sup>410</sup> <http://www.produktyregionalne.pl/biuletyn.html> URL correct as of 1 May 2012

<sup>411</sup> Ustawa o jakości handlowej artykułów rolno- spożywczych. 29.09.2005, Dz. U. 2005, Nr 187, poz. 1577

time. The product can bear the logo for no longer than three years. During that time the product is subjected to controls. The right to use the logo can be withdrawn from the user if the certified product no longer fulfils the quality requirements.

It is intended to deduce from the collected data how the coexistence of a number of food quality schemes shapes the effectiveness of the EU legislation.

Summarising: Adaptation of laws is just one aspect of the process, there is also a political side to it. According to high officials from the Ministry of Agriculture, apart from legal measures that need to be introduced, certain political steps need to be undertaken as well, which will be geared towards giving effect to the food quality policy at the local level. It was clearly stated in the interviews that the implementation of the food quality legislation and the creation of food quality schemes is done via both legal and political implementation. Legal implementation encompasses, according to the interviewees, a proper introduction of the quality regulations into the national legal system. This activity also involves an introduction of new bills or negotiations over adoption of amendments to existing regulations, which hamper, or may potentially hamper, the existence of the schemes.

Political implementation means setting up and managing the whole food quality policy in such a way as to create a conducive environment for the food quality schemes to flourish. The political implementation is more complex than the legal one, and it takes place at two levels: the Union level and the national level. At the Union level, the representatives of the Ministry participate in the Committees within the comitology function performed by the European Commission, where, among other things, political developments are discussed. At this level, according to the respondent, the Ministry has a chance to secure producers' interest via political tools, whereas the national level is mostly characterised by educational and promotional activities. Further data will shed more light on how these tasks have been achieved.

Nevertheless, for the research participants who represent implementing agencies, the implementation seems to have been conducted in a full and compliant manner. Both the European Commission and the Office for the European Integration (PL: UKIE, currently a department of the Ministry of Foreign Affairs) – an institution which is responsible for assessing compliance of the Polish law with the EU law, as well as evaluating the implementation and transposition of the Union legal acts – have never expressed any doubts concerning the process. Hence, it would seem that since the legal implementation was correct, Poland should have a well-functioning and effective food quality system in place. According to UKIE, the effectiveness of food quality systems in Poland has always been unquestionable. The number of applications accurately reflects the successful absorption of the system on the national ground. At the same time, the respondent representing this institution admits that his perception of the system is based on the following factors: Poland's compliance with EU law: correct adoption of food quality legislation on the ground as well as the number of applications filed. Since the Commission has never questioned Polish implementing measures, nor it has challenged the acquisition of the regulations in question and the number of applications is high, considering Poland's brief presence in the scheme, the only conclusion stemming from these facts is a confirmation of high effectiveness of the schemes in Member States.

The respondent continues that any further check on the effectiveness of the system on the ground remains beyond the scope of the competences of the officials of the institution.

This situation is also confirmed by the Ministry of Agriculture. One of the high-level officials says:

“I have never received any information from the Commission or the Office for the European Integration that introduction of the schemes to the national system was incomplete. Every delegation foreseen by Regulation 510 and 509, even

those which were facultative, have been duly introduced. Everything that we as a Member State were expected to do has been done.”<sup>412</sup>

It seems that legal implementation, judging from documents and interviews with implementing agencies, has been completed with highly satisfactory results. Provided that research stopped here, the most likely perception of the functioning of the schemes on the ground would be a conviction that the schemes are functioning well. But legal implementation constitutes only a part of the whole process of giving effect to a given programme, which is why such findings based mostly on document analysis are worthy of being evaluated further in order to confirm or alter this initial conclusion.

### **3. Implementing agencies and their tasks**

The implementation process usually requires the presence and engagement of implementing agencies. The importance of such agencies is widely discussed in political science literature; some excerpts from that discussion are presented in Chapter Two. It is implementing agencies, which by performing their duties within legal and political implementation, have the potential to vastly influence the final outcome of the process. Hence the subsequent part of the investigation will present tasks allocated to agencies, the performance of which in further analysis, will be evaluated against the specific character of the schemes.

Council regulations do not create the law enforcement regime for those who might want to benefit from participation in the system. This obligation has been handed over to Member States. In Poland, there are several institutions at all administrative levels involved in the management of the food quality schemes, starting from the scrutiny of applications to guaranteeing producers' compliance with specifications, and enforcing producers' rights against infringing parties.

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<sup>412</sup> The high state official in Polish government, Warsaw.

The following national authorities are responsible for assessing applications for registration:

The Ministry of Agriculture which:

- accepts, evaluates and forwards applications to the European Commission for registration and applications to amend the product's specification;
- conducts objection proceedings launched by another Member State as well as manages national objections;
- informs the European Commission about authorities and bodies authorised to conduct product control and certification.

In addition the Ministry acts as an intermediary between the producers and the Commission. It forwards the Commission's questions to the producers in addition to representing them at the meetings of Standing Committees, whenever the need occurs.

The Council for Traditional and Regional Names of Agricultural Products and Foodstuffs, is an advisory body to the Minister of Agriculture, which delivers opinions on:

- applications for registration and applications to amend specifications;
- objections to applications for registration raised by another Member State;
- objections raised by Poland against another Member State's application for registration.

There are also the officials of the national authorities and bodies involved in the control and certification system of products registered as PDO, PGI or TSG and they are:

- the Minister of Agriculture, who authorises certification bodies to carry out controls and to issue and withdraw certificates confirming that products registered as PDO, PGI and TSG meet the requirements laid down in the specification;



- the Chief Inspector of Agricultural and Food Quality Inspection (PL: *IJHARS*), who supervises the certification bodies accredited by the Minister, and the Voivodeship Inspector of Agricultural and Food Quality Inspection (PL: *WIJHARS*), who verifies the compliance of PDO, PGI and TSG products with the specification.

The IJHRS is a supervisory body with the broadest competence over traditional and regional agricultural products. The IJHRS acts against unfair practices implemented by entrepreneurs who have decided to introduce their food products to the market. The controls are conducted to trace and combat situations where food products on the market provide the customer with false information as to the content, origin, quality and method of production, for example, when products contain cheaper ingredients or ingredients of lower quality. The inspection runs checks over processed products as well as raw materials, handling conditions and storage methods. In other words, it checks the whole product cycle up to its introduction on the market.<sup>413</sup>

The verification of compliance with specifications of the production process of products' names registered as PDO, PGI and TSG is carried out by IJHRS or an authorised certification body at the request of producers. The selection of the certification body is made by producers, who cover the costs of the inspection. This inspection has the objective of checking whether the product complies with the declared specification.

The scope, frequency and type of control all depend on the specific nature of the production process of a given product and are defined in the specification.

According to the website of a major national inspection body, the verification of compliance with specification by IJHRS is conducted in accordance with the principles of assessing the commercial quality of agricultural and food products, described in the Act of 21 December 2000 on the Commercial Quality of Agricultural and Food Products (with further amendments).

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<sup>413</sup> <http://www.ijhar-s.gov.pl> URL correct as of 1 May 2012

Authorised private certification bodies also carry out the verification of compliance with the specification of products bearing the registered names.

In accordance with the Act on the Commercial Quality of Agricultural and Food Products, the tasks of IJHRS also include official controls of agricultural and food products registered as PDO, PGI and TSG, as well as cooperation with the authorities exercising such controls in other EU Member States.

The compliance of various market operators with food quality law can be checked by: the IJHRS, the Trade Inspection, the police and prosecutors, City Guards, Sanitary inspections and Veterinary inspections.

For the effectiveness of any system its enforcement is crucial. In the case of food quality schemes, the schemes can be infringed not only by certified producers who do not comply with the specification but also by other actors introducing the product to the market under a registered name which does not satisfy the specification. There are various enforcement mechanisms foreseen by law that are geared towards protection of the registered names.

For example, under Article 57 of the Act on Registration and Protection of Geographical Indications any operator who is not entitled to use the name of the product, and does so, can face a fine – no less than PLN 4,000 (approximately GBP 900), a sentence restricting freedom, or a prison sentence of up to two years. Preparations to carry out such acts are also punishable under criminal law. In addition, if the law is infringed in order to establish a source of income he or she may face a prison sentence from six months to five years.

By fulfilment of delegations included in the food quality regulations, the introduction of the EU GI system into the national legal order via legal means has been completed. Application procedures taking place in the Member States have been regulated and competent authorities responsible for carrying out those proceedings established; a national objection procedure has been established; conditions for transitional protection laid down, and control bodies

together with their codes of conduct created.<sup>414</sup> According to the information from one of the interviewees, who is currently employed by the Polish Office of the Committee for European Integration, the introduction of the food quality system into the Polish legal system has been duly carried out and successfully performed. The European Commission, when notified of Poland's conduct with regard to the introduction of the food quality schemes to national legal order, has never submitted any considerations or objections concerning those proceedings.

In 2012 Poland has registered 23 names, three names have been published for objections. In total, 36 names of products originating from Poland can be found in the DOOR database.<sup>415</sup> Products registered as PDOs or PGIs come from the following voivodeships: Subcarpathian, Mazovian, Silesian, West Pomeranian, Lesser Poland, Świętokrzyskie, Greater Poland, and Lower Silesian. The origin of products registered as TSGs is not limited to any geographical area. The administrative map of Poland is included below.

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<sup>414</sup> Ustawa o rejestracji i ochronie nazw i oznaczeń produktów rolnych i środków spożywczych oraz produktach tradycyjnych. 17.12.2004, Dz. U. Nr 10, poz. 67, 68

<sup>415</sup> [http://ec.europa.eu/agriculture/quality/door/list.html;jsessionid=NmbK Tk4BmJR8D5Lp90C RsCN1CQ2PLjfjJI1sTvbfzSCsT73kvnHP!324973716?&recordStart=0&filter.dossierNumber=&filter.comboName=&filterMin.milestone\\_mask=&filterMin.milestone=&filterMax.milestone\\_mask=&filterMax.milestone=&filter.country=&filter.category=&filter.type=&filter.status=PUBLISHED&locale=en](http://ec.europa.eu/agriculture/quality/door/list.html;jsessionid=NmbK Tk4BmJR8D5Lp90C RsCN1CQ2PLjfjJI1sTvbfzSCsT73kvnHP!324973716?&recordStart=0&filter.dossierNumber=&filter.comboName=&filterMin.milestone_mask=&filterMin.milestone=&filterMax.milestone_mask=&filterMax.milestone=&filter.country=&filter.category=&filter.type=&filter.status=PUBLISHED&locale=en) URL correct as of 1 May 2012

## The administrative map of Poland



### Applications which have been lodged by Poland:

Name of product	Logo	Type of product	Status	Number of certified producers <sup>416</sup>
1. Fasola wrzawska	PDO	Beans	Registered	None
2. Jagnięcina podhalańska	PGI	Lamb meat	Published	N/A
3. Ser koryciński swojski	PGI	Cheese	Published	N/A
4. Fasola Piękny Jaś z Doliny Dunajca	PDO	Beans	Registered	None
5. Kabanosy	TSG	Pork sausages	Registered	None
6. Jabłka grójeckie	PGI	Apples	Registered	None
7. Kołocz śląski/Kołacz śląski	PGI	Bakery product	Registered	9
8. Miód drahimski	PGI	Honey	Registered	5
9. Karp zatorski	PDO	Carp	Registered	None
10. Kielbasa jałowcowa	TSG	Pork Sausage	Registered	None
11. Kielbasa myśliwska	TSG	Pork Sausage	Registered	None
12. Miód z Sejneńszczyzny/Łódzieszczyzny	PDO	Honey	Published	N/A
13. Chleb prądnicki	PGI	Bread	Registered	1
14. Jabłka łuckie	PGI	Apples	Registered	5
15. Śliwka szydlowska	PGI	Plums	Registered	None
16. Obwarzanek krakowski	PGI	Bagel	Registered	5

<sup>416</sup> Number of certified producers on the 11<sup>th</sup> of April 2012. Source IJHRS – the main public inspection body, Warsaw.

17. Kielbasa lisiecka	PGI	Pork Sausage	Registered	8
18. Suska sechłońska	PGI	Prunes	Registered	None
19. Podkarpacki miód spadziowy	PDO	Honey	Registered	7
20. Miód kuropiowski	PGI	Honey	Registered	None
21. Fasola korezyńska	PGI	Beans	Registered	None
22. Wiśnia nadwiślanka	PDO	Cherries	Registered	31
23. Redykołka	PDO	Cheese	Registered	7
24. Truskawka kaszubska lub Kaszëbskô Malëna	PGI	Strawberries	Registered	21
25. Pieriekaczewnik	TSG	Bakery product	Registered	2
26. Olej rydzowy	TSG	Oil	Registered	None
27. Andruty kaliskie	PGI	Bakery product	Registered	2
28. Wielkopolski ser smażony	PGI	Cheese	Registered	4
29. Rogal Świętomarciński	PGI	Croissant	Registered	101
30. Połtorak	TSG	Honey liquor	Registered	None
31. Dwójniak	TSG	Honey liquor	Registered	None
32. Trójniak	TSG	Honey liquor	Registered	1
33. Czworniak	TSG	Honey liquor	Registered	None
34. Oscypek	PDO	Cheese	Registered	20
35. Bryndza podhalańska	PDO	Cheese	Registered	8
36. Miód wrzosowy z Borów Dolnośląskich	PGI	Honey	Registered	4

#### **4. Functioning of the EU food quality schemes in Poland – the post-introduction stage**

The previous sections were mostly devoted to the legal implementation of the food quality schemes. However, since the purpose of the research project is the presentation and analysis of the whole process of giving effect to a programme, the next section will be devoted to the political implementation and practical functioning of the schemes on the ground. This section will be derived mostly from interviews and from documents whenever they are appropriate and available. These sources will be examined in an effort to deliver information enabling the assessment of how the duly managed legal implementation is then reflected in the actual situation as evidenced by the food quality schemes.

##### **4.1. knowledge about the schemes gained by participants**

The food quality schemes are voluntary, in the sense that producers have a free choice whether or not to follow this opportunity created by law. The schemes exist in a national legal order but they cannot be imposed on its final recipients namely agricultural/food producers or processors. Since it is the final recipients who determine the existence and scope of the schemes by their access to them, their knowledge of the possibilities of participation seems crucial for the practical functioning of the schemes.

If potential participants to the schemes have scarce or no knowledge and understanding of the schemes the probability that they will ever decide to mobilise the system is low.

The question concerning the awareness and understanding of the specificity of the schemes was presented to current participants in the schemes – how they have learned about them, and to producers who function within the national food quality scheme that is the List of Traditional Products.

Asking the producers whose products are on the List is important as most of the participants who are governmental or local officials clearly stated that the List

is a preliminary stage before European registration takes place. In addition, they treat the List as an indication of registration potential. In such cases, collecting information about awareness of the schemes by producers whose products are included on the List may give some indication of the future prospects of the schemes on the ground.

The answers given by participants in the national scheme produce a conclusion, that the participants in a national food quality scheme have scarce awareness and understanding of the schemes. Many participants have heard some selected information about the schemes, mostly that information was linked to the troublesome registration of one of the most famous Polish products' names – the ewe milk cheese *Oscypek*, where an objection to registration from Slovakia was lodged, rather than with the specificity, purpose or requirements of the schemes.

The examples from the interviews:

“X explained something. He has got that thing already. But to be honest I have not spoken to him much about that. When we meet we talk about something else anyway.”<sup>417</sup>

Or:

Researcher (R): “I will come back to the European schemes if I may. Could you tell me what is it that you know about these schemes?”

Participant (P): “I know just a little bit. One of the officials from the Marshals Office told me something. But I have not heard anything particular.”<sup>418</sup>

Or:

R: “Now I am going to ask about the European schemes. Have you heard about them? If yes, are you considering applying for European protection?”

P: “Yes, we would like to apply for European protection, we have introduced our two products to the List of Traditional Products and we would like to move forward with these products and get European recognition.”

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<sup>417</sup> Independent producer, milk based products, Lesser Poland, no employees.

<sup>418</sup> Independent producer, fruits and vegetables processing company, Mazovia, up to 10 employees.



R: “Tell me please what exactly you know about these schemes: according to your knowledge what are these schemes for?”

P: “I am not particularly informed, I do not know much about them yet. I guess these schemes can help in foreign markets, they give some kind of recognition. We are already well-known in Poland but we have also started to export more and more, so we think we may need this European logo in future.”

R: “Are you aware what is characteristic about these schemes, what is the difference between the national quality scheme and these European ones.”

P: “No, we do not know that, we do not deal with politics, we are focused on production and the national market currently.”<sup>419</sup>

Or:

R: “Do you know anything about the specific character of the European schemes?”

P: “Not really, something was mentioned while on Polagra (International Food Fair) but not in detail. As I have just said I cooperate with that man in the Marshal’s Office, and I hope he will be able to help, but we will see.”<sup>420</sup>

Another piece from the interviews:

“Even if we wanted to learn more about the European system, about all these procedures, standards, proportions, technologies, we simply could find spare time to allocate to it. Without cooperation with a person or institution dealing with this system, someone who can explain everything, who would guide us, we would stay where we are, because it is already overwhelming. [...] Even if we go to any food fair and there are people from the Ministry, they do not provide detailed explanations, it is all too general. If there are, let’s say, 10 to 15 people and everyone represents a different food sector, the information is often inadequate. It is like in bullet-points. Too vague.”<sup>421</sup>

Those who put their product on the List were informed about and encouraged to join this scheme by state officials, either from the local or from voivodeship level. Entering the scheme was hardly ever based on participants own initiative.

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<sup>419</sup> Marketing manager, meat processing company, Greater Poland, up to 50 employees.

<sup>420</sup> Independent producer, meat based products, Mazovia, up to 5 employees.

<sup>421</sup> Independent producer, confectionary products, Lodz, up to 5 employees.

Participants say:

“It all started because of a lady in our local Centre for Rural Advice. She liked that I was doing products according to my mum’s recipe. I prepared a beautiful basket with my products, she took those products to some fair where people from the Marshal’s Office were present and they loved them. Afterwards people from the Marshal’s Office invited me to the other fair and it got moving. I have to say that the Marshal’s Office works hard on that. They have a lot of very competent people who are totally devoted to their jobs. You know what it is like in state official posts, people can get lazy, but not them. They have passion for these products. They organise lots of fairs and festivals.”<sup>422</sup>

Or:

R: “Who encouraged you to apply for national protection, if I may ask?”

P: “That lady here, she is from the Marshal’s Office. She is responsible for searching for such traditional producers like us. They admired our products and encouraged us to put them on the List. We were even invited for a regional food gala, and we won a prize there. And it was then that we were talked into this national system.”<sup>423</sup>

The vast majority of participants who are already in the EU system indicated that they learned about the schemes and entered them having been encouraged by the NGO – AgroSmak. It hardly ever happened on a producer’s own initiative. AgroSmak prepared the first registrations. The NGO quickly focused all its efforts on food quality schemes and started treating them with priority. Interested producers were immediately guided towards Union registration not towards any of the national food quality schemes. Its actions were well-managed, and most importantly, they were provided free of charge. Research, documentation, ethnographical studies, meetings with producers, seminars, etc. were commissioned by AgroSmak. Every farmer or food producer interested in embarking upon the EU schemes could benefit from the expert knowledge of the NGO members as well as from grants allocated to the development of the schemes.

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<sup>422</sup> Independent producer, fruits processing company, Mazovia, up to 10 employees.

<sup>423</sup> Product manager, meat processing company, Greater Poland, up to 50 employees.

A producer says:

“I know that we as producers should be the most involved, but honestly we do not have time to do this. There has to be someone like Mr Gąsiorowski (the president of AgroSmak) who sits with us, sees to the production process, and helps to write a good specification. We owe him a lot, without him we would fail to proceed with registration.”<sup>424</sup>

Or:

“We were supported by such a wonderful institution, a foundation in fact, called AgroSmak. They gave money to a PhD student in the form of a grant, and he prepared all the documentation for us.”<sup>425</sup>

Or:

“There was that programme by AgroSmak. Once it started there was money, meetings, and seminars. Applications were prepared for free. Now AgroSmak is gone and we have no support anymore.”<sup>426</sup>

Or:

“Mr Gąsiorowski from AgroSmak is our idol. Thanks to him and his organisation I have learned a lot, and done a lot.”<sup>427</sup>

Or:

“We wrote our application with AgroSmak. There were people devoted to their job, application was thought through thoroughly. This organisation was ideal for that purpose. It is not operating anymore though.”<sup>428</sup>

One more excerpt:

“Madame, have you heard about AgroSmak? It is not functioning but while it was they were coming here, they were teaching us, encouraging...”<sup>429</sup>

To summarise: as it transpires through interviews, producers who placed their products on the List learned about the European schemes from officials representing Offices of the Marshals of Voivodeships or advisors from the Advisory Rural Matters. The Centres helped farmers in preparing the application, justifying it and collecting necessary evidence to back up the

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<sup>424</sup> Independent producer, milk based products, Lesser Poland, up to 10 employees.

<sup>425</sup> Independent producer, bakery products, Lesser Poland, up to 30 employees.

<sup>426</sup> Independent producer, primary agricultural production, Lodz, no employees.

<sup>427</sup> Agricultural advisor, state administration body, Silesia.

<sup>428</sup> Independent producer, meat processing company, Lesser Poland, up to 30 employees.

<sup>429</sup> Independent producer, primary agricultural production, Lodz, no employees.

statement on the traditional character of their products. Some of the respondents clearly stated that without the perseverance of the workers at the Centres, they would never have pursued with the registration of their products on the List. When farmers were introduced to the system created by the List, they started cooperating with the departments in the Offices of Voivodeship Marshals, responsible for managing the List. That is why the producers expect to be further supported by local administration representatives in the application process for the EU schemes. They are not eager to cooperate with the Ministry, or act alone.

However, these two major information providers are not responsible for the administration and management of the European schemes: they are also not entitled to run the national process of registration. They provide information on their own initiative. This may be the reason why the information they delivered is incomplete. Since each and every application must be handed over to the Ministry, these officials may prefer to leave the explanation of details and specificity to the institution which will ultimately guide interested parties thorough the application procedure.

And yet, there is still a clear expectation on the part of producers to be able to receive more information and help with regard to the Union food quality schemes at the local level, ideally in Rural Advice Centres or in the Offices of Voivodeship Marshals, which manage the List of Traditional Products. Yet, as stated by the Ministry officials, following the division of competences between local and state administration and due to the specificity of the subject matter, it is not possible to pass the competences of preparing the PDO, PGI, and TSG applications to local administration. The justification for such a statement was the way the application process for obtaining protection is managed. Since the applications, once the national stage of registration has been completed, are submitted to the European Commission which communicates its feedback to the state and not to the local administration bodies, it is believed that state institutions are the most suitable to be in charge of the quality schemes.

Nevertheless, producers who took part in the research project, with few exceptions, claim that in their case entry onto the List has not triggered the registration at the EU level. And those whose products are on the List are not particularly eager to proceed with the Union registration. These products, nevertheless, receive support from the Marshals' Offices in the form of free or subsidised stands at food fairs or publications or leaflets, which is comparable to the promotional support given to PDO, PGI and TSG products. Some of the producers of traditional products perceive such a situation as particularly convenient since being on the List brings benefits, but it is not linked with any additional burdens or requirements which are an inseparable element of food certification schemes.

In the case of Union registrations, most of the applications were prepared by the NGO. Since AgroSmak stopped functioning, the number of applications has dropped significantly. According to the researcher's knowledge, only two applications have been lodged by Poland in the last two years. It will be interesting to observe the functioning of the schemes in the future, and see whether the application process slows down permanently or if that stagnation passes.

#### **4.2. motivations of participants**

Understanding the motivations of current participants and the incentives sought by potentially interested ones may prove to be a good opportunity to discover independent variables which are external to statutory or administrative reality but nevertheless determine the success or failure of a political programme.

In addition, data stemming from answers given by interviewees can provide information not only on attitudes and motives of current and potential participants but also on a day-to-day functioning of the schemes. For example, if current producers benefit from the fact of registration, then prospective scheme participants may find accession to the scheme worthwhile. Conversely a lack of gains experienced by those who have registered their products may suppress potential participants from mobilisation of the law in question.

In general, producers of traditional or regional products who are either in national or European schemes, were hoping for promotional support, recognition, higher profit margins, and protection of their quality products against counterfeiters.

A participant says:

“I participated once in a food fair in Berlin, and while there, there was an announcement that apples from South Tyrol had just been registered as a regional product. The Italian Minister for Agriculture was there, they had a great gala with press conference, festive reception and champagne. And then I thought that there was a huge promotional potential in such a registration, especially in promotion of a brand. This is what I want - information noise. Already something is happening. I have been invited by the radio and television. I need this because the logo as such still remains unknown to Poles. At least in Western markets the logo is associated with a product that is worth buying.”<sup>430</sup>

Another participant says:

“I wanted to be sure that my unique product would remain unique. I wanted protection for it. In addition, such intellectual property constitutes added value for every entrepreneurship, and I was hoping that by the registration, by that scheme people would finally understand that I have rights which must be respected, because these rights belong to me. I wanted to protect my interests.”<sup>431</sup>

Or:

“Marketing, that was my motivation...we do not function in a vacuum, everything is a matter of profit and loss.”<sup>432</sup>

One more excerpt:

“But if you would like to ask if I am willing to apply for the geographical indication, the answer is no. I read in our professional journal about it and I am against it. Procedures are long, satisfaction illusory and benefits non-existent.

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<sup>430</sup> Independent producer, primary agricultural production, Mazovia, up to 10 employees.

<sup>431</sup> Independent producer, bakery products, Lesser Poland, up to 30 employees.

<sup>432</sup> Independent producer, bakery products, Lesser Poland, up to 50 employees.

For me the List is more than enough. I am happy with what we can get out of it.”<sup>433</sup>

On a similar note:

“I dropped this thing. They told us that we would be able to sell for more, but it did not happen. My prices were the same and I had to pay for controls on top of everything else.”<sup>434</sup>

Or:

“Have I benefited? Not particularly. Everyone who sells my products benefits more, they use the logo to promote themselves, their shops or points of sale.”<sup>435</sup>

Or:

“I do not know if I want it. Others say that we can charge more, but it is not true. We have the same price all the time. And one has to pay for the certificate...they will come and check the water and will ask for payment...they will come for controls...the tax office will get involved...”<sup>436</sup>

This situation is particularly interesting as it shows how important the effectiveness is, especially for a voluntary system like this one. The good or bad experience of participants may be a determinant for the ultimate success or failure of the whole undertaking.

For example *Oscypek*, or *Bryndza podhalańska*, due to public campaigns and a very significant amount of work put into the promotion by the highlanders, have become flagship products of the food quality schemes in the country. It needs to be emphasised, though, that these two products have been the most famous among all registered products’ names. They are genuine artefacts of the Polish folk, strongly associated with the mountain region.

Their popularity, though, has a negative aspect as well. The renown of *Oscypek* and *Bryndza podhalanska* attracts counterfeiters and otherwise dishonest parties to steal the benefit from their success. Producers of these products repeatedly emphasised that benefits which followed the registration were particularly

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<sup>433</sup> Independent producer, primary agricultural production, Lesser Poland, no employees.

<sup>434</sup> Independent producer, milk based products, Lesser Poland, no employees.

<sup>435</sup> Independent producer, bakery products, Lesser Poland, up to 50 employees.

<sup>436</sup> Independent producer, milk based products, Lesser Poland, no employees.

fruitful for traders, often impersonating themselves as genuine producers. In addition, in the colloquial language, the usage of the names *Oscypek* and *Bryndza podhalanska* is long present and deeply rooted, and has become an umbrella term for the majority of cheeses originating from the mountain area. This fact, coupled with consumers' lack of knowledge of how to distinguish *Oscypek* and *Bryndza podhalanska* from other mountain region products, rendered the task for dishonest parties even easier. An average consumer calls every smoked and salty cheese, wearing a typical folk pattern, *Oscypek*, and is often surprised when it is explained that this is not that same product.

For example, a dishonest market operator, usurping the name *Andruty Kaliskie* (thin sweet wafers), has set up a website where he sells his products under the registered name, without being entitled to do so by a certification body. This operator does not use the PGI logo on the packaging of his products, he does however use the registered name, and he uses the logo extensively on the website, clearly wishing to evoke the association between the genuine PGI and the product he sells.

*Rogal świętomarciński* (croissant) is another example. The product originates from Poznań, one of the biggest cities in Poland, and is strongly associated with the place and its culture. *Rogal* has been baked by local producers for decades on the occasion (and only on the occasion) of celebrating local events. Nowadays, after the registration, such croissants that do not comply with the specification can be found everywhere, often under a homonymous name, in the same way as in the case of the wafers, triggering the association with the registered PGI.

#### **4.4. availability of advice and financial support**

Information on availability of advice and support aids learning about the statutory and factual engagement of implementing agents in the process of putting the policy into effect, and learning about habitual patterns of cooperation and interaction between implementing agencies and final recipients.



The availability of broadly understood resources, (i.e. finances, skills and people) constitutes yet another condition that has an impact on effectiveness. From the legal point of view, traditional or regional agricultural products may, under certain conditions, benefit from a number of programmes foreseen by Union law. When an initiative to support a producer or product has been undertaken by a private entity, the limits to such action are not far-reaching. Private parties should follow general resolutions of competition law such as the application of appropriate labelling that does not mislead the consumer. Whenever the initiative comes from a Member State or its emanations, Union rules regulating state aid need to be taken into consideration.

As could be seen in the subtitle on participants' knowledge of the schemes, it was mostly AgroSmak which educated producers about new opportunities. AgroSmak was not limited by any legal rules, either on state aid or on public finance. The only limitation it had to consider was the total sum of money available for the project. When that money ran out AgroSmak stopped functioning and current as well as potential participants stopped receiving help. Before that happened, however, many applications were sponsored and prepared by the NGO and many meetings were conducted and publications were published. Those participants who were working with AgoSmak considered themselves lucky, because at that time it was the only organisation which could provide such comprehensive support. Currently an organisation like that does not function.

Today PDO/PGI and TSG producers can apply for financial aid from the state. For example: the Ministry of Agriculture has undertaken steps geared towards facilitating the establishment of producers' groups. The Ministry organises a great variety of training courses and workshops for farmers, explaining the benefits of setting up cooperatives or producers' groups as well as the legal requirements that need to be fulfilled by such establishments. Apart from strengthening market power, the farmers willing to form a group may apply for financial support allocated to such activities. Producers may receive a compensation for administration costs incurred in the process of group creation. The support may last up to five years and is specified in percentage terms -

10%, 10%, 8%, 6%, 4% of the income generated by the group in subsequent years. Once the group has transformed itself into a producers' organisation, it becomes eligible to apply for a financial support from the Union funds.<sup>437</sup> It remains to be seen whether legislative solutions and other initiatives implemented by the Ministry of Agriculture will lead to an increase in the number of agricultural production groups. Undoubtedly, the producers benefit from cooperative and joint action, and yet, the specificity of the Polish rural culture may slow down the process of introducing desired changes.

In Poland only 11 out of 31 producers' groups which registered names for their products are groups constituted by farmers. Hence only these groups may receive support. The rest of the groups, even if involved in food quality schemes – this is one of the conditions for entitlement to funding – are excluded from applying.<sup>438</sup>

Financial aid can also be granted to farmers who participate in food quality schemes. Once the name of a product is registered, the farmer who is entitled to use the logo may apply for financial support. The amount which is allocated to each entitled applicant is PLN 3.200 (approx. GBP 630) yearly and is paid for five years.

This support is also foreseen for farmers only, hence no other business entity involved in the food quality scheme can benefit from it.<sup>439</sup>

There is also the other side of the coin. Even though some help is available, those who are entitled to it are afraid to ask. As transpired through the interviews, farmers without support from the lower level officials they already

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<sup>437</sup> Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie szczegółowych warunków przyznawania pomocy finansowej w ramach działania „Grupy producentów rolnych” objętej Programem Rozwoju Obszarów Wiejskich na lata 2007-2013. 20.04.2007, Dz. U. Nr 81, poz. 550

<sup>438</sup> Ustawa o grupach producentów rolnych i ich związkach oraz o zmianie innych ustaw. 15.09.2000, Dz. U. 2000 Nr 88, poz. 983.

<sup>439</sup> Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi w sprawie szczegółowych warunków i trybu przyznawania oraz wypłaty pomocy finansowej w ramach działania „Uczestnictwo rolników w systemach jakości żywności” objętego Programem Rozwoju Obszarów Wiejskich na lata 2007-2013. 16.12.2010, Dz.U. 2010, Nr 20, poz. 119

know, feel too overawed to pursue the Union registration which, at the national level, is managed by the Ministry of Agriculture. The most common answers were:

“Do I really need to go that far, the Ministry is not a place for such an ordinary farmer as me”<sup>440</sup>

Or:

“The Union is not for me”<sup>441</sup>

Or:

“I do not want the Union registration, because you know what it is like there. They would want me to rebuild my farm or they would close it.”<sup>442</sup>

One of the representatives of the Advisory Centre for Rural Matters summarised the situation in this way:

“Farmers do not want to talk with anyone who claims to be an official. They talk to us because we are advisors, we do not have any executive power we only provide help and support. Thanks to our cooperation with the Marshal's Office, we managed to persuade our farmers to start cooperating with them. They agreed but they only trust the person who stayed in a close relationship with us. Still, I may say that the cooperation has been based on personal trust rather than on trust for the institution.

As far as the Ministry is concerned, well..., for our farmers it is a barrier impossible to break. And the Ministry means nothing. It does not matter what comes from the highest level, the farmers are not interested in listening to it. They do not trust high authorities. The Marshal's Office in the Voivodeship of Silesia at least organises food fairs and food competitions, and it gives money which goes to farmers, one way or another. The Office sponsors stands, leaflets, workshops. The Ministry is not present at the local level. It does not exist in the farmers' mentality as an institution worth cooperating with. As far as applications are concerned, I have managed a large number of applications for

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<sup>440</sup> Independent producer, primary agricultural production, Silesia, no employees.

<sup>441</sup> Independent producer, primary agricultural production, Lesser Poland, no employees.

<sup>442</sup> Independent producer, primary agricultural production, Silesia, no employees.

the LTP. First, I approached people at food festivals. I was talking about the scheme and I managed to persuade a few people to put their products on the List. Once they had discovered they could showcase their heritage and become appreciated, plus supported financially, they started to come to me with new ideas for registration on the List. I have even tried to encourage some registrations to the European system. But, to be honest, among all the products which are on the List, only a very limited number could be considered for European protection.”<sup>443</sup>

The Ministry of Agriculture recognised the problem and shortly after 2004 (accession to the EU) put a significant amount of effort into recruiting prospective participants to the new food quality schemes. Ministry officials paid a number of visits to the potential quality producers and conducted many training courses and seminars. This conduct is not maintained with the same level of devotion however. But while it was the most intense, in the case of cheeses for example, ministerial officials visited places where cheeses were being made, all in order to understand producers’ needs so that they could respond to them in the most appropriate way. The enactment of the legal act allowing cheese production to be carried out in the traditional wooden cabins was one of the most prominent results of that close cooperation of high level officials with the target recipients of the legal system. According to a Chairperson of the Breeders’ Association, this was probably the only legal act prepared with careful consideration of the people who would subsequently become affected by it. It has been created by those at the bottom and adopted by those at the top. By doing so the Ministry used the entitlement given by EU law to grant derogations to traditional and regional foodstuffs. As advocated in the bottom-up implementation approach, policy-makers recognised the needs of final recipients and answered them. Without these derogations, all traditional, hand-made mountain cheeses would have to disappear from the mountain landscape. Nevertheless issues to do with cases of *Śliwowica* (plum brandy) and *Jagnięcina* (lamb’s meat) still remain unresolved.

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<sup>443</sup> Agricultural advisor, state administration body, Silesia.

The presented data shows that these programmes are not free from weakness. Firstly they are not for business entities but only for farmers – a significant number of PDOs, PGIs and TSGs have been registered by non-farmers. Hence butchers, bakers or confectioners will not receive any support. Secondly the application process is highly bureaucratic. And thirdly, farmers often fear the highest state institutions, as they are perceived by them as hostile towards common people. Perhaps this is the reason the researcher did not come across anyone who was actually granted financial aid from the government.

On the other hand, advice and financial help for producers whose products are on the List is continuous. They are constantly supported by the Marshals' Offices. These Offices have a budget purposely allocated to promotion of the List. Producers participate in food fairs or other food-related events at the Offices' cost. In addition, Marshals' Offices publish special promotional materials. The Offices are not entitled to manage EU applications.

An excerpt from an interview supports this finding:

“As you could see, madam, there are these books with products published by the Marshal's Office. These books are available to the public, they can be found in simple grocery shops as well as in bigger chains. Information reaches people and they look for our products later on. This is a kind of marketing done for us by somebody else.”<sup>444</sup>

Or:

“The Marshal's Office refunds most of the fairs. They pay for stands and all that. They keep inviting me to show my product at various events.”<sup>445</sup>

Further excerpts from interviews:

“It is good that there is a local association in our village. Thanks to them I introduced my product onto the List of Traditional Products. I have no time to deal with such things, I have to be focused on my business. Even though this application is not particularly difficult, its preparation requires time. One needs to go to the library, do some research, talk to an ethnographer, and collect old documents. If you run a small business like I do, you will not be able to make it

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<sup>444</sup> Marketing manager, meat processing company, Greater Poland, up to 50 employees.

<sup>445</sup> Independent producer, primary agricultural production, Lodz, no employees.

without somebody's help. That is why I am glad the association looked after that. [...] Or for example information. Yes, there is information on that European system you are asking about, but it is on the Internet. I do not have time to sit in front of the computer and look for it. I would have to do it at night because I work all day... These are complicated issues. I would rather ask somebody to collect this information for me. The problem is that our local authorities do not know a thing. If I go to the Marshal's Office, they will probably help me, but they cannot proceed with it, as the system belongs to the Ministry. If I were represented by someone, it would have been a lot easier. [...] Two years have passed since we introduced our product to the List of Traditional Products and since then we have been constantly busy with it: food-fairs, festivals, production, and promotion.<sup>»446</sup>

It seems that financial and marketing support works best for producers who put their products on the List. Such producers receive a lot of help of different kinds: participation in food fairs is sponsored, books and leaflets are published and distributed, and they are invited to various events to present their products.

Since EU requirements for the PDO/PGI or TSG protection are more elaborate and demanding than those stemming from the law on industrial property (e.g. with respect to the obligation to prepare the specification of the product, presentation of the link, etc.), producers needed more guidance and support than previously. The application process, in which the local administration could participate together with the producers, could be less daunting for the latter, since the burden of documentation preparation could be shared by the participants.

This expectation can hardly be met. Officials currently responsible for administration of the List have no entitlement to manage Union applications. They may only provide some general explanations but facilitation of Union registrations is not one of their statutory duties.

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<sup>446</sup> Independent producer, confectionary products, Lodz, up to 5 employees.

Lack of proportion is also visible here. Those who participate in less demanding national scheme receive constant support, those who participate in the Union schemes must go through a much more elaborate application process to be granted the aid. On top of that, as already mentioned, the aid is foreseen for farmers only.

#### **4.4. participation in the scheme**

The food quality schemes have very particular requirements that need to be fulfilled by participants. They also have their specific character, such as the requirement to set up a producers' group, prepare and conform to a specification, controls and enforcement, interaction with other food quality schemes and finally, input from the European Commission. This section will offer some empirical evidence on how various participants – including implementing agencies – understood and accommodated these factors.

##### **4.4.1. producer's group**

Once the legal implementation of food quality schemes has been completed, the stage of giving effect to the policy comes into play. There is national law, there are derogations, institutions, and control bodies, and so forth. Now it is time for the producers to endow black-letter law with its real dimension. Producers have to join the schemes, but to be able to do so they need to form a group.

The schemes, with a minor exception,<sup>447</sup> require an applicant to be a collective body, comprising producers or processing producers working with the same agricultural product or foodstuff. In other words, in order to apply for protection, a producers' group needs to be created.

Producers do not trust one another, they often do not understand the whole idea of cooperation for the sake of the common good. They would rather see the scheme being exclusive than inclusive, for example the right to use the logo for

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<sup>447</sup> A single person can also lodge an application but this person has to show that he or she is the only producer of a given product, Council Regulation (EC) No 1898/2006, loc. cit.

the registered name could be available only for those who were personally involved in the application process as a reward for their effort. One of the reasons behind that thinking is the worry about the quality of the product. There are examples of participants, who in order to maximise their immediate profit, sell a product under the protected name which does not comply with the specification or even health and safety standards. The other reason why groups are not established is the lack of time and resources.

A participant says:

“I am worried about quality. There is that fear that someone will sell a second-class product instead of the product of top quality and the whole brand will suffer. I understand that it is cheaper to keep a client than to recover his trust, but it is still not clear to everyone.”<sup>448</sup>

One of the participants summarised this in the following way:

“Currently under the registered name everything is sold. As long as we the producers are spreading such practices, nothing good will come out of the registration.”<sup>449</sup>

Or:

“The group does not work for me. I know what I am doing but I cannot guarantee this for anybody else. That is why I decided to work only with my friend. Because if we started doing it collectively, we would have been finished by now. It is not easy to find someone who would understand that a group is stronger than a single person. I understand that, but I have a feeling there are not many thinking like me.”<sup>450</sup>

Further excerpt:

R: “These European schemes, in principle, are designed for a producers’ group. You would be expected to establish such a group with other producers.”

P: “Yes, sure, I can establish a group with someone who, for example, will deliver ingredients to me, I guess we could do that.”

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<sup>448</sup> Independent producer, primary agricultural production, Mazovia, up to 10 employees.

<sup>449</sup> Independent producer, milk based products, Lesser Poland, up to 5 employees.

<sup>450</sup> Independent producer, deli products, Mazovia, up to 5 employees.



R: “This producers’ group is understood as a consortium of producers of similar products rather than a cooperation of various businesses whose activities differ.”

P: “In that case, I do not see that happening, it does not make sense to me at all.

R: Why do you think so?”

P: “A small businesses like ours competes with uniqueness. Our clients recognise the taste of our products, our product is one of a kind. This is what it is all about, to be recognisable. But what is strange, there was a lady here talking about that European protection and she did not mention a word about that group thing. What is more, we have not heard any details. I have not seen the application form, or anything else. I was told to apply for national protection.”<sup>451</sup>

A participant says:

“First of all, the group has to be created – it is mission impossible. I have tried with the bee-keepers, but they need someone who would manage the whole process all the way through. They do not have time, they struggle with money. I cannot finance the application – there is no budget for that and I cannot focus on one case only. Since AgroSmak stopped functioning, there has been no one who can take responsibility for the European system at the local level. The Ministry, as I said, is too far away. The local officials have no entitlement to manage the applications, and they have no budget to do that.”<sup>452</sup>

Another participant said:

“As far as I know, either AgroSamk or some lower level officials or local rural advisers were involved in the application to the European system. Producers need to be represented, they are focused on work and any additional tasks consume too much time and energy. We used to have AgroSmak, now there is no one to manage the system and there are not enough registered products to learn from their experience. [...] A producers' group that is rocket science, Madam. Please remember these are all private entities, with separate ways of life, their own ideas and secrets. They do not want to act collectively.”<sup>453</sup>

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<sup>451</sup> Product manager, meat processing company, Greater Poland, up to 50 employees.

<sup>452</sup> Local administration official, Silesia.

<sup>453</sup> Local administration official, Lodz.

So far, one association which is supposed to represent the interests of all producers of traditional or regional products has been set up. The association is called The Polish Chamber of Regional and Local Product and its major goal is to cooperate with governmental as well as local authorities in establishing a national system of administering the situation of local and regional products in Poland. According to the status of the Chamber, its major aim is: enhancing producers', consumers', inspecting bodies' and local administrations' awareness of traditional and regional production and products. The Chamber sees itself as an institution which spreads knowledge about the characteristics, idiosyncrasies, particular needs, and the societal as well as economic role of local and traditional production.

Nevertheless, some actions of the Chamber are perceived by producers as highly unsatisfactory. Producers complain for instance that the Chamber, when organising food fairs, does not eliminate participants who sell products of an unknown origin or even counterfeited ones. These types of actions are perceived by the producers as highly unprofessional and even disrespectful. Feeling ill-treated, on a number of occasions, some of the producers have decided to opt out of participation in fairs and events organised by the Chamber. Representatives of the Chamber are said not to be putting enough emphasis on products which have come through the longest and the most difficult route, that is products bearing the PDO, PGI or TSG logo. There are interviewees who claim that the Chamber promotes products that participate in competitions organised by the Chamber much more than any PDO, PGI and TSG products, even though the latter products possess the strongest marketing value. Producers claim that because of the poor performance of the Chamber, their membership in the organisation remains much more formal than actual. In addition, a significant number of the respondents, especially producers of PDO, PGI and TSG products, state that they withdrew or are about to withdraw from the organisation, since the Chamber has not been fulfilling its statutory role.

Apart from the Chamber there are only a very limited number of organised local associations which represent or have the capacity to represent the producers. Highlanders can be represented by two producers' groups, one of

which is particularly active nowadays in organising sales of products, promotion or contact with local or central authorities. Apple producers, led by one entrepreneur, also try to encourage more farmers to join the group so as to strengthen their market position. Leaders of the groups very often complain that they do not get any support from producers on whose behalf they act. The common situation, reported by the interviewees, is of the nature that non-associated or even associated producers do not show any initiative that could contribute to the development of common well-being. All the burden of being a driving force of any action rests on the leaders' shoulders.

The other strong group associates the *Rogal Świętomarciński* producers. This group, though, had been active under the previous regime as well as when the producers needed to create guilds. In addition, this guild has its own norms and codes of conduct in place, which have been developed over time. It has also established very strong administrative structures and even supervisory power over the associated producers. In other words, this group has not been set up for the schemes but it simply took on board new responsibilities related to new challenges.

Most commonly however, producers' groups are formed by two or three individuals who anyway constituted a company or a partnership before.

#### **4.4.2. specification**

Once a producers' group or other representative of the applicant has been established, the next step in the registration procedure, which requires the close collaboration of producers interested in having the name of their product registered, is the preparation of the specification. The specification constitutes one of the most important aspects of the food quality system. It is a declaration of future actions and a binding code of conduct. Establishing the specification takes time and effort.

The specification performs three major functions. Firstly, it should support the claim that a product's quality or characteristics are attributable to the area of

origin, and in the case of TSGs, the specification has to show the specificity of the product. Secondly, the specification describes the production method that has to be adhered to by the producers. And finally, the specification serves as a point of reference for the control bodies who supervise the compliance of the registered name users with the said document.

It is worth mentioning here that obtaining the conformity certificate is a *conditio sine qua non* for using any of the PDO/PGI or TSG logos as well as the registered name. The protection granted to the PDO/PGI or TSG product is conditional. Only producers who follow the method of production declared in the specification can use the logo. Hence the obligation to subject products to voluntary control, the aim of which is the verification of conformity of the production process with that described in the specification.

In 2007, when protection was granted to *Bryndza podhalańska* at the EU level, only two shepherds decided to subject their production to the official controls in order to obtain their certificate of conformity; in 2008 – six producers; and in 2009 – three producers.<sup>454</sup> In 2008, six producers were granted the certificate, and therefore were allowed to mark their products with the PDO logo. In 2009 that number decreased and only three producers decided to embark upon the control procedure. Deriving from the information gathered during the interviews, there were numerous reasons why such a limited number of producers were willing to apply for the confirmation certificate. Highlanders, especially *bacowie* (senior shepherds), constitute a very unique group of farmers who have always been very independent and whose methods were rarely confronted with any formal code of conduct. This freedom of not being constrained by legal rules, especially related to their breeding and production activity, has contributed to the development of a very strong sense of individualism and self-determination among the members of the group. *Bacowie* objected to allowing any control body to encroach upon their independence or to verify their production methods against the formalised

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<sup>454</sup> Information obtained from the main certification body that not only conducts controls of products bearing the quality logo but also keeps the register of all certificates of conformity granted to producers.

procedure set out by the specification. *Bacowie* also claim that the lack of effective executive mechanisms, provided by the state authorities and aimed at eliminating the countless number of counterfeited products from entering the market, discouraged them from applying for the certificate of confirmation and from bearing the costs of certification controls, if their rights as legitimate producers were not secured anyway.

One of the respondents said:

“What worries me is the fact that producers who applied for the registration do not make use of it [...] there is only one strong group of producers where there are approximately 70 certificates behind the product, in the case of the rest..., well, there are two or three”.<sup>455</sup>

The Ministry has very often been involved in that process and it facilitated the negotiations over the production methods. Support in drafting the specification was also provided by AgroSmak when the NGO was functioning. The engagement of the Ministry in the drafting process is not perceived uniformly. Some producers claim that the Ministry imposed a specification which was too difficult to accept, thus leading the producers to decide not to follow that method of production and not to certify their products. Others see the Ministry's activities as necessary, for without them, reaching consensus would be highly unlikely. For example, the Ministry of Agriculture, together with a group of senior shepherds associated with the Breeders Association, prepared the application for the protection of a product name and managed the entire process. The registration procedure was successfully completed and lasted two years, from 2005 to 2007. The European Commission granted protection to *Bryndza podhalańska* cheese as a Protected Designation of Origin (PDO). Since then every *Bryndza podhalańska* producer, manufacturing cheese within the borders of the specified geographical area, who followed the mode of production provided by the specification and who was willing to subject their production to the control conducted by the authorised body, has been granted the right to use this designation.

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<sup>455</sup> High governmental official, Warsaw.

In the case of *Bryndza podhalańska*, the prepared specification proved to be overly restrictive. The shepherds felt constrained with the provisions laid down in the specification, mainly for two reasons. It only allowed the added cow milk to come from cows of a specific breed. This breed had previously been typical to the region but nowadays is rarely kept by farmers, resulting in shepherds' experiencing milk shortages, which, consequently, limits cheese production.

“Highlanders scored their own goal. They wrote that the cheese can be made from ewe’s milk collected in the territory of the National Tatra Park from April to October. The problem is that since no one lets sheep out into the Park, there is no way to get the milk which satisfies the conditions of the specification. They were told so many times, that in order to register the product they have to be able to comply with the specification otherwise the registration equals stupidity.”<sup>456</sup>

Or:

“One has to be cautious with the specification, everything that is there will be checked by the inspection. Thank God I was not overly ambitious and I did not say anything about vitamins or acidity. It would cost me a fortune to have those parameters examined every time.”<sup>457</sup>

Or another excerpt:

“These statistics make me laugh. Their only purpose is to mark the presence in the European statistics. But these products are not available on the market!”<sup>458</sup>

The specification, which is registered by the European Commission, determines the producers' behaviour for as long as they wish to manufacture the registered product, or until the Commission has registered the requested modifications. In the vast majority of cases, the specification is valid for a number of years. Having that in mind, producers should prepare the specification in such a way as to be able to fulfil its requirements later on. In the case of Poland, most producers either do not identify themselves with the specification, or find it too constraining or economically disadvantageous. For example, the producers of

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<sup>456</sup> Non Governmental Organisation, Warsaw, up to 5 employees.

<sup>457</sup> Independent producer, primary agricultural production, Mazovia, up to 10 employees.

<sup>458</sup> President of a Non Governmental organisation, Warsaw, up to 5 employees.

the crescent shaped bun claim that the pastry is too big and consumers do not want to buy it in this form. The producers of drinking honey described the sugar content in a way that cannot be satisfied in the course of production. An extremely precise and detailed specification for honey, indicating sugar and pollen level, requires a very costly laboratory analysis, which renders the honey production totally unprofitable. In the case of cheeses however, some highlanders claim that they know best how to make the cheese since they have been doing this for generations.

While AgroSmak was functioning, the NGO tried to unify producers over the specification.

As an example an excerpt from the interview:

“I invited a few producers and I asked them to bring their products appropriately branded. I gave those products to the lady who helped me, she removed brand labels, cut the product and marked them with numbers only. I asked producers to try these products and say which was the best and which was the worst. They did that, most of them picked one product as the best and one as the worst. Afterwards I explained them how important it was, economically important I mean, to have a strong consortium producing something which was genuinely good. But in order to have such a strong consortium they would have to agree on one production method and stick to it in order to deliver such a good product as the one they had just picked. They understood, and they discussed the recipe. At the end of the day they all felt that this recipe was theirs, they could treat it as their common creation, their common good. I am convinced that this is the only way to overcome problems with the specification. The specification has to reflect producers’ best practices but such practices which are important and close to every one of them.”<sup>459</sup>

Nowadays those producers perform well on the market. They established a strong consortium and they derive benefits from such collective and organised action.

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<sup>459</sup> Non Governmental Organisation, Warsaw, currently non existing.

The specification can always be amended. The amendment procedure has been foreseen in the quality regulations. It is common that when the specification becomes too burdensome for a producer, the applicant may change it in the due course of the appropriate proceedings. Yet in the case of Poland, the request for amendments is not sent to the Commission. Producers are discouraged by the lengthy procedure. They also do not want to go through the stage of answering numerous questions sent back by the Commission services.

The fact that producers abandon the specification or upon seeing the specification they do not enter the system at all, reveals the weakness of the system which transpires through a small number of producers actually producing a certified good. For a very long time after the registration of four drinking honeys as TGSs, none of the producers applied for the certificate of conformity, in consequence, none of the producers was using the EU logo.

All these shortcomings of the specification result in producers not applying for the certificate or resigning from the certificate at the expense of using the name and the logo. Some of the reasons behind such a development came up in the interviews. Apparently the Ministry intervened too much in the process of preparing the specifications and shaped the specifications in such a way as to please the European Commission rather than to secure the producers' interests. As a result, the specifications do not match the reality when it comes to the production process, or the producers are unable to reach a compromise regarding to one production method. Therefore, for many products, the specifications cannot be prepared, or are prepared by a non-representative number of producers. Many respondents pointed to the fact that groups of producers are weak, or do not exist at all. And it is the task of the producer groups, for example *consorzia* in Italy, who negotiate the specification with the producers and then represent the producers' interest where it is necessary. In the absence of an appropriate representation, every single producer has to deal with an additional amount of administrative, promotional or other kinds of activities, which could be delegated to the representative. There are different voices on who should represent the producers' group – the Ministry, local authorities or, ideally, an NGO. The content of specifications was not consulted with for



example a certification body which could provide the estimated expenditure of the necessary analyses. In consequence, some specifications proved to be too expensive for the producers.

#### **4.4.3. inspections**

Firstly, as already explained in point three on implementing agencies, control bodies – the major one among them is IJHRS, which apart from undertaking actions against counterfeits, issues the certificates of conformity with the specification. This type of control is carried out following the producers' request, and is commissioned by the producers themselves. Respondents very often emphasised the fact that the inspection authorities were conducting their duties in a very authoritative way. In other words, inspectors followed the well-trodden path; they treated PDO, PGI and TSG products in a similar manner to products subjected to ordinary standards, without noticing the particular specificity of the quality schemes. This approach, according to the producers, causes their resentment towards the whole system as such, since it too strongly resembles the usual, over-formalised and very meticulous method of conducting controls of agricultural products and foodstuffs, which goes beyond the scope of assessing products' compliance with the specification.

The producers' apprehension at inviting the IJHRS for the certification check is evident. At the same time, private certification bodies do not appear to be functioning adequately. The market for certification services is so limited that private certification bodies find it difficult to find enough clients that would render performing their services profitable.

For producers, the existence of a specification essentially means controls, and controls are something they would like to avoid, for example:

“Madam, we have too many controls. There should be one unified body responsible for that. These inspection bodies, they are really big administrative

structures, and there are always gaps between them and areas which are beyond any supervision.”<sup>460</sup>

Or:

“The IJHRS it is a different story. It is an inspection body with a huge range of competence, starting from food hygiene, to legality of the functioning of the food establishment, to elements of fiscal controls. It is not a nice institution, and... they are also entitled to control conformity with the specification. How on earth any producer can trust them. How can they be persuaded that while controlling conformity with the specifications some other things, for example, adherence to sanitary conditions should not be subjected to investigation? Even for such an official from the IJHRS, changing his or her approach to controls, it is like crossing the spread of light. They may come and check the products against the specification but they will come to the office and send their colleagues over to check something else that they had spotted when conducting the check. Madam, it is schizophrenia. [...] I will not work with the IJHRS, I am sure. I bet that if producers from my group heard that the IJHRS was going to control them, they would dismantle the group on the spot and immediately decide not to use the logo.”<sup>461</sup>

Often participants recall their experiences from visits to foreign/Western farms and they juxtapose their observations with the Polish reality.

A participant says:

“Our Centre for Rural Advice organised a trip to Italy. We visited a cheese farm and milk barn. Thank God we were not offered to try that milk. Believe me madam I am not a delicate guy but I would have never drunk it. The conditions there were so poor, it was all so disgusting that we could not believe our eyes. We all agreed that instead of us the producers, our zealous sanitary or veterinary inspectors should have been brought here to see how fancy Western production looks. Perhaps they would look at us differently. But the other thing is that our sanitary legislation is so demanding that a small producer cannot simply afford to build such facilities. It is all for big entrepreneurs only. Our

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<sup>460</sup> President of food processing company, Greater Poland, up to 100 employees.

<sup>461</sup> Independent producer, bakery products, Lesser Poland, up to 30 employees.

small and local food processors have no chance to satisfy that legislation that is why they would rather stay with primary production which unfortunately is totally unprofitable.”<sup>462</sup>

#### **4.4.4. enforcement of the new law**

The last stage of giving effect to the law is its enforcement. The kind of legal measures that are available and that institutions are responsible for implementing them have already been presented.

A very similar situation has also been noticed with regard to other products. When the popularity of registered products grew, it immediately triggered actions from other parties interested in capitalising on somebody else’s achievement. Points-of-sale of products imitating the registered ones started to mushroom. These active entrepreneurs were either using the registered name without having any entitlement to do so, or were creating names which closely resembled those which had been registered.

The respondents clearly differentiate the actions of inspection bodies resulting from a producers’ request geared to issue a certificate of compliance from controls in the market. This should lead to the protection of PDO, PGI, and TSG producers as well as consumers against dishonest practices applied by other participants in the market.

Producers who are farmers find subjecting their products to controls particularly discouraging. Producers who are business entities do not find controls overly burdensome – as they said, they became used to various types of inspection while running their businesses.

Secondly, the control bodies take actions which guarantee that registered names are protected against: misuse, imitation, and all other practices that could mislead consumers as to the true origin of the product. These controls are

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<sup>462</sup> Independent producer, fruits processing company, Mazovia, up to 10 employees.

carried out at the inspection bodies' own initiative, and are budgeted by the state.

Both farmers and entrepreneurs have expressed their dissatisfaction with the performance of inspection bodies related to market control. Respondents said that these types of control are carried out very infrequently. Inspectors, instead of acting on their own motion, expect to be notified about the law infringement before they intervene. Many producers find it unacceptable to point out a violation performed by others, as they believe such an expectation only proves a lack of interest on the part of inspectors to bring the wrong-doers to compliance. Consequently, the producers do not feel that in their effort to deliver very high quality products, they are supported by the authorities responsible for quality protection. It has been repeatedly mentioned that the lack of effective inspection mechanisms can even make dishonest parties feel impudent. Dishonest operators who pass themselves off as genuine PDO/PGI/TSG producers and send very low quality products to the market also damage the reputation of the latter.

Apart from agencies directly responsible for the enforcement of food quality schemes, there are other actors who are indirectly involved in enforcement. These actors are food-fair organisers. Producers of registered products highly value food events where organisers carefully select participants. A number of respondents indicated that certain local administration officials do not allow any sellers of goods of an unknown origin to showcase their products at the food events, or they also demand a certificate of conformity with the specification if a person presents goods under a registered name. The producers of registered products emphasise that they acknowledge the fact that the revenue from such events comes from the stands which have been sold. All the more reason that they appreciate the introduction of this type of selection as a sign of respect for their dedication to traditional or regional production and to their hard work in getting their production recognised at the EU level. According to the respondents, the vast majority of organisers do not attach any importance to issues of certification or traceability of foodstuffs. Consequently, registered products are displayed together with counterfeited ones, which not

only misleads the consumers but also undervalues all the effort put in by PDO/PGI and TSG producers in having their goods registered by the European Commission.

#### **4.4.5. coexistence of various food quality schemes**

Then asked about other food quality schemes available to them, the major focus of the research participants, was to be put on the List of Traditional Products. The List may contain products which are not on the market or are hardly ever made. The only expectation from somebody who wishes to register his or her product there is the ability to make it. In consequence, the List can also contain products which are fictitious, which in turn lowers the credibility of that instrument. Some of the products which are on the List are typically home-made foodstuffs. According to sanitary and veterinary norms and standards and other pieces of law that precisely regulate the food market these products can only be prepared for private use and never sold on a wider scale.

That is probably why the research participants' attitude to the List is not unified. It depends on the product specificity. Producers who have registered their product at the EU level do not appreciate the List and they even claim that the List constitutes an obstacle to the development of a genuine food quality platform in Poland. The most commonly provided justification for that opinion is the fact that the List usurps human and financial resources, which could otherwise be allocated to high quality certification schemes. However, for producers who have very limited capacity to register their product at the EU level, the List is associated with a positive initiative and an opportunity to become recognised, at least briefly, at the local or regional forum.

Respondents acknowledged the List's capability to create a register or inventory of local, regional or traditional foodstuffs, but at the same time most of them agreed it should be limited to that.

There are also voices that criticise the existence of national food quality schemes other than the List of Traditional Products. For example, the scheme

‘Quality Tradition’ is another certification scheme like the European one. But the acquisition of the certificate issued under that scheme is not so burdened with formalities as in the case of PDOs, PGIs or TSGs. Therefore, the participants are convinced that this scheme drives producers from the more demanding scheme.

Other national food quality schemes such as: ‘Our Culinary Heritage’, ‘Slow Food’, ‘European Chain of Culinary Heritage’ were not mentioned by the respondents and that is why they are not presented in the thesis. Nevertheless, the participants were clear that the higher the number of schemes and logos, the lower the consumers’ understanding and recognition of them.

#### **4.4.6. the European Commission**

The national dimension is not the only platform on which problems may arise. The impact of the Commission itself also needs to be presented as it has been recalled by the participants in a significant number of interviews. The registration stage that takes place at the Union level appears to have its flaws as well. Apart from the lengthy character of the proceedings, the nature of questions from the Commission seems puzzling to the producers. For the Ministry, the Commission enquiries seem to be irrelevant to the subject matter of the food quality legislation. For producers, the irrelevance of the Commission’s questions seems to reveal a lack of knowledge about the specificity of agricultural production on the part of officials.

A number of respondents admit that the Commission officials’ lack of understanding of basic agronomic matters undermines the authority of the Institution. The answers to certain types of questions ought to be looked for internally in order to hide the knowledge gaps of the officials dealing with the registration of PDOs, PGIs and TSGs. In addition, the Commission clearly experiences staff shortages if the first analysis of a single dossier lasts a few months or more. Furthermore, the Commission finds it difficult to reject an application that does not fulfil the requirements laid down in the regulations. This, in consequence, binds the Commission, Member States, and to some

extent the producers into lengthy objection procedures, which negatively influences the time allocated to the examination of new applications.

The vast majority of participants, potential newcomers as well as governmental officials claim that the registration process at the European Commission level definitely lasts too long. The Commission takes up to three years to grant protection to a product. The length of the proceedings is usually determined by the number of enquiries sent back from the Commission to Member States regarding a given product, as well as the time Member States take to give answers to them. The need to answer numerous questions delays the decision on whether or not to grant the protection. The interviewed producers repeatedly stated that questions are frequently absurd and they show a lack of knowledge on the part of the Commission officials about agricultural products or foodstuffs. One of the respondents said that the standard of questions posed by the Commission is comparable to questions posed by children who discover the world and its basic principles.

And yet, not all the blame should fall on the Commission. The Commission asks questions because not all applications are properly prepared. Even if it is a Member State that should scrutinise the application first, the Commission often has to conduct its own investigation anyway. Applications that leave the Member State are often unclear or incomplete, or even legally dubious. For example, attempts to bypass the currently binding law also occur on the access to the market, the labelling directive or the control of production volume in order to influence the price of the product. These elements force the Commission to carry out the whole scrutiny once again in order to produce a well-informed decision based on a thorough analysis of the data provided.

Nevertheless, these producers who are dissatisfied with the way the Commission acts usually send a negative message to potential newcomers. In addition, a long registration procedure slows giving effect to the scheme by blurring the purpose of the system as a tool that supports food producers and farmers. The producers gradually stop associating the schemes with mechanisms which have been designed to help them improve their situation,

but rather they begin to perceive them as a legislative whim of the European administration falling far short from the real needs of the farmers.

It has been mentioned on numerous occasions that the Commission seems not to have a coherent and unified policy on how to scrutinise applications since questions are random and difficult to predict. One of the reasons provided by the respondents is a rotation of the Commission's personnel in the Food Quality Department, which only contributes negatively to the lack of systematic method of application examination. Therefore, guidelines on how to properly prepare a single document issued by the Commission could facilitate the registration process, and are long awaited at the national level.

## **5. Evaluation**

A very interesting excerpt from one of the interviews conducted with a governmental official shows that there is clear distinction between legal implementation and practical effectiveness.

R: "In your opinion does the system in Poland function well, is it effective?"

P: "Are we talking about effectiveness in terms of procedures and registration? Here I am suggesting you ask the officials from the Commission why the registration lasts so long. I would be keen to hear how the Commission has changed its approach to the new requirements set out in 510 and 509 aimed at shortening registration. Currently it is a Member State which scrutinises an application and evaluates it. The Commission does not even receive all the documentation. But still they examine every comma and every dot, which is why the pile of applications only grows higher and higher.

On the national level I have not heard any complaints about our procedures. From the administrative point of view the food quality schemes function highly effectively. The national procedure lasts no more than three to four months provided no objections are lodged. In the case of objections procedures get longer. It shows that it is possible to create procedures which function very well, and do not overstretch registration unnecessarily. How producers respond



to that it is an entirely different story. Producers cannot be convinced to join the system overnight. It takes time but we work on that constantly.”<sup>463</sup>

This duality of the perception of effectiveness can also be found in other excerpts from interviews. According to the founder of AgroSmak for example, compliance with EU law meant for the Polish government a proper absorption of the food quality legislation to the national legal system. Nevertheless, rendering the law effective on the ground remained outside the scope of the government's interest. The Ministry of Agriculture was much more focused on putting sanitary and veterinary standards in place since the implementation of these could be checked and executed by the European Commission.

One of the participants said:

“These statistics make me laugh. Their only purpose is to mark their presence in the European statistics. But these products are not available on the market!”<sup>464</sup>

The Ministry put a huge amount of effort into finding suitable products, persuading producers to pursue with the registration procedure. This effort is clearly visible when one opens the DOOR database to check what the situation in Poland looks like. Once we go deeper underneath the façade, the situation is not as promising as it may at first seem. The number of certified producers behind a registered name varies drastically from one to over 100. Most of the respondents repeated that the rush to registration that started in Poland just after accession to the EU, blurred a number of important factors which ought to have been taken under consideration when the food quality schemes concerned: namely, the real production capacity behind the protected name of a product. Currently, the number of registrations corresponds neither to the availability of the product on the market, nor, which is even more worrying, to the market presence of the product at all. Even though cheese producers were strongly supported by the Ministry throughout the whole process of application, and every interviewee emphasised very strongly the invaluable help they received

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<sup>463</sup> High governmental official, Warsaw.

<sup>464</sup> President of Non Governmental Organisation, Warsaw, up to 5 employees.

from the Ministry, the number of producers willing to follow the specification and subject their production to the control was not impressive. From the 120 senior shepherds actively cultivating the cheese making tradition, only a few decided to endorse the law and use the PDO logo.

The discrepancy between the number of potential and factual quality producers calls the successfulness of the policy in Poland into question. The problem with this state of affairs can be found in the post-registration reality, which not only shapes the factual functioning of the food quality system, but also reveals the mistakes which could have been made during the preceding stages. The implication for the system in Poland is that as long as there are no products with real market capacity, the system will remain fictitious. Some consumers may start to associate the logo with a European food quality sign, but they will not associate it with any concrete national product.

The removal of national norms remaining in conflict with or jeopardising the effective functioning of food quality schemes in Poland is not free from weaknesses. Preliminary analysis of the immediate, legal environment of food quality schemes in Poland suggests that no Polish legal provisions remain in conflict with the food quality regulations. Even if there was such a conflict, the contradictory national regulations could be replaced, according to the supremacy doctrine, by the hierarchically higher Union law. However, the existing regulations which do not oppose the food quality system might jeopardise its effective functioning. For example, with limited exceptions, agricultural producers are not allowed to sell processed products while retaining the status of a farmer. In other words, agricultural producers selling processed products are not treated as farmers by the tax law but as business entities, which, as far as fiscal obligations are concerned, places them in an incomparably less favourable position, due to the massive bureaucratic burden linked to running a business entity. The production and sale of alcoholic beverages is even more restricted. In this case, the fiscal burden is onerous, which, coupled with heavily demanding sanitary requirements, renders the whole undertaking very unappealing for a small-scale producer.

Another problem in managing the system, as it transpires through the interviews, is the brief presence of the food quality legislation in the Polish legal system. Bearing in mind that the law on Geographical Indications, which had been in force before the introduction of the Council Regulations, is very loosely related to the EU food quality schemes and could not serve as a point of reference on which any experience could be built. All actors involved in the EU certification schemes need to learn how to function in that new legal reality. A number of factors must occur by any means if the system is to become a well established element of the national legal order. More producers must express their willingness to access to the schemes so that the Ministry of Agriculture has more applications to work on and send to the Commission. The Commission needs to quicken the registration process so that the Ministry can draw from the Commission's feedback and apply it to consecutive applications. All participants claim that the dilatoriness of the European Commission in processing the applications not only discourages potential scheme participants, but also slows down the process of acquisition and implementation of a more appropriate mode of conduct. In other words, the more products' names are registered, the more feedback from the Commission, and the more expertise at the local level, the better the understanding of the specificity of the scheme by all actors involved will become. For example, the producers complain that inspection bodies control the PDO, PGI or TSG products in the same way as they treat standard production, without taking into consideration the specificity and aim of such inspections. Needless to say, those inspections ought to be carried out in an appropriate manner to serve their purpose, but as noticed by high state officials, it is impossible for the inspectors to forget their old habits if their opportunities to examine PDO, PGI or TSG products are limited. Poland has sent approximately 35 applications to the European Commission so far and only 10 products have been registered. The number of registered names, even if multiplied by the number of producers, is not so significant as to allow inspectors to deeply understand the idiosyncrasies of the new system.

All things considered, the introduction of new legal solutions triggers changes in a variety of spheres at multiple levels. In an ideal situation, the changes should happen simultaneously on different platforms, all the actors involved in

the system should either cooperate or at least not act in a counterproductive way.

As it has been frequently mentioned, this legal implementation does not determine the effectiveness of the system, meaning that a correctly implemented law does not guarantee an outcome in the form of well-functioning food quality schemes. According to the respondents in a Member State where the system is new, one of the factors that stimulates the interest is a ‘good example’ or a success story. Potential participants want to see the results of the registration, they want to see protected products on the market and they want to talk to producers who have already gone through the application and registration processes to draw on their knowledge and experience.

## **Chapter Five**

### **Analysis and Conclusions**

This aim of this research is to analyse the process of putting policy into practice, where the case in point is the effectiveness – the actual functioning - of two EU food quality regulations in Poland.

The major assumption of this project is the idea that law is a real creation which exists in society, and which is not purely an abstract entity separate from its creators, implementers and addressees. If this is so, the effectiveness of law, in this case European Union law, is determined not only by the deadline for its transposition or fulfilment of delegations expressed in legal statutes, but also by factors which are political in nature, for example the behaviour of implementing agencies and/or their target recipients. This study of effectiveness is not only limited to legal investigation: it goes further and embraces the study of what is happening beyond documents and papers. Such effectiveness has its legal and political dimensions which are intrinsically joint to their social environment.

The existence of the gap between how law should perform and how it actually performs was, however, recognised very early on by law theorists. Austin, for example, enunciated the existence of a clear discrepancy between the logical, coherent, hypothetical legal system and the actual legal system of a particular state.<sup>465</sup> Also, Pertażycki's theory of law as a psychic experience grew out of his dissatisfaction with the inability to explain the reality of law via tools delivered by, for example, positivism or idealism in law. He claimed that the reality of law cannot be found in the illusionary world of words.<sup>466</sup> Petrażycki also distinguished between the living law and law in books. The latter – binding law – is placed in abstract reality as a normative phenomenon, it establishes social institutions. The living law is the kind of law which is expressed by people's behaviour – this law directly influences people's

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<sup>465</sup> Bickenbach (n 179)

<sup>466</sup> Sandurska (n 180)

decisions. The living law is motivational: it provides a stimulus to behave in a certain way.<sup>467</sup>

Similar approaches to effectiveness can be found in the functionalist movement, which dates back 70 years to the United States. Functionalism discussed law in action vs. law in books.<sup>468</sup> That is why, due to its practical approach, it developed a very pragmatic perception of effectiveness. Law, according to functionalists, ought to respond better to societal problems, needs to rely on causal inference, and needs to consider political, cultural and economic contexts within legal institutions.<sup>469</sup> In addition, law for functionalists exerts an impact on society and society influences law via its feedback.<sup>470</sup>

Contemporary scholars also see effectiveness in a similar manner. For example, for Nicolades<sup>471</sup>, practical effectiveness is not only the actions of the Institutions of the Union but also the attitudes and behaviours of individuals affected by law, Mastenbroek stated: “the laws in the books are a useful starting point of research but the really interesting question is to what extent these are given effect”.<sup>472</sup>

Indeed, having analysed the data, it becomes clear that effectiveness can be perceived differently when studied through the lens of either legal or political scholarship, and only a close look at the situation at the Member State level allows an assessment of how and why these two do not complement each other.

In order to cover both aspects of effectiveness, two research questions have been designed for this project. Answering the first question required a more legalistic approach, for example, black letter law analysis and the investigation of the concept of compliance. The second question was aimed at discovering

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<sup>467</sup> Podgórecki (n 181)

<sup>468</sup> Michaels (n 277)

<sup>469</sup> Whytock (n 278)

<sup>470</sup> Travers (n 188)

<sup>471</sup> Nicolades (n 156)

<sup>472</sup> Mastenbroek (n 203)

political and other extra-legal factors which determine the practical effectiveness of a programme on the ground that has been approached by methods available in political sciences, such as interviews amongst others. Since the research project is a case study of legal implementation *and* current use – the effectiveness - of the food quality schemes in Poland, the interview protocol has been designed in such a way as to cover extra-legal factors which may influence the functioning of the schemes. The protocol is based on a set of questions stemming from the literature review and a pilot study conducted at the beginning of the research process. The academic literature supporting this thesis indicated the contentious areas linked with the effectiveness and the pilot study established which of these areas can and should be explored empirically.

The two main research questions, explained and justified in Chapter Three were as follows:

**RQ1: Has Poland successfully introduced the law on Geographical Indications and Traditional Specialities Guaranteed into its legal system according to the legal concept of effectiveness?**

- Has Poland complied with EU law requirements regarding the introduction of this law into the national legal system?

**RQ2: Has Poland successfully introduced the law on Geographical Indications and Traditional Specialities Guaranteed into its legal system according to the political concept of effectiveness?**

- Has Poland rendered the EU food quality regulations effective on the ground?

## **1. Effectiveness in law is impeded by:**

### **1.1. lack of, or misleading official information**

The Union institutions such as the European Commission, the European Court of Justice have been endowed in power to guarantee and oversee effectiveness of Union law, in detail described in Chapter One, which are supposed to allow them to secure Member States' compliance with EU law. These prerogatives, even though far reaching and compulsory in nature, have weaknesses, as posited by literature on the subject matter as well as current empirical research.

The Court, for example, contributes to the harmonisation of EU law by issuing preliminary rulings<sup>473</sup> concerning interpretation of the Treaty or validity and interpretation of acts of the Union. Referral to the ECJ must be made during proceedings before a national court and cannot be made after the case has been decided. In cases where violation takes place the ECJ also does not act on its own motion. If the Commission fails to submit the allegation against a Member State, or the national court fail to pose preliminary questions, the ECJ will never get involved in bringing the transgressor to compliance, and will not be able to correct misinterpretation or misapplication of Union law on the ground.

The Commission is the institution endowed with prerogatives to oversee Member States compliance with Union law.<sup>474</sup> The Commission as the guardian of the treaties should be the best suited to secure effectiveness. The legal literature, presented in Chapter One, has pointed to a number of weaknesses which affect the Commission's performance. In principle the Commission has neither the money nor the resources to be able to be fully engaged in the front-line supervision process.<sup>475</sup> Thus the Commission relies on publicly available documents and formal information delivered by Member States. As noted by Wincott, implementation of EU law is still dependent on the *bona fide* status of

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<sup>473</sup> Article 267 Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47

<sup>474</sup> Egeberg (n 75)

<sup>475</sup> Mastenbroek (n 95); Nugent (n 74)



Member States.<sup>476</sup> If a Member State fails to provide the Commission with up-to-date information. The Commission may never be able to obtain it. There may also be political, social, or economic reasons why the Commission hesitates to bring Member States to compliance and decides not to initiate the infringement procedure when the violation occurs.<sup>477</sup>

Cases of ineffectiveness do not often constitute acts of non-compliance. It seems that in instances where ineffectiveness cannot be classified as a violation of EU law, the Court is deprived of the legal basis to act, and malfunctioning of EU law may not be rectified.

The collected data invites comment on the above-mentioned literature findings concerning the Commission. The role of the Court could not be evaluated as the Court has never been involved in any dispute related to the investigated topic.

The legal implementation of the food quality regulations has been considered as successful. Neither the Commission nor UKIE (the national governmental institution responsible for overseeing compliance with Union law) has ever expressed any concerns about Poland's actions in this respect. Poland has registered over 30 product names so far. All of them can be found in the DOOR database. Statistically speaking Poland has more registrations than many Member States from the so-called old EU, for example, Austria, Belgium, Finland, Ireland, Denmark or Sweden. The Ministry is satisfied with this result and speaks about the number of registered names with pride. Judging by the number of entries to the DOOR database, the Commission may perceive Poland as interested in the system and devoted to it.

Indeed, if the study was limited to official, legal documents and statements, the success of the schemes in Poland would appear to be unquestionable. But this study went further and probed this impression through empirical investigation. The researcher discovered that behind the formal register of names, there are either just a few producers, or products with the registered name do not exist on

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<sup>476</sup> Wincott (n 37)

<sup>477</sup> Börzel (n 100)

the market at all.<sup>478</sup> In Poland following the official statistics delivered by IJHRS (the main national inspection body) 15 out of 30 registered names are not backed up with certificates of conformity to specification. This means that none of the entitled producers can use the registered name, because they have not subjected their production processes to voluntary control. According to Article 11 of Regulation (EC) 510/2006, any product bearing a PDO or a PGI logo must be verified by the competent control body before placing it on the market.<sup>479</sup>

It needs to be emphasised is that a lack of producers behind a product will not be reflected in the DOOR database. Registration of a PDO or PGI remains valid even if the name is not in use. As long as the link between the name and the area exists, the name remains protected. Such a solution encourages implementing agencies to apply for registration of a name just for the sake of having another entry to the database. In the case of trade marks, their actual use is one of the conditions for maintaining such protection. If, following the trade mark regulations, any agent involved in the schemes was responsible for keeping the name alive, under the threat of losing the right to use the logo, the gap between legal and political effectiveness in the field of food quality schemes could be narrowed.

These findings confirm duality of effectiveness and show that depending upon the approach – legal or political – the results from investigating the same subject matter may vary significantly. Bridging the two disciplines more closely may not only allow the discovery of new facts but also lead to an understanding of why discrepancies in findings occur.

## **1.2. no systemic post-implementation evaluation in EU law**

As is the case with directives, the Union regulations are not automatically a posteriori examined for their results. The execution of the vast majority of

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<sup>478</sup> Please see the table with registered names and number of certified producers in Chapter Three, page 169 -171

<sup>479</sup> Article 11 in conjunction with Article 4 and Article 8 of Council Regulation (EC) 510/2006. loc. cit.

regulations remains under the discretion of national institutions. In this regard the Commission needs to rely on a Member State's assurance that the introduction of regulations was properly managed. The Commission usually limits itself to checking whether a delegation foreseen in regulations has been followed, a deeper analysis of what is really happening does not take place on a regular basis.<sup>480</sup>

Due to that lack of a posteriori evaluation, the Commission may not be well-informed about the actual practices at Member State level. Perhaps closer supervision of Member States could improve Member States' performance in this respect. There is however a downside to such a solution. Firstly it could require an increase in the number of the Commission's officials, or even an establishment of local Commission offices, which could lead to a rise in the costs of the Union's administration. Secondly, such supervision could collide with sovereignty – Member States might not be willing to give up another chunk of their discretion related to internal affairs to external administration. Thirdly, there is no guarantee that such a solution would bring the required results. There is a high risk that tightening EU surveillance over its members could result in the emergence of a negative perception of the Union, and not an enhancement of its effectiveness. Thus the Commission may consciously agree to limited effectiveness of Union law in order not to create a greater financial burden for the Union as a whole. The existence of the implementation gap may be the result of a compromise between gains and costs.

The researcher has not found mechanisms which can be put in place in order to rectify the effectiveness issues linked to regulations, but there are mechanisms, widely presented in Chapter One, which are designed to bring Member States to compliance. Measures described in Chapter One are predominantly focused on directives. In addition, they are concerned with acts of infringement rather than ineffectiveness. Hence, if a situation in a Member State cannot be classified as a violation of Union law, the Commission may find it difficult to

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<sup>480</sup> Nugent (n 74)

justify any action which is more compulsory in nature. Cases of ineffectiveness may then remain unattended.

What is happening in Poland, where there is a clear discrepancy between the front cover of the scheme – the DOOR database – and the actual performance, cannot be rectified by recourse to measures such as for example, the principle of supremacy or an action of infringement. Even though this situation clearly amounts to an act of ineffectiveness, it is not covered by the development of the EU doctrine. This reveals an incompleteness of mechanisms available under EU law.

### **1.3. complexity of legislation and overlap with related national law**

The ever growing bulk of EU law makes it more difficult for the Commission to reveal acts of non-compliance, let alone ineffectiveness as far as regulations are concerned. Let the example be the case of *Jagnięcina Podhalanska* – lambs' meat from the Region of Podhale, as presented in Chapter Four. Under Regulation (EC) 510/2006 interested parties lodged an application for protection of the name. They received a positive response from the national authorities. The application successfully passed the scrutiny performed by the Commission (the application has been published in the DOOR database) and in the absence of objections the name will soon be granted protection. National law, however, will prevent the entitled producers to derive benefits from registration by prohibiting them from selling their products.

This prohibition stems from the law which does not allow the introduction to the market of meat from primary production. This law is not in conflict with EU law because it has been introduced following delegation provided in Regulation (EC) No 853/2004 laying down specific rules on the hygiene of foodstuffs. The Regulation in recital ten says:

“Community rules should not apply either to primary production for private domestic use or to the domestic preparation, handling or storage of food for private domestic consumption. Moreover, where small

quantities of primary products or of certain types of meat are supplied directly by the food business operator producing them to the final consumer or to a local retail establishment, it is appropriate to protect public health through national law, in particular because of the close relationship between the producer and the consumer.”

The question is: how should situations like this be approached? Can one perceive such a situation as a conflict of laws?

The conflict of laws as defined in the literature occurs when even validly adopted national provision is incompatible with Union law.<sup>481</sup> In the case of such conflict the principle of supremacy could be applied. But this principle, following the *Costa v. ENEL*<sup>482</sup> judgement, means that Union law would have to be given primacy over national norms. This case, however, does not seem to be covered by the Union law doctrine. Neither the *Simmenthal*<sup>483</sup> ruling nor the principle of state liability in damages<sup>484</sup> seems to be applicable. We do not deal here with the situation where national law contradicts Union law. Here the latter is merely hampered by the former, and the former is not a pure creation of the national parliament. The national law recalled here is an emanation of Union law. It has been introduced into the national legal system on the basis of permission formulated in the European system.

Who has the right to complain and to whom? Can national courts disapply national rules to allow interested parties to benefit from EU regulations?

These concerns lead further; with the ever-growing bulk of EU law how likely is it that EU law provisions collide with other EU law provisions at

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<sup>481</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

<sup>482</sup> Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585

<sup>483</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

<sup>484</sup> Case C-8/88 *Federal Republic of Germany v Commission* [1990] ECR I-2321; Joined Cases C-6/90 and C-9/90 *Andrea Francovich and others v Italian Republic* [1991] ECR I-5357; Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith* [1999] ECR I-623

Member State level? And if such a situation occurs, who should be entitled to decide which norm to follow?

Nugent<sup>485</sup> has already pointed out that accommodation of the new provision of EU law gradually grows in difficulty. Local administration bodies are often overwhelmed by the amount and ever-changing character of EU law, they therefore struggle to manage it, which the case of *Jagnięcina* clearly confirms.

*Jagnięcina* also shows that clashes between EU law and national law often occur in practice. The architecture of the EU system however, has not foreseen clear solutions to this problem. Can ineffectiveness be considered an infringement of Article 4(3) TEU? Or perhaps treating ineffectiveness as an infringement would be too far-reaching?

## **2. Effectiveness from the political science perspective is impeded by:**

### **2.1. lack of mechanisms linking desired outcomes/policy goals and regulative measures**

In political sciences on the other hand, the existence of the implementation gap – the difference between outputs and outcomes – is widely recognised.<sup>486</sup> Any policy that is to be implemented ought to be evaluated against its desired outcomes in order to establish a mechanism that will best secure the planned results. The need for evaluation is also presented in jurisprudence. The evaluation of food quality schemes in this thesis has been developed via an interview protocol which, for example, covered aspects such as advice and financial support, or factors which rendered participation in the scheme (un)appealing.<sup>487</sup>

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<sup>485</sup> Nugent (n 74)

<sup>486</sup> Winter (n 174)

<sup>487</sup> For the protocols please see Chapter Three, p. 115-117.

Following the logic presented in political science literature, regulations could be more easily adopted if they were evaluated more thoroughly against existing national legislation – ideally *ex ante*. The first argument for this evaluation is that not all national legislation dealing with the same subject matter will be replaced by Union regulations. Regulations will only replace national law which deals with the same issue. The second argument is that regulations will have to coexist in a new legal environment which may obstruct them to some extent. Such evaluation could help to establish if there is a risk that the functioning of regulations may be limited or even severely obstructed by national law.

Where EU regulations are in force on the ground, such evaluation has not been anticipated. All these developments of the doctrine: the principle of supremacy, loyalty, and enforcement, can be applied *ex post*, and only in response to violations. In the case of directives, the requirement of transposition exists, that is, the obligation imposed on Member States to achieve certain results to some extent secures their effectiveness. The intended outcome of regulations can be found in their preambles, which character is rather more informative than binding.

In addition, it is unclear who should perform that evaluation. If directives were to be analysed the answer would be easier. The first agent responsible for the evaluation is a Member State. Such a Member State must achieve results expressed in the directive, under threat of being held responsible for non-compliance. The second agent is the Commission which assesses the correctness of the transposition. However, as far as regulations are concerned it is unclear who should perform such an evaluation – whether the Commission, the Court or the Member State.

The sole specificity of regulations – they are addressed to all Member States – also renders their applicability to the whole territory of the Union more difficult. Regulations should rather be introduced in cases where unification of laws across the EU is absolutely necessary. Where harmonisation or more customised solutions can be applied, directives could prove to be a better

choice. In addition, a change in a regulation may become politically complicated as every amendment of a regulation affects every Member State, therefore some Member States for which a regulation works well may strongly oppose any alterations.

## **2.2. behaviour of the Commission officials**

Another aspect exerting an impact on effectiveness is the behaviour of the Commission officials.

Interview respondents repeatedly stated that it was the Commission's behaviour that created resistance. Once the food quality regulations became available in Poland and a number of applications were sent to the Commission, the Commission took long years to grant protection to the proposed names. That approach, as respondents said, contrasted with the attitude taken by the national authorities who swiftly scrutinised the applications and raised doubts in applicants' minds as to whether it was worthwhile to enter the schemes at all.

Many participants expressed dissatisfaction not only with the lengthy procedures but also with the quality of service provided by the Commission. The most common observation concerned the officials' lack of knowledge about the subject matter. Their dubious competences triggered an unnecessary exchange of correspondence between the involved parties which again resulted in an unduly prolonged registration procedure and a growth of resentment and dissatisfaction on the applicants' part.

In addition, the research confirmed that the Commission hardly ever involves itself with final recipients. It organises advisory groups where any given lobby can express their opinions but these opinions are in any case limited to the most powerful representatives in a sector or field. The majority of common citizens have limited opportunities to present their notions before the Commission. In consequence, the Union legislative acts are often created separately from the real needs of their addressees. The Commission is growing apart from EU



citizens and this contributes to an image of an EU administration as unrepresentative, counterproductive and purely bureaucratic.

National implementing agencies have been widely discussed in political science literature, as Chapter Two clearly presents,<sup>488</sup> but EU officials have so far been neglected by the literature. The findings leave no doubt that the EU officials' role ought to be examined when the widely understood effectiveness of EU law at Member State level is analysed. Decisions made by these officials have very far-reaching consequences for the vast number of addressees of EU law. Hence the officials' performance: their motives, attitudes, responsibilities and qualifications should attract more academic and non-academic attention.

### **2.3. behaviour of national implementing and enforcement agencies**

Legal and political literature focuses attention on the organs of national administration. For example, under the principle of sincere cooperation, Member States ought to secure adequate administration and execution of EU provisions.<sup>489</sup> Political science strongly emphasises that national implementing agencies ought to be devoted to their job. If this is not the case, the effectiveness of an implemented programme will be jeopardised.<sup>490</sup>

Performance-oriented Member States are said to be more likely to produce better results, and enforcement agencies must themselves be committed to the behaviour required by law. More authoritarian Member States are advised to develop a recipient-oriented approach in order to facilitate inclusion of society into the new legal programmes.<sup>491</sup> Also, many Member States cannot provide sufficient funds to train new personnel. Typically those who already handle other tasks will be deployed to implement new programmes. As a result such personnel may prove to be inadequate to perform new duties.<sup>492</sup>

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<sup>488</sup> Sabatier (n 209), Pressman (n 205), Sabatier (n 230)

<sup>489</sup> Hinton (n 20)

<sup>490</sup> Sabatier (n 230), Pressman (n 205), Bardach (n 138)

<sup>491</sup> Knill (n 133)

<sup>492</sup> Bardach (n 138)

The research data confirms these assumptions. As presented in Chapter Four, the research participants on many occasions mentioned that the behaviour of the state police, inspection bodies and local administration effectively discouraged them from participation in the scheme. The performance of these institutions is determined to a large extent by the culture of their staff. Implementing agencies employ personnel they used to employ, and following statements made by the research participants, these personnel struggle with understanding the requirements of the new tasks. The 'old staff' often find it difficult to abandon their habits deeply rooted in the specificity of the previously ruling communist regime, or the chaos that followed its collapse. These habits manifest themselves in the lack of professionalism or disrespectful approach to applicants.

The police were described as reluctant and ill-informed, inspection bodies as excessively strict, and local administration bodies as counterproductive, unprofessional, and disinterested. Many participants withdrew from the schemes or expressed strong concerns about joining as a result of the perception that the performance offered by those agencies was unsatisfactory. The Geographical Indications department in the Ministry of Agriculture on the other hand is seen as open and modern due to the fact that it is predominantly manned by a younger generation of officials whose work ethic has not been shaped by the difficult past.

Another aspect of the influence of national agencies on effectiveness is their availability to the interested parties. Participants, as demonstrated in the research section, clearly expressed an expectation to bring the first point of contact about the quality schemes closer to them. According to Elmore<sup>493</sup> the most effective means of reaching the point of contact ought to be established and the point of contact should be allocated with appropriate resources.

In the current Polish implementation, this point of contact is the Ministry, not a local administration or even an NGO. Only a small number of agricultural

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<sup>493</sup> Elmore (n 221)

producers bring themselves to the point where they overcome apprehensions and approach government officials directly. They feel much more comfortable with local representatives with whom they deal on an everyday basis.

Since producers find it difficult to approach the Ministry, perhaps the Ministry could approach them instead. Shortly after the introduction of the food quality schemes, such direct actions were conducted by ministerial officials. Interview participants claimed, that they have become less frequent. Perhaps continuation of such activities could boost the overall performance of the schemes and increase the number of applications, especially since benefits stemming from participation do not constitute an incentive. Hence if the point of contact does not serve its purpose the question may be asked: Where has the mistake been made? Was the point of contact inappropriately chosen or did it lack resources to fulfill its tasks.

Chapter One surveyed legal scholarship recognising the role of national courts as guardians of enforcement of EU law.<sup>494</sup> Such courts were considered to be vital for effectiveness, as they are able to submit preliminary questions. They are not obliged to raise an issue concerning a breach of the provisions of Union law, where such an action would go beyond the prerogatives of the court.<sup>495</sup> They also hear the claims submitted by individuals who are deriving their rights from the direct effect of Union legislation.<sup>496</sup>

Political perception, presented in Chapter Two, on the other hand sees weaknesses of the national courts in the field of enforcement. The research also reflected on the role of courts in effectuating law. Courts are seen, especially by lawyers, as guardians of legal order. The empirical research indicates that courts do not seem to play that part. Following<sup>497</sup> Cohen, the role of courts in rendering the law effective is usually overestimated. Courts play their part only in the last stage of effectuating the law, and only when clear ineffectiveness in

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<sup>494</sup> Barnard (n 7)

<sup>495</sup> Snyder (n 73)

<sup>496</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 13, Hinton (n 20)

<sup>497</sup> Cohen (n 187)

the form of infringement has already occurred. This concept has been confirmed by the research. None of the research participants mentioned courts as responsible, involved or even needed, in the process of giving effect to law. For the participants, prevention was much more important than the possibility of seeking justice after the violation took place. Therefore the occurrence of infringement is already seen as a severe malfunction of the scheme, and the necessity to engage courts only proves that the system is poorly managed. In Poland, where cases of food quality law abuse are numerous, courts have not been involved in any dispute resolution. Participants in the schemes do not see this way of bringing transgressors to compliance as worth pursuing. They expect law enforcement bodies to take immediate action when violations occur. Having said that, the importance of a well-functioning enforcement system, backed by the compliance of enforcement agencies, is very high. Those who are guardians of the law must first be well-acquainted with the purpose and means of enforcement. The non-compliance of enforcement agencies renders the schemes vulnerable. A system where guardians are weak may easily fall apart or even stop functioning.

#### **2.4. obstruction by the national law**

The dedication of implementing agencies to their tasks may sometimes be obstructed by national law itself. For example IJHARS (the major national control body), despite being the main control body, is not endowed with the authority to control the situation in local markets. Its actions are limited to shops and restaurants. Traders who sell their products in such markets can be brought to compliance by the state police using appropriate legal provisions, city guards, or veterinary inspections. It should be added that in Poland, owing to business barriers to entry, regional and traditional products are mostly sold in such local, open markets, rather than in big chains or even grocery shops. Hence when the institution legally endowed with responsibility to be the guardian of the system cannot act in places where the system most commonly operates, it cannot remain indifferent to the effectiveness of the system. Therefore, the removal of such constraints can only benefit the scheme,

especially since the most commonly occurring acts of counterfeiting happen where the authority of the inspection fails to reach.

The importance of the commitment of any enforcement agency is unquestionable. Almost every research participant referred to it as the major issue hampering the effectiveness of the schemes.

## **2.5. malfunctioning benefits**

In Evan's<sup>498</sup> conditions for effective legislation, presented in Chapter Two, compliance should be rewarded. This claim cannot be more fitting as far as voluntary schemes are concerned. Benefits attract participants. Such benefits may take a variety of forms: financial support, prestigious awards or mixed. It is important for the legislator to foresee what kind of benefits will be the most attractive, and how they can be provided. Registration may prove to be beneficial if the registered products get market recognition and begin to be purchased by interested consumers.

In Poland most of the interviewed producers admitted that registration improved the market recognition of a product, but financial benefits were much lower than expected. Firstly, financial benefits which can be granted to products bearing PDO or PGI logos are not foreseen for all products' types. These benefits can only be granted to produce, that is non processed products; producers of processed foodstuffs are not entitled to apply for money. Secondly, financial support and other benefits offered by the local administration is the same for products registered under national law and products' names registered under EU law. Those who decided to participate in the Union food quality schemes are in principle treated equally with those who decided to join national food quality schemes. Bearing in mind that participation in the Union schemes involves much more effort than participation in the national scheme, and is, contrary to participation in the national scheme, burdened with financial outlay, there is in the eyes of

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<sup>498</sup> Travers (n 188)

producers a lack of distinction in the derived benefits from the two schemes which renders the effort unnecessary. The existence of two quality schemes in one area does not seem to be wise. These systems, even though legally different, are perceived to be competing, as promising similar benefits. In consequence the scheme which is less demanding is growing.

Here clearly the national law diminishes the effectiveness of the quality regulations by:

- introducing a national food quality scheme which, despite initial assumptions, turned out to compete with the Union schemes; and
- creating unnecessary differences between participants in the Union schemes and introducing a unified approach to participants in national and European schemes.

Hence not only are mere benefits important but also such benefits that remain in proportion to the effort put into the application process. If the benefits do not offset engagement compliance and effectiveness may be weakened.

## **2.6. final recipients**

Producers themselves also negatively influence effectiveness. The specificity of the schemes is such that they have been designed for groups. In Poland producers do not have one representative with whom they would all agree. The closure of the AgroSmak foundation was repeatedly mentioned as a huge loss to the scheme. Not only did AgroSmak represent interested producers but also sponsored the preparation of applications.

When producers need to act solely on their own initiative the number of application requests visibly drops down. If farmers in Poland abandon their old habits and apprehensions, they will be able to derive much more from these collective schemes.

This finding confirms that a system that has been designed for a group does not work effectively for a single person. It also supports the bottom-up suggestion that the final recipients of a programme matter for its effectiveness, which is why they should be included in the implementation study in the same way as policy-makers.

### **3. Summary of conclusions**

Having presented the findings it is time to summarise the analysis. This research has revealed a number of issues that influence the effectiveness of EU law and the effectiveness of the food quality schemes at Member State level.

The doctrine of EU law seems not to have developed with the Union and seems not to tackle the new challenges which this law faces today. The EU and EU law have grown in size, and the EU gets bigger and the law covers more and more different areas. In addition, EU law is now present in 27 Member States of vastly different legal traditions, which renders its application more and more complicated.

Compliance with EU laws and policies does not guarantee their effectiveness anymore. Most of the EU supervisory mechanisms tend to focus on correctness of legal implementation, leaving political implementation unattended.

The concept of direct applicability of regulations seems to draw scholars' attention away from this particular source of EU law. Direct applicability does not guarantee effectiveness. On the contrary it may, due to a lack of strong control mechanisms over regulations blur the perception of their actual functioning at the Member State level.

The ever-growing bulk of EU law may lead to situations where EU law conflicts with EU law or EU norms will merely be hampered by national norms whilst no conflict occurs between them. There have to be mechanisms in place which allow problems be to resolved where the proper functioning of EU

programmes is prevented or obstructed by national norms that do not remain in direct conflict with Union law.

The implementation theories developed within the political science are, with adjustments, applicable to the EU context. For example, the importance of implementing agencies has been confirmed, but the definition of implementing agencies should also cover EU officials, not just the actors who are responsible for national implementation.

The exercise aimed at combining the two approaches to implementation described in Chapter Two, that is the top-down and bottom-up approaches, has proven to be appropriate where investigation of the implementation gap in the voluntary programme is concerned. In short, the top-down approach focuses on the legal statute and policy designers as the central actors in orchestrating and influencing the process of policy formulation and implementation. On the other hand, the bottom-up approach emphasises the role of the programme final recipients and service deliverers, which in the vast majority of cases is the local administration.<sup>499</sup>

Final recipients are important because whenever on a programmes' participants compulsory measures securing effectiveness of the system cannot be imposed, policy-makers lose their authority to exclusively influence the outcome of the programme on the ground. This means that the effectiveness study should not be restricted to actors who have limited ability to influence the final outcome, but rather should be expanded to embrace all participants with decision-making powers. What is more, in the case of voluntary schemes, the concept of policy makers, should be modified into a concept of policy influencers, that is, all those who have a decisive impact on the outcome of the programme regardless of their authority to impose or enforce certain behaviour on others. The role of legal statutes, so important for the top-down theories, cannot be neglected. The legal statute itself may contain provisions which either weaken effectiveness, or

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<sup>499</sup> Matland (n 228)



as in the case of the food quality regulations may be lacking provisions which enhance effectiveness.

Political sciences also strongly advocate the need for evaluation of a programme. Evaluation is an effort to “make sense of what is happening”.<sup>500</sup> Only a deep and robust evaluation of empirical effectiveness of EU regulations allows an assessment of the actual shape and condition of the law. Such an evaluation may also serve to underpin future recommendations for the evaluated programme and constitute a point of reference for further comparative studies.

Investigation of the food quality programmes has shown that for the improved effectiveness of EU policies, understanding of the programmes’ specificity by their addressees and implementers is vital. Also, if possible, policy-makers should be able to secure benefits that will follow participants’ efforts to join and stay with the schemes. Moreover, lack of responsibility for keeping the name alive under the threat of losing the registration could be foreseen. Currently, situations are common in which the registered names appears in the DOOR database but are not in use.

### **3. Recommendations**

In the end the success or failure of the food quality schemes depends on the will, attitudes and behaviour of those for whom the schemes have been created. Food producers or food processors should be made the centre of attention by all legal and political agencies – as data show. And not only should these producers or processors be fully supported by each and every implementing agency, but they should also be able to derive benefits from their access to the schemes.

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<sup>500</sup> Pressman (n 205), Goggin (n 207), Bardach (n 138)

Member States can always consult the Commission if there is any doubt as to whether a national measure conflicts with Union law.<sup>501</sup> National agencies should evaluate the situation on the ground as they have the best access to information, the best resources and the best understanding of it, and whenever in doubt they should seek help from the Commission. In Poland the most pressing concern is the creation of a system of benefits which will incentivise participation in the Union schemes and which will effectively offset some of the incurred costs related to participation.

At the Union level, the system of geographical indications could benefit from bringing it closer to other areas of IP law, especially trade marks. The responsibility of the entitled user of a trade mark for using the mark prevents the trade mark system from becoming fictitious. In the case of PDOs and PGIs even if there are no products behind the registered name, the name is still protected and it cannot be used by others. This situation may constitute a distortion of competition by creating a barrier to market entry, and it also undermines the credibility of the system as a whole.

In addition, the solution may be the revival of the instrumentalist approach to law, where law is treated more as a tool in the hands of legislators, through which certain social changes are to be achieved. This again requires a certain level of *a priori* consideration of how new laws and political programmes could be made more effective.<sup>502</sup> An analysis from the standpoint of jurisprudence seems to be very relevant to the current state of EU legislation. The significant bulk of EU law is designed to implement EU policies rather than to regulate the conduct of citizens. For example, directives are addressed to Member States and are binding as to the final result, but the modalities in which Member States are going to achieve the aim depends on the Member States' choice. Regulations or directives are different in terms of discretion granted to Member States when they are implementing them. The relevance of this theory to EU affairs goes further. Both regulations and directives usually

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<sup>501</sup> Lang (n 39)

<sup>502</sup> K. Van Aeken (n 184), Wintgens (n 191)

include provisions for the Member State as well as for individuals, while courts remain at the end of the implementation chain. They come into play when either a Member State fails to implement legislation or an infringement by a Member State or individuals occurs.

The food quality regulations have also been examined by the European Commission in its 'Impact Assessment' as well as by the European Court of Auditors.<sup>503</sup> Both studies were focused on rendering the schemes more effective and investigated the schemes' weaknesses. They involved a close reading of the wording of the regulations and their implementation at the Member State level, in an effort to propose remedies.

The study conducted by the European Court of Auditors included two Directorates Generals of the Commission and the responsible services in Member States. The data was gathered by means of documents' analysis, surveys and interviews. The PDO/PGI/TSG producers were not covered by the study. The Commission on the other hand targeted the final recipients of the scheme, but the methodology of the Commission's research was not particularly clear. In addition the Commission might not have been fully objective while processing the data, as the Commission was one of the actors whose performance exerted an influence on the success or failure of the schemes. In other words the Commission acted as a judge in its own case which may have made it susceptible to bias.

Interestingly none of the aforementioned studies examined the number of certificates of conformity with the specification behind the registered names, as a result information on how many registrations remain fictitious remained lacking.

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<sup>503</sup> EC Staff Working Paper, 'Impact Assessment Report on Geographical Indications – Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes' Brussels, 2010  
European Court of Auditors, 'Do the Design and Management of the Geographical Indications Scheme Allow it to be Effective?' Special Report No 11, Luxembourg, 2011

There is still room for research in the form of an independent case study, which is able to devote more attention to producers and products. Moreover such research thanks to its focused character can apply more time consuming methods, including semi-structured interviews, difficult to employ in a large-scale project. Semi-structured interviews have the potential to probe tacit knowledge, impossible to extract from e.g. surveys, and can help to answer the question ‘why’ and not only provide information on ‘what is’.

It needs to be mentioned that there is a vast oeuvre of academic studies devoted to the implementation of the law on Geographical Indications in developing countries.<sup>504</sup> Due to regulatory differences it goes beyond this research project to discuss them in detail. Further research concerning the effectiveness of food quality schemes would however greatly benefit from comparative legal studies of the Union regulations and the law of geographical indications from non-EU countries. Knowledge about other regulatory solutions would also allow for better judgement in the appropriateness of mechanisms available within the European Union.

On the date of the 1<sup>st</sup> of February 2012 the DOOR database, where all the applications for PDO, PGI or TSG protection are listed, did not show any new applications for registration from Poland since June 2011. The state of play was 33 registered products, and there are three products published and waiting for registration. Considering the eight years in which Poland has been a member of the Union, the size of the country (population: 38 million) and its highly agricultural character, these 33 registered products do not amount to a spectacular success for the food quality policy on the ground. For the sake of

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<sup>504</sup> Exemplary literature: J. Hughes, ‘Coffee and Chocolate—Can We Help Developing Country Farmers through Geographical Indications?’ International Intellectual Property Institute (2009) Washington DC; S. Reviron, E. Thevenod-Mottet, and N. El Benni, ‘Geographical Indications: Creation and Distribution of Economic Value in Developing Countries’ NCCR Working Paper No 2009/14, March 2009; D. Rangnekar, ‘Geographical Indications and Localisation: A Case Study of Feni’ (2009) ESRC Report; P. Van de Kop, D. Sautier, A. Gerz (eds.) *Origin-Based Products: Lessons for Pro-Poor Market Development* (KIT, Amsterdam 2006); M. Blakeney, T. Couillet, ‘The Protection of Geographical Indications (GI): Generating Empirical Evidence at Country and Product Level to Support African ACP Country Engagement in the Doha Round Negotiations’ 9 ACP RPR 140 - 011-10, Mid Term Progress Report, March 2011

comparison the Czech Republic (population: 10.5 million) had 31 registered products, one published, and three which have applied for registration; Slovakia (population: 5.5 million) had 13 registered products, with one published.

In the case of Poland, protection of the name only partially serves the purpose. The scheme attracts certain attention, and the number of registered names is slowly growing. The vast majority of registered products come from rural, sometimes less-favoured and mountainous areas. Selected products with registered names that have gained in recognition thanks to registration and which in the longer run may also be translated into higher profit margins.

Compliance with the *aquis communautaire* remains in general a contentious issue and not just because of the administrative complexity of the Union, which currently comprises 27 Member States. A part of the problem lies in the size of the body of legislation. According to a September 2007 Commission Communication on applying Union law, EU institutions have issued over 9000 legislative measures, 2000 of which are directives requiring between 40 and over 300 measures for transposition into national and regional legislation. Therefore, as stated in the communication, “All EU institutions have an interest in the application of Union law. Assessing how laws are being applied is an important input into the policy-making cycle. Discussions [...] on the impact of Union law, its implementation, management and enforcement, and analysis of the root causes of problems, can enrich policy assessment and development.”<sup>505</sup>

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<sup>505</sup> Commission of the European Communities. Communication from the Commission, A Europe of results – Applying Community Law COM (2007) 502 final, Brussels, 5 September 2007

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