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CONSTITUTIONAL CHANGES AND ENFORCEMENT OF SAA IN THE WESTERN BALKANS: COMPARATIVE EXPERIENCES WITH THE EUROPE AGREEMENTS

INTRODUCTION

With the initiation of the Stabilisation and Association Process in the Western Balkans, the EU formulated a new generation of association agreement with the States of this region.[1] The Stabilisation and Association Agreements ("SAAs") form an integral part of the process, providing the main legal basis of relations between the Union and the relevant (potential) candidate country. The scheme and contents of the SAAs were largely inspired by and founded upon the earlier Europe Agreements ("EAs") with ten Central and East European countries ("CEECs").

These EAs were, in large part, novel creations to deal with the novel situation of the collapse of the Communist regimes and the (re-)birth of democracies wishing to "return to Europe." It was clear to the then European Communities that the CEECs' road to membership was likely to be longer than previous

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[1] On the issue of enlargement, see generally, A.F. Tatham, ***Enlargement of the European Union***, Kluwer Law International, Alphen aan den Rijn (2009).

accession rounds with the result that, while the enlargement process underwent development and re-orientation, the EAs remained solidly at the centre of the process providing it with an immutable legal basis.

In this context, the CEECs would be under pressure – in the time leading up to membership – not only to adopt and implement EU law but also to enforce it. Thus harmonisation of a CEEC's laws and legal system to the Union carried with it an implicit recognition that national administrations and judiciaries would be under some sort of an obligation gradually to align their practices with those of the EU, pending accession.

However, this need to ensure homogeneity in the enforcement of the acquis in the Union and in the candidate countries proved to be a relentless and seemingly irresolvable problem of the pre-accession period. With limited Treaty-based provisions in the EAs actually requiring homogenisation, experience of the CEECs in the 1990s and early 2000s brought to light difficulties their courts faced in trying to apply the ***acquis*** before accession, which in many ways may be played out again as the States of the Western Balkans edge towards EU membership.

The aim of this paper then is to analyse various decisions of national constitutional courts in the CEECs concerning the provisions of their EAs with the EU. In highlighting this experience, it is hoped to shed some light on the situation that Western Balkan courts will face with respect to the judicial enforcement of various provisions of the SAAs in the period before joining the Union. In order to underline the relevancy of this thesis, the present author has taken the example of the SAA signed by the EU, its Member States and Serbia which is currently undergoing ratification.[2]

However, the context of this work requires first a brief appraisal of the obligation of judicial co-operation that is incumbent on Member State courts to enforce EU law and protect rights deriving from it in cases before them. This will then be followed by a discussion on the homogeneity provisions in the EAs and a comparison with those in the EU-Serbia SAA. The following section focuses on certain cases brought before CEEC constitutional courts regarding their respective EAs, and the work will conclude with a discussion

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[2] Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part: COM(2007) 743.

on the possible constitutional implications of the SAA for Serbia in the light of CEEC experiences.

The EU context of judicial co-operation in ensuring enforcement of EU law in the Union

The success or otherwise of the Internal Market and EU law generally is dependent on national judicial and administrative systems. The support and co-operation of national authorities, including courts,[3] is indispensable since much EU law is applied at national level. Put simply, the Union legal order would be instantly deprived of its ***sui generis*** characteristics[4] were support from national institutions, including, and perhaps especially, courts, to be withdrawn. Article 4(3) TEU provides a basic statement of the obligations undertaken by Member States towards the Union:[5]

Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and shall refrain from any measure which could jeopardise the attainment of the Union's objectives.

The obligations in Article 4(3) TFEU are binding on Member States and consequently on all national authorities, whether they are executive, legislative or judicial.[6] The fact that the executive represents the Member State vis-à-vis the Union institutions does not free the legislature or judiciary from their obligations to respect and execute Union law: this is so even, if, according to their respective national constitutions they are independent and sovereign.[7]

Article 4(3) TEU obliges national courts effectively to protect the rights of individuals and companies deriving from EU law. In fact, the principles of

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3 Case 103/88 ***Fratelli Costanzo v. Comune di Milano*** [1989] ECR 1839.

4 On these points generally, see A.F. Tatham, ***EC Law in Practice: A Case-Study Approach***, HVG ORAC Lap- és Könyvkiadó, Budapest (2006), chapters 1-3, at 1-147.

5 Article 4(3) TEU was previously numbered Article 10 EC and originally numbered Article 5 EEC.

6 On this see Tatham (2006), at 96-97; and J. Temple Lang, Community Constitutional Law: Article 5 EEC Treaty, (1990) 27 ***CML Rev***. 645.

7 Case 167/73 ***Commission v. France*** [1974] ECR 359.

direct effect and primacy, created by the European Court of Justice ("ECJ"), have become part of a bolder and more ambitious principle of "effectiveness" which encapsulates the notion that EU law should confer rights plus remedies to render real the practical enjoyment of those rights.[8]

JUDICIAL ENFORCEMENT OF THE EUROPE AGREEMENTS

General duty to try and harmonise the law

Before addressing the requirements of homogeneity in the EAs, it is valuable to begin with a short discussion of the main legal bases for harmonisation of laws that were contained in the EAs. These clauses put the CEECs under a general duty to try and harmonise their laws which duty, with the passage of time, evolved into a strictly enforced pre-accession criterion.[9] Despite there being various clauses for harmonisation scattered throughout the EAs, the basic requirements were found in two Articles under a separate chapter heading. In the EC-Hungary EA,[10] these were found in Title V, Chapter III on "Approximation of Laws." According to Article 67 EA:

> The Contracting Parties recognise that the major precondition for Hungary's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Hungary shall act to ensure that future legislation is compatible with Community legislation as far as possible. [Emphasis supplied.]

The same provision in the EC-Poland EA[11] stated that Poland "shall use its best endeavours to ensure that future legislation is compatible with Community legislation." This so-called "endeavour clause"[12] became much

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8 A.F. Tatham, Restitution of charges and duties levied by the public administration in breach of European Community Law: a comparative analysis, (1994) 19 ***EL Rev***. 146; A.F. Tatham, Judicial review as effective protection of Community rights, (1995) 36 ***ZfRV*** 15.

9 Tatham (2009), chap. 8, 193, at 228-299.

10 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part: OJ 1993 L 347/2.

11 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part: OJ 1993 L 348/2.

12 Tatham (2009), at 344-345.

more precise and definite in Article 69 of the EAs later concluded with the Czech Republic[13] and Slovakia[14] wherein it provided that "its legislation will be gradually made compatible with that of the Community." The wording used in the Czech and Slovak EAs became the standard formula for all the remaining EAs and the new wave of SAAs with the Western Balkan States. The endeavour clause did not, per se, amount to a general obligation to harmonise within a defined period, merely underlining its importance in the integration process: it had to be read with other documents to be fully understood in a changing context from association to pre-accession to negotiation and with it the concomitant condition of EU membership to accept the entire ***acquis***.

BASIC ELEMENTS OF THE EUROPE AGREEMENTS ON ENFORCING EU JUDICIAL PRACTICE

Judicial capacity to apply the ***acquis*** is a core element in the preparation for accession and a central factor for the success of the enlargement process;[15] in fact, it has been a constant issue since the formulation of the Copenhagen criteria for membership of the EU.[16]

The Union had to propose a way to try and ensure conformity in judicial practice before accession while respecting the individual constitutional set-ups of the CEECs. In the absence of an equivalent to Article 4(3) TEU, the EU however could only make relatively weak demands on the CEECs – pending membership – to bring the practice of their courts into line with that of the ECJ and the General Court ("GC").[17] The EAs therefore made relatively little

13 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part: OJ 1994 L360/2.

14 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part: OJ 1994 L357/2.

15 European Commission, European Commission, Communication, The Action Plans for administrative and judicial capacity, and the monitoring of commitments made by the negotiating countries in the accession negotiations: COM(2002) 256 final, at 3.

16 Tatham (2009), at 206-236.

17 Before the entry into force of the Lisbon Treaty, this institution was known as the Court of First Instance.

(implicit) recognition of the "harmonising" of third-State judicial practice to that of the EU, more particularly to the European courts' judicial practice.

There were, however, certain exceptions to this approach, viz. protection of intellectual property rights and competition law, in which CEEC courts were required to follow the practice of the European courts.

Intellectual property rights

In respect of the harmonisation to both European law and practice in the field of intellectual property, the 1991 EC-Hungary EA provided in Article 65 EA:[18] "Hungary shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide … a level of protection similar to that existing in the Community, including comparable means of enforcing such rights."

Article 113 EA stated that within the scope of the Agreement, each Party undertook to ensure that natural and legal persons of the other Party had access free of discrimination in relation to its own nationals "to the competent courts and administrative organs of the Community and Hungary to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property."

In a series of Joint Declarations to the respective EAs, the EU and the associated State agreed that – for the purposes of the EA – the term "intellectual, industrial and commercial property" was to be given a similar meaning as in Article 30 EC (now Article 36 TFEU). It would therefore seem that third-State courts and authorities were to take account of the "substance" of European law in their rulings on the rights concerned,[19] irrespective of when the European IPR secondary legislation came into force or of when the ECJ ruling on the interpretation of the Article 30 EC (now Article 36 TFEU) wording occurred. In other words, future jurisprudential development by the ECJ could not be excluded which meant that CEEC courts would be bound to follow such case-law without any temporal limits.

But requesting accession State bodies to take an ECJ ruling "into account" – especially where this had not been translated into the domestic language and

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[18] Similar provisions were contained in all EAs.

[19] A. Evans, Voluntary Harmonisation in Integration between the European Community and Eastern Europe, (1997) 22 ***EL Rev***. 201, at 204.

might thus not have had any binding effect in that third State – ultimately proved insufficient to render a "level of protection similar to that existing in the Community." This was particularly true in respect of Regulations (only directly applicable in the EU) and Directives (also only of direct/indirect effect post accession) as interpreted by the ECJ. In truth, what was missing was a provision similar to Article 4(3) TEU on Union loyalty as mentioned above.

Competition law

In respect of European competition law, the EAs provided for use of the European courts' case-law in applying the relevant Treaty Articles. Again, according to the EC-Hungary EA, Article 62(1) EA, anti-competitive practices, abuse of dominant position and state aids were incompatible with the EA in so far as they affected trade between both parties. Article 62(2) EA provided: "Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 EC [now Articles 101, 102 and 107 TFEU]." In this way, the EU attempted to bind national courts and competition authorities in the CEECs to applying not only Treaty provisions but also their European judicial interpretation (both past and future European courts' decisions as there was, yet again, no time limit defined as to which judgments were to apply).

Comparing enforcement of EU judicial practice in the SAAs

With respect to judicial enforcement, the EU-Serbia SAA is largely cast in the mould of the EAs but with some important innovations. In this sense, the endeavour clause of Article 72(1) SAA has been revamped and includes express reference to implementation and enforcement:

The Parties recognise the importance of the approximation of the existing legislation in Serbia to that of the Community and of its effective implementation. Serbia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community ***acquis***. Serbia shall ensure that existing and future legislation will be properly implemented and enforced.

Requirements similar to the EAs in the field of the protection of intellectual, industrial and commercial property rights are provided in Article 75(3) SAA but now includes "effective means of enforcing such rights" rather than the earlier "comparable means." The relevant competition provision, Article 73(2) SAA, follows those of the EAs but with some changes:

Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty [now Articles 101, 102, 106 and 107 TFEU] and interpretative instruments adopted by the Community institutions.

Thus while extending the field of application of ECJ case-law to Article 86 EC (now Article 106 TFEU) on commercial state monopolies, the SAA expressly permits the courts and competition authorities in Serbia to use such "interpretative instruments" as Notices from the European Commission related to the practice in particular matters of EU competition law.[20]

Under Article 126 SAA, it is provided that – within the scope of the SAA – natural and legal persons of the EU and Serbia shall be ensured access, free of discrimination in relation to their own nationals, to the other Party's competent courts and administrative organs so that they can defend their individual and property rights. Unlike the EC-Hungary EA, however, reference is not specifically made to the protection of intellectual property rights.

Despite these basic similarities between the SAA and the EAs, there are some novel aspects of the SAA concerning judicial enforcement which did not appear in the EAs. For example, Article 126 SAA is subsequently complemented by a sort of "Union loyalty-lite" clause in Article 129(1) SAA, according to which: "The Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall ensure that the objectives set out in this Agreement are attained." While this is only a somewhat pale reflection of the wording of Article 4(3) TEU (there is no prohibition on measures imperilling the attainment of the aims of the SAA), nevertheless it marks a distinct step forward in ensuring Serbian judicial and

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[20] See, e.g., European Commission, Notice on co-operation within the Network of Competition Authorities: OJ 2004 C101/43, European Commission, Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC: OJ 2004 C101/54; European Commission, Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty: OJ 2004 C101/65 European Commission, Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty: OJ 2004 C101/65; and European Commission, Notice on informal guidance relating to novel questions concerning Arts. 81 and 82 of the EC Treaty that arise in individual cases (guidance letters): OJ 2004 C101/78.

administrative compliance with EU law (and the interpretations given it by the European courts in the intellectual property and competition sectors).

Although the precise impact of this clause in practice remains to be clarified in case-law, if taken together with Article 126 SAA and based on the practice of the ECJ discussed earlier, the Serbian courts are enjoined – under express provisions of an international treaty – to follow and apply the developments in European court rulings in intellectual property rights protection and in competition law, without any temporal limit. It is a much stronger requirement that under the EAs, European judicial decisions are not just mere tools for interpretation but, it could be argued, are now binding on the Serbian courts. In the light of such argument, the cases presented below must be cautiously viewed in the light of these new judicial enforcement provisions in the SAA.

QUESTIONING THE CONSTITUTIONALITY OF THE EAS

Introduction

The actual constitutionality of the EA was considered pre-ratification by the Slovene Constitutional Court and led to the State's first amendment to the 1991 Constitution, while its Hungarian counterpart considered the issue only post-ratification and entry into force. It is to this latter case that this work will now turn.

Hungary

The judgment of the Hungarian Constitutional Court in Dec. 30/1998 (VI.25) AB[21] highlighted the constitutional implications of applying EU law in the domestic system of an Associate State. Most CEECs had already accepted – without demur – the infringement of sovereignty entailed by the EA competition provisions solution and its concomitant implementing Association Council Decision,[22] but this was not the case with respect to

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21 ABH 1998, 220. A full discussion of the implications of the Decision for Hungary, in particular the Constitutional Court, can be found in J. Volkai, The Application of the Europe Agreement and European Law in Hungary: the Judgement of an Activist Constitutional Court on Activist Notions, ***Harvard Jean Monnet Working Paper*** No. 8/99:http://www.law.harvard.edu/Programs/JeanMonnet/papers/99/990801.html.

22 For example, as required in EC-Hungary EA Art. 62(3) to implement paragraphs (1) and (2).

Hungary. The private petitioner in this case was able to challenge the EA and the Association Council Decision because the Court had already decided, in Dec. 4/1997 (I.22) AB,[23] that an individual had standing to seek constitutional review of the national legal rules which had implemented the European provisions into the Hungarian system.

Challenge to constitutionality of EA and related EC rules

Decision 30/1998 (VI.25) AB concerned a constitutional challenge of provisions of both the EA[24] (in the form of its transforming statute[25]) and Association Council Decision 2/96[26] (in the form of national implementing rules in an executive decree:[27] the "Implementing Rules" or "IR").[28] The relevant contested provisions were Article 62(2) EA (quoted earlier) together with (i) Article 1 IR which provided that anti-competitive practices that might affect trade between Hungary and the then EC were to be settled according to the principles in Article 62(1) and (2) EA for which purpose, these cases were to be dealt with on the Hungarian side by the Office of Economic Competition ("OEC"); and (ii) Article 6 IR, according to which, in applying Article 62 EA, the OEC was to ensure that the principles contained in the block exemption Regulations in force in the EC were applied in full.

In its ruling, the Constitutional Court held that, in execution of Article 62(1) and (2) EA under the national transforming statute, it was a constitutional requirement that the Hungarian law-applying authorities (i.e., the OEC) might not directly apply the application criteria referred to in Article 62(2) EA, but rejected the submission seeking the annulment of this latter provision. Nevertheless it did find Article 1(1) and (2) IR and Article 6 IR unconstitutional[29] on the grounds, inter alia, that a separate constitutional

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23 Dec. 4/1997 (I.22) AB: ABH [Alkotmánybíróság határozatok, Constitutional Court Decisions] 1997, 41.

24 Article 62 EA.

25 Act I of 1994: Magyar Közlöny [Hungarian (Official) Gazette] 1994/1, 1.

26 Decision 2/96 of the EC-Hungary Association Council: OJ 1996 L295/29.

27 Contained in Government Decree 230/1996 (XII.26) Korm.: Magyar Közlöny 1996/120.

28 A.F. Tatham, Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court (1999) 48 *ICLQ* 913.

29 The effect of its Decision was suspended until 31 December 1999. According to Act XXXII of 1989 on the Constitutional Court (as amended), s. 43(4), the Court may exercise its discretion and determine the date of the abrogation of the legal norm or its

authorisation would have been necessary to permit limitations of Hungarian sovereignty and accordingly allow the OEC to apply the European competition legal criteria (effectively foreign norms of a public law nature) in proceedings before it.

Reasoning

The main body of the Decision revolved around three, interlinked themes: (a) the mode of reference to EC competition criteria; (b) the temporal effect of such criteria; and (c) the territorial effect of such criteria and the constitutional requirement of democratic legitimation. These will now be dealt with in turn.

Mode of reference to EC competition criteria

According to Article 62(2) EA and Article 1 IR, the OEC had to take into account in proceedings before it the criteria deriving from application of Articles 85 and 86 EC (now Articles 101 and 102 TFEU). Yet it was the very fact that the relevant criteria appeared only by way of reference which prevented their application in Hungarian law.[30] Such reference was to internal legal rules and to the legal practice of internal fora (European Commission, GC, ECJ) of another subject of international law. Thus the European competition criteria were to be applied in OEC (and court) proceedings, without ratification and incorporation or transformation and promulgation in a domestic legal rule; this was necessary for the internal assertion of international treaties in accordance with the Hungarian Constitution, Article 7(1) of which provides: "The legal system of the Republic of Hungary shall accept the generally recognised rules of international law and shall further ensure the harmony between domestic law, and the obligations assumed under international law."

According to the Court, the second clause of Article 7(1) did not constitute a constitutional basis for the challenged provisions precisely because such regulation was based on reference alone,[31] nor did it amount to abstract and

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applicability in a given case in a different manner than that already described if justified by a particularly important interest of legal certainty or of the person who initiated the proceedings.

30 Decision 30/1998 (VI.25) AB: ABH 1998, 220, Part IV.2-3.

31 The matter would therefore have been different if the EA or IR had laid down the respective criteria. Such criteria in the ***acquis***, ECJ rulings as well as EC legal

general transformation under the first clause since the European competition criteria amounted neither to generally recognised rules of international law nor to ***ius cogens***.

Temporal effect of the competition criteria

The obligation undertaken in Article 62(2) EA, according to the Court,[32] (Part V.1), was not limited to the criteria for application already subsisting at the time of signature of the EA.[33] In other words the OEC was required to apply criteria emerging in European law and practice after the signing of the EA. The provisions of legal rules resulting in direct domestic assertion of EC criteria to be generated in the future were unconstitutional, since the source of such criteria was not the legitimate Hungarian public power vis-à-vis the Constitution or any of its organs. In other words, in the absence of the constitutional (parliamentary) basis for legitimation, post-EA conclusion European competition ***acquis*** could not be applied directly by the OEC (although indirect application was possible, as will be discussed later).

Territorial effect of the EC competition criteria and democratic legitimation

The Court considered these competition criteria as foreign law with respect to its application in Hungary which was not yet an EU Member State. The legal relationship of public law and authority, of which the sphere of the prohibition of unfair competition (like criminal law) formed a part, was directly connected to national sovereignty and belonged to the exclusive jurisdiction of the State. This exclusivity was intimately connected with territoriality – within its own jurisdiction, the State might dispose of its powers within the framework of its international relations. In the course of conducting such relations, there existed the natural consequence of limitations on sovereignty occasioned by undertaking international obligations. In this area the power of Parliament was not an unlimited power and had to be exercised in accordance with the Constitution.

On the issue of sovereignty, the main provisions were set out in Constitution Article 2(1), "Hungary shall be an independent, democratic state under the

provisions, had already been incorporated to some extent in the Hungarian Competition Act, Act LVII of 1996 (Magyar Közlöny 1996/56, 3498).

[32] Decision 30/1998 (VI.25) AB: ABH 1998, 220, Part V.1.

[33] The EA and IR contained no provision limiting the temporal effect of the application of the EC competition criteria.

rule of law," while under Article 2(2), "all power is vested in the people, who exercise their sovereignty through elected representatives and directly." The Court noted that one of the requirements of a democratic state under the rule of law, based on the sovereignty of the people, was the fact that state power might only be exercised on the basis of democratic legitimation. All norms of public law enforceable against subjects of domestic law were to be based thereon. Exercise of power by the State was subject to such a requirement in respect of both internal and external activities. As a result, as with the present case, unless Parliament had express constitutional authorisation, it was constitutionally not entitled to infringe the principle of territoriality in the frame of an international treaty (the EA and IR) in a legal field, however narrow and strictly circumscribed, belonging to the exclusive jurisdiction of state supremacy.[34]

Democratic legitimation imposed the requirement (in respect of legal norms to be applied in Hungary) that their creation be attributable to the ultimate source of domestic public power. In the present case, it was clearly not possible to trace back to a Hungarian legal source the criteria referred to in Article 62(2) EA and the IR since a concrete and precise state undertaking in an international treaty was quite different from the present circumstance wherein some internal legal areas had been subjected to another system of public power (regardless of its limited sphere of application). A separate constitutional authorisation would have been necessary to permit limitations on Hungarian sovereignty and accordingly allow the OEC to apply the European competition legal criteria (effectively foreign norms of a public law nature) in proceedings before it.

Outcome

Decision 30/1998 (VI.25) AB was read in a way that obliged the Government/Parliament to turn the relevant European competition acquis into domestic sources of law. The creation of a list of competition acquis was mooted in this respect which could then be translated and published in the

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[34] Decision 30/1998 (VI.25) AB: ABH 1998, 220, Part V.2-3. On this point, in support of its contention, the Court cited to Case C-327/91 ***France v. Commission*** [1994] ECR I-3641 at 3678, according to which if the Commission enters into an international agreement with a non-Member State, then it will be reviewable if it produces legal effects. It is to be noted that this is perhaps the first citation to an ECJ judgment made by a Hungarian judicial body.

Magyar Közlöny (the Hungarian Official Gazette), thereby becoming sources of law in the Hungarian system and rendering them applicable by the OEC and ultimately domestic courts. The undertaking of such a task was daunting.[35] The ultimate solution was to replace the 1996 Association Council Decision with another, Association Council Decision 1/2002,[36] implemented into the Hungarian system by a 2002 statute[37] which, inter alia, authorised[38] the government to promulgate by decree, in a specific order, the official Hungarian translation of the European competition norms listed in the Annex (both Regulations and Commission Notices); to act concerning the review of the Annex; and to promulgate by decree, according to the amendments, the official Hungarian translation of the new European competition norms entered in the Annex.

The experience of Hungary in this respect is a salutary lesson in accepting the individuality of constitutional systems and their reaction to the conclusion and enforcement within their territories of association agreements with the EU and related rules. The provisions of the 2002 Act may have been one reason why the Commission Notices were included in the EU-Serbia SAA as an expressly-recognised instrument for interpretation.

Slovenia

Hungary was not alone in experiencing a constitutional moment with respect to its EA. Slovenia[39] too was faced with such an issue, in a Constitutional Court ruling related to the foreign ownership of property and the EA, Case Rm-1/97.[40] The then 1991 Constitution, Article 68 provided that: "Foreigners may not acquire title to land...." However, according to the EA with

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35 However, an attempt at addressing this problem was previously made in the drawing up of 1996 Competition Act which, in certain provisions, amounted to an incorporation of the ratios of some of the leading ECJ judgments in the competition field: A.F. Tatham, European Community Law Harmonization in Hungary, (1997) 4 *MJ* 249, at 262-263 and at 281-282.

36 OJ 2002 L145/16.

37 Act X of 2002: Magyar Közlöny 2002/34/I, 3498.

38 Act X of 2002, section 4.

39 See generally, M. Pogačnik, M. Starman & P. Vehar, Slovenia, A.E. Kellermann et al., ***The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries: Hopes and Fears***, T.M.C. Asser Press, The Hague (2006), 179-187.

40 Opinion of Slovene Constitutional Court, 5 June 1997, Case Rm-1/97: Uradni list RS [Official Gazette of the Republic of Slovenia] No. 40/97. Available at: <http://www.us-rs-si>.

Slovenia,[41] especially Article 45(7c) EA and Annex XIII EA, the Government had committed itself to take the necessary measures: (a) to allow EU citizens and braches of EU companies – on a reciprocal and non-discriminatory basis – the right to purchase property in Slovenia by the end of the fourth year from the entry into force of the EA, and (b) to grant EU citizens (having permanently resided on the territory of Slovenia for three years), on a reciprocal basis, the right to purchase property from the entry into force of the EA. The Government, in the process of EA ratification, sought the opinion of the Constitutional Court as to the constitutionality of the Agreement.

In its Opinion, the Court declared Article 45(7c) EA and parts of Annex XIII EA unconstitutional and held that the Government could not approve any such commitments on behalf of Slovenia under international law as they would contravene the Constitution. Such commitments would be unconstitutional if, by the coming into force of the EA, the EA created directly applicable unconstitutional norms in domestic law, or if it bound the State to adopt any such instrument of domestic law as would conflict with the Constitution. Nevertheless, the Court did indicate that the possible solution would be to adopt a constitutional amendment.

This solution was followed by the Government, leading to the first amendment of the 1991 Constitution by changing Article 68 to read: "(1) Foreigners may acquire ownership rights to real estate under conditions provided by law or if so provided by a treaty ratified by the National Assembly, under the condition of reciprocity. (2) Such law and treaty from the preceding paragraph shall be adopted by the National Assembly by a two-thirds majority vote of all deputies."

In its judgment, the Constitutional Court clearly treated the EA as an international treaty but made a number of points in this respect:[42]

The fulfilment of an international agreement can be realised already by the fact that its provisions pass directly into the internal legal system of the State at the time of the coming into force of such agreement. Such fulfilment takes place in the case if an international agreement has been ratified in accordance

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41 Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part: OJ 1999 L51/3.

42 Opinion of Slovene Constitutional Court, 5 June 1997, Case Rm-1/97, at para. 20.

with the internal legal system of the Republic of Slovenia and if its provisions are, in the nature of the matter, directly applicable (self-executing treaties), for they regulate the rights and obligations of natural and legal persons.

However, if the provisions are not directly applicable, it is necessary, with a view to fulfilling contractual obligations, for appropriate measures to be taken by internal law – the adopting of appropriate legal instruments. From the viewpoint of international law, it is essential that the State fulfil an international obligation, but it is not of importance in what way such fulfilment has been effected (through direct application of provisions of the international agreement in internal law or by the adoption of the necessary instruments of internal law); the manner of fulfilment would only be of relevance to international law in the case if this is expressly provided by the international agreement.

The Court's Opinion in this respect allowed for (1) the possible recognition of certain provisions of the EA having some form of direct applicability;[43] and (2) the need to enact national implementing measures in order to give the EA effect in the domestic legal system.

A further point of interest was raised by in the concurring opinions of Jambrek and Ude, JJ., was the fact that they touched upon the concept of incorporation of the competition ***acquis*** before EU membership. Referring expressly to the Hungarian Constitutional Court, Dec. 4/1997 (I.22) AB, Jambrek, J. stated that the EA transferred sovereignty from Slovenian authorities by forcing the Slovene courts to apply the law and legal principles of the EC, including ECJ case-law. In his view, this type of incorporation would legally mean already being in the same position as the EU Member States but only on "the passive side," rendering this unconstitutional.

[43] This point was subsequently affirmed, by argument ***a contrario***, in Opinion of the Constitutional Court, 21 November 2000, Case U-I-283/00, ***Uradni list RS***, No. 86/2000.

IMPACT OF EU LAW THROUGH CEEC PRE-ACCESSION CONSTITUTIONAL COURT PRACTICE

Introduction

CEEC constitutional courts, when addressing the issue of the enforcement of EU law before accession, generally considered the judiciary to be under a duty to interpret national law – if possible to do so without infringing the Constitution – to comply with the provisions of EU law. Thus the courts viewed EU law, as transmitted through the EA, not to be a binding legal source in their national systems in the lead up to membership but rather as a tool for interpretation of domestic law.

Hungary

Despite the import of its judgment in Dec. 30/1998 (VI.25) AB,[44] the Hungarian Constitutional Court made further, more positive, remarks concerning the use of European law as an instrument of interpretation by domestic courts and law-applying authorities. It considered that matters falling within the remit of the EA and coming before the OEC were subject to a "double ruling": namely they were to be judged on the basis of the Article 62(2) EA criteria while simultaneously the substantive laws of the parties were to be applied. The IR provision on the application of either party's own substantive law did not mean that the OEC was to apply exclusively the rules of Hungarian competition law. The relevant European legal criteria were also "leading" for the OEC as criteria for interpreting its own domestic competition rules.[45]

On that basis, it was clear that the criteria deriving from the judicial application of the rules included in (the former) Articles 85, 86 and 92 EC (now Articles 101, 102 and 107 TFEU) – as stated in Article 62(3) EA – were not recognised as sources of law in Hungary. However, the Court expressly said that such criteria might be used as tools of interpretation provided that such interpretation did not breach Article 2(1) of the Constitution concerning a democratic state under the rule of law:

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44 Decision 30/1998 (VI.25) AB: ABH 1998, 220.

45 The Court supported its argument on "double ruling" by express reference to the XXIV th Report on Competition Policy: COM(95) 142 final, art. 402, at 284.

Though the Office of Economic Competition ["OEC"] does not apply Article 62(1) and (2) EA because of the absence of direct effect of such provisions, it does apply the substantive rules of Hungarian competition law – also containing prohibitions and legal consequences – however it has to determine their content to be applied in a way that the relevant legal criteria of the Community be properly asserted in the domestic legal practice. Thus the relevant legal criteria of the Community determine indirectly the content of the decisions of the OEC taken against the enterprises (private legal subjects) subject to the OEC procedure.

….[T]he OEC is obliged to take into consideration the legal criteria of the Community referred to in Article 62(2) EA during judgment of concrete cases. The Constitutional Court does not see any possibility for an interpretation to the contrary. As regards the constitutional analysis, compared to this the fact that the relevant legal criteria of the Community serve only as directives for interpretation to the OEC procedure is only of secondary importance.

Since the OEC had to determine the content of Hungarian competition law to be applied in a manner that allowed the proper assertion in domestic practice of the relevant European legal criteria, it was in effect enjoined to apply the Union criteria indirectly. The Court's arguments on this point, embodying an opinion binding on the OEC, went some way to ensure that European competition rules were to have an important bearing in their field of operation,[46] this possibility perhaps offering the best guarantee of faithful (indirect) application of European competition law internally, pending accession.[47] This opinion of the Hungarian Court was not an isolated one. Similar views, on areas beyond intellectual property and competition, were expressed by other superior courts in the CEECs.

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[46] Such argument had previously been put by the present author in an Advisory Opinion to the Constitutional Court in this case, in May 1997.

[47] However such interpretation possessed outside boundaries namely that the principle of favor conventionis could be asserted only in so far as it did not infringe the Constitution. Were the proper interpretation of the international undertaking to result in infringement of Article 2 of the Constitution (democratic state under the rule of law), the Court asserted, the harmony required by Article 7(1) of the Constitution would not be established.

Poland

In the pre-accession period, academic literature maintained the position that Polish courts were under a duty to interpret domestic law in a manner as favourable as possible to EU law.[48] Indeed, it was presumed that the national court should choose the European meaning of a domestic provision from among the possible meanings available according to the relevant rules of interpretation:[49] such academic position, conforming to the *Marleasing* jurisprudence,[50] was confirmed by the case-law of the Constitutional Tribunal.

The Tribunal's approach before accession was to use EU law and ECJ rulings – by means of Poland's EA[51] – as a tool of interpretation of national norms. In Dec. K 15/97,[52] e.g., the Ombudsman petitioned the Tribunal, seeking review of the constitutionality of section 44(2)(1) of the 1996 Civil Service Act[53] which referred the determination of retirement age of female civil servants to the general legal provisions concerning retirement pensions. Thus, it was submitted, by implication the possibility of compulsory retirement of a female civil servant at 60, i.e., five years before a male one. In challenging this as an infringement on the right of equality between men and women under Article 78 of the then (1952, amended) Constitution,[54] the Ombudsman used in support a line of judgments of the ECJ.

The Constitutional Tribunal, ruling in favour of the Ombudsman's petition, held that in section 44(2)(1) the differentiation in compulsory retirement ages amounted to sex discrimination contrary to the then Constitution Articles 67(2) and 78(1) and (2). It noted that Article 119 EC (now Article 157 TFEU)

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48 On this issue, see generally K. Kowalik-Bańczyk, Prowspólnotowa wykładnia prawa polskiego, *Europejski Przegląd Sądowy grudzień* 2005, 9-18.

49 S. Biernat, Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich [Interpretation of national law in compliance with EC law], in C. Mik (ed.), *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* [Implementation of European law in the internal legal systems], TNOiK, Toruń (1998), at 123.

50 Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] ECR I-4135.

51 Note 10 above.

52 Dec. K 15/97, 29 September 1997: OTK ZU 1997/3-4, Item 37.

53 Act of 5 July 1996, Dz. U. No. 89, Item 402.

54 Now to be found in Art. 33 of the current Constitution dating from 1997.

had fundamental importance for the formulation of the principle of equality of men and women and had been further developed in several Directives, the most important being the then Directive 76/207/EEC on equal treatment.[55] The Tribunal continued that, in the light of the Equal Treatment Directive, notice had to be taken of the ruling of the ECJ in Marshall[56] where it had stated: "Article 5 of the Directive must be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and women, constitutes discrimination on grounds of sex, contrary to that Directive."

Then the Tribunal further remarked that the ECJ had assumed a similar standpoint, in a ruling of the same date, Beets.[57] It thereafter proceeded to balance the clear lack of domestic effect of EU law prior to accession with the requirements of the EA:

Of course, [EU] law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasise the provisions of Article 68 and Article 69 of the [EC-Poland EA] .... Poland is thereby obliged to use "its best endeavours to ensure that future legislation is compatible with Community legislation" and this obligation is referred to, for example, provisions regulating "protection of workers at the workplace." The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the Parliament and the Government) also results in the obligation to interpret existing legislation in such a way as to ensure the greatest possible degree of such compatibility. [Emphasis supplied.]

It is evident that the Constitutional Tribunal considered it as incumbent on domestic law-applying authorities to interpret national law as far as possible in a Euro-conform manner. The Tribunal, like its Hungarian counterpart, would accordingly not countenance an interpretation that would be

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55 Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: OJ 1976 L39/40. This, with other Directives in the discrimination field, has now been consolidated into Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation: OJ 2006 L204/23.

56 Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

57 Case 262/84 *Beets-Proper v. Van Lanschot Bankiers* [1986] ECR 773.

unconstitutional: such ***contra legem*** limits were re-emphasised in post-accession cases.[58] Decision K 15/97 thus implied the duty to apply an interpretation ***infra legem*** (explanatory function) but did not impose (although permitted) an interpretation ***praeter legem*** (supplementary function) and prohibited an interpretation ***contra legem*** (specifically the Constitution and its principles):[59] this duty of consistent interpretation was followed in later judgments.[60]

In the lead up to accession – in respect of the particular case of Polish courts being bound to the interpretation of EU law in rulings of the ECJ – the position of Polish legal thinking was divided between those who felt that an express rule ordering the courts to respect such ECJ interpretation was needed[61] and those who considered them as part of the ***acquis*** and thus introduction of such an express requirement into Polish law was unnecessary.[62] The absence of any legal changes confirmed the latter assumption and this was affirmed in Constitutional Tribunal case-law in the year before accession.

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58 The need to interpret national law in a Euro-conform manner (within the field of sex discrimination) also arose in Dec. K 27/99 (28 March 2000: OTK ZU 2000/2, Item 62); Dec. K 15/99 (13 June 2000: OTK ZU 2000/5, Item 137) and Dec. K 35/99 (5 December 2000: OTK ZU 2000/8, Item 295). Moreover, the Tribunal did not see itself limited to merely legal sources from the EU in support of its arguments: in Dec. K. 15/98 (11 April 2000: OTK ZU 2000/3, Item 86), it even made reference to the 1997 Commission Opinion on Poland's application to the EU.

59 C. Mik & M. Górka, The Polish Courts as Courts of the European Union's Law, in B. Banaszkiewicz et al., 1 Jahr EU Mitgliedschaft: Erste Bilanz aus der Sicht der polnischen Höchstgerichte, ***EIF Working Paper*** No. 15, Institut für Europäische Integrationsforschung, Österreichische Akademie der Wissenschaften, Wien (2005), 33, at 41: <http://www.eif.oeaw.ac.at/downloads/workingpapers/wp15.pdf>. 29 January 2011.

60 For example, Dec. K 12/00, 24 October 2000: OTK 2000/7, Item 255.

61 C. Mik, Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek konstytucyjny, 1998/1 ***Państwo i Prawo*** 33, at 37.

62 N. Półtorak, Zmiany w postępowaniu przed sądami polskimi jako konsekwencja Polski do Unii Europejskiej [Changes in Polish court procedures as a consequence of Polish EU accession], in C. Mik (ed.), ***Polska w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia*** [Poland in the EU: Perspectives, conditions, chances and dangers], TNOiK, Toruń (1997), 270; J. Skrzydło, Sędzia polski wobec perspektywy członkostwa Polski w Unii Europejskiej [Polish judge considering the perspective of Poland's EU membership] 1996/11 ***Państwo i Prawo*** 35ff.

The Tribunal gradually transformed the duty of consistent interpretation into the principle of a friendly approach to European law. In Dec. K 2/02,[63] the Constitutional Tribunal was seized of a case concerning the advertisement and promotion of alcoholic drinks. In the judgment, the Tribunal invoked the ECJ rulings in von *Colson*[64] and *Marleasing*[65] and observed that, although in the pre-accession period, Poland did not have the legal obligation to apply the principles of interpretation derived from the *acquis*, it nevertheless stressed that the duty of consistent interpretation could be considered as a practical and the least expensive instrument for law harmonisation. Such a duty was, however, subject to two preconditions: (1) the Polish law in question could not expressly contradict the EU rule as a result of political and legislative choices made in the pre-accession period; and (2) some gap existed to allow for interpretative flexibility.[66]

The evolution of this approach into a constitutional principle occurred several months later in Dec. K 11/03[67] on the constitutionality of the Act on National Referenda. In its reasoning, the Constitutional Tribunal stated that the interpretation of binding law – whether constitutional provisions or any domestic norms – should take account of the constitutional principle of a friendly approach to European integration and co-operation between States. According to the Tribunal, the basis for this principle was the Preamble (e.g., "Aware of the need for co-operation with all countries for the good of the Human Family") as well as Article 9 of the 1997 Constitution: "The Republic of Poland shall respect international law binding upon it." The Constitutional Tribunal therefore posited the position that it would be constitutionally correct and preferable to interpret the law in such a way that it would contribute to the realisation of this principle.

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63 Dec. K 2/02, 28 January 2003: OTK ZU 2003/1A, Item 4. See also Dec. K 33/03, 21 April 2004: OTK ZU 2004/4A, Item 31.

64 Case 14/83 *Von Colson v. Land Nordrhein Westfalen* [1984] ECR 1891.

65 Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

66 Despite its apparent convenience and attractiveness, consistent interpretation was counselled only as a supplementary method of European law implementation and not as a substitute form other legislative activities aimed at European law harmonisation in Poland: P. Biernat, 'Europejskie' orzecznictwo sądów polskich przed przystąpieniem do Unii Europejskiej, 2005 *Przegląd Sądowy*, No. 2, 7.

67 Dec. K 11/03, 27 May 2003: OTK ZU 2003/5A, Item 43.

On the eve of membership, the Constitutional Tribunal revised its understanding of the constitutional basis for this principle. Decision K 33/03[68] concerned certain provisions of the 2003 Biofuels Act which aimed at inducing producers and distributors of liquid fuels to manufacture and offer petrol and diesel containing additives of biological origin (biofuels). The Ombudsman challenged three particular provisions of the Act[69] which, he considered, amounted to substantial restrictions on economic freedom or were unfavourable from the perspective of consumer protection. In applying the challenged provisions to all manufacturers (or sellers) – not just to national but also to foreign (EU) ones – the national legislator would be imposing a measure having equivalent effect to a quantitative restriction, prohibited by Article 28 EC (now Article 34 TFEU), and would be unable to justify it under Article 30 EC (now Article 36 TFEU), in the light of cited ECJ case-law on the subject.[70]

In making its ruling, the Constitutional Tribunal observed that the principle of interpreting national law in a manner favourable to European law, based on Constitution Article 91(1), related in particular to interpretation of the constitutional basis of review performed by the Constitutional Tribunal – which in this case were the principles of economic freedom and consumer protection.

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68 Dec. K 33/03, 21 April 2004: OTK ZU 2004/4A, Item 31.

69 The three provisions in question were: (a) section 12(1) which made it obligatory for manufacturers to market in any given year the amount of biocomponents specified in a Council of Ministers' Decree issued annually under section 12(6). Biocomponents could be introduced in three different forms: as a component of "normal" liquid fuels; as a component of liquid bio-fuels; or as pure engine fuel (pure bio-ethanol, pure VOME bio-diesel); (b) section 14(1) which stated that "normal" liquid fuels with bio-component additives could be sold through unmarked pumps. The obligation to sell from separate pumps, marked in such a manner so as to enable identification of the bio-component content, related only to bio-fuels in the strict sense (section 14(2) which was not challenged in the present proceedings) and (c) section 17(1)(3) which prescribed an administrative fiscal penalty for undertakings failing to market bio-components or marketing them in lower quantities than those prescribed by the aforementioned Decree. The penalty would amount to 50% of the value of marketed liquid fuels, bio-fuels and pure bio-components.

70 Referring basically to ***Cassis de Dijon*** (Case 120/78 ***Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein*** [1979] ECR 649) and ***Keck*** (Joined Cases C-267 and C-268/91 Criminal proceedings against ***Keck and Mithouard*** [1993] ECR I-6097).

Estonia

Constitutional regard for European law also came in a 1998 case concerning equality of treatment of seamen, appealed to the Constitutional Review Chamber of the Estonian Supreme Court. In a concurring opinion to the Chamber's Decision, the Chairman[71] noted the ratification of the EC-Estonia EA[72] and its requirements to harmonise legislation. The EU had been built on the four freedoms and observed that Article 48(2) EEC (now Article 45(2) TFEU) sought to abolish any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. He continued: "One of the general principles of European law is the principle of equal treatment. It is allowed to impose restrictions on free movement of persons but only if it is triggered by 'real and serious threat to a state's policy'." For the Chairman, these were the legal-political landmarks that Estonia had to be guided by in further legal regulation of movement of labour force, including seafarers: judges and other law-applying agencies were therefore clearly bound to or at least had to have close regard to the principles of European law in cases before them.

Czech Republic

The existence of a "Euro-friendly" interpretation of national law within the competition sector was evinced in the decision of the Czech Constitutional Court in the Škoda automobilova a.s. case[73] on abuse of dominant position. The plaintiff car manufacturer had originally challenged the decision of the Czech Competition Authority on the grounds that EU law was not, at that

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[71] Decision of the Constitutional Review Chamber of the Supreme Court of Estonia of 27 May 1998, No. 3-4-1-4-98, concurring opinion of Chairman of the Chamber Rait Maruste: <http://www.nc.ee/?id=461>. 2 February 2011.

[72] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part: OJ 1998 L 68/3.

[73] Czech Constitutional Court, 29 May 1997, Case III, ÚS 31/97: ***Sbírku nálezů a usneseni Ústavního soudu*** [Constitutional Court Reports], Vol. 8, No. 66, 149. See I. Milinkova, Competition Law and Policy in the Czech Republic, Czech Office for the Protection of Economic Competition, ***Paper presented to Budapest Conference***, 9-11 October 1998, Budapest, at 4; and M. Bobek & Z. Kühn, What about that 'incoming tide'? The Application of EU Law in the Czech Republic, in A. Łazowski (ed.), ***The Application of EU Law in the New Member States – Brave New World***, TMC Asser Press, The Hague (2010), chap. 10, 357, at 358-359.

time, a binding source of law in the national legal system and that it therefore could not be taken into account in the interpretation of national law. On appeal, the High Court (in emphasising the international links between domestic competition laws) stated:[74]

For that matter [the 1991 Czech Competition Act] received the basic ideas of the Treaty of Rome, particularly already mentioned Articles 85, 86 and 92 [now Articles 101, 102 and 107 TFEU]; this was from the perspective of harmonisation of the legal systems of the European Communities and the Czech Republic an absolute necessity.

The High Court held that it did not amount to an error in law for a national authority to interpret Czech competition law consistently with ECJ case-law and Commission Decisions. In the same case, the Constitutional Court was seised of a constitutional complaint from the car manufacturer: nevertheless, it affirmed the High Court's approach and maintained that both the EC Treaty and the EU Treaty derived from the same values and principles of Czech constitutional law. As a result, the interpretation of European competition provisions by EU institutions (whether the ECJ, General Court or Commission) was valuable for interpretation of the corresponding Czech provisions.

The Court thus ruled on the relationship between the Czech and the EU decision-making processes by declaring the relevance of European rules and judicial and institutional practice to the facts of the case, using them as interpretative tools for domestic law. The supporting arguments pointed, in part, to the insufficiency of Czech concepts to protect economic competition and the manifested Czech judicial determination to apply European rules and practice.

In a subsequent decision from 2001,[75] the Czech Constitutional Court was petitioned by a group of MPs, seeking annulment of a government decree on setting milk production quotas, which decree, inter alia, had harmonised domestic law to the relevant EC Regulation. At the oral hearing, the petitioners expressed the opinion that Community law was not relevant to the Court in evaluating unconstitutionality, as the Czech Republic was not an EU Member State. The Court strongly objected to this proposition as being

[74] High Court (Olomouc), 14 November 1996: (1997) 5(9) *Právní rozhledy* 484.

[75] *Milk Quota case*, Czech Const. Ct., 16 October 2001, Case Pl. ÚS 5/01: No. 410/2001 Coll.

oversimplified and sketchy and stated in its ruling[76] that one of the sources of primary Community law was the general legal principles which the ECJ took from the constitutional traditions common to EU Member States. General legal principles were contained in the concepts of a state based on the rule of law, including fundamental human rights and freedoms and fair proceedings within that framework. Similarly, the Czech Court had repeatedly applied general legal principles which were not expressly contained in legal rules, but were applied in European legal culture (e.g., the principle of reasonableness). The Court thus viewed itself as having subscribed to European legal culture and its constitutional traditions. It continued: "Thus, primary Community law is not foreign to the Constitutional Court, but to a wide degree permeates – particularly in the form of general legal principles of European law – its own decision making. To that extent it is also relevant to the Constitutional Court's decision making."

In fact, in order to emphasise its openness to EU law, the Court later referred[77] to support its reasoning to the ECJ case of ***Hauer***[78] – a case which had concerned the issue of limiting the fundamental right to property in connection with the application of community regulations on agricultural production. Use of ECJ rulings in its own decision-making was repeated by the Czech Court in the Sugar Quota II case, in which it acknowledged:[79]

[O]ne can refer to the case law of the European Court of Justice only peripherally, and in the form of further development of the Constitutional Court's arguments in [the Milk Quota case]. In its ruling on the complaint ***Metallurgiki Halyps v. Commission*** (258/81), the European Court of Justice emphasised that Community restrictions on steel production in the public interest, although they can endanger the profitability of an enterprise, do not represent any violation of the right to own property.

From these cases, it is possible to see that the Czech Constitutional Court accordingly took its own "European-friendly approach" based on the similarities between EU and domestic constitutional law, a matter that has

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[76] Case Pl. ÚS 5/01: No. 410/2001 Coll., Part IV.
[77] Case Pl. ÚS 5/01: No. 410/2001 Coll., Part VII.
[78] Case 44/79 ***Hauer v. Land Rheinland-Pfalz*** [1979] ECR 3727.
[79] ***Sugar Quota II case***, Czech. Const. Ct., 30 October 2002, Case Pl. ÚS 39/01: No. 499/2002 Coll., Part VI.

been emphasised more recently in respect of national constitutional review of the Lisbon Treaty.[80]

Conclusion

The impact of implementing and enforcing EU law is crucial on the domestic legal system of a (potential) candidate country like Serbia. Judicial capacity concerns not only an independent judiciary, trained and able to apply EU law and protect before them rights derived from it[81] but also the existence of an efficient functioning court system (avoidance of excessive delays, intra-system computerization, and elimination of case backlogs in specific courts), with adequate resources and professional staff.[82]

For such reasons and as already outlined in this work, it may be necessary to consider the consolidation and deepening of the legal foundations of Serbia-EU relations by adding some judicial dynamic to the development of these links. In the SAA, unlike the EAs, the provision similar to Article 4(3) TEU in Article 129(1) SAA, at the very least could engender a general obligation on Serbian courts to interpret domestic harmonised law (as far as practicable) in concordance with that of EU law and the interpretations given to it by the ECJ and GC. Such interpretations become even more authoritative then through the express provisions of the SAA on intellectual property rights and competition law, despite the unlimited temporal nature of the requirement: in other words, Serbian courts have to match their interpretations to future and continuing developments in the European courts' decision-making. No doubt, were the Serbian Constitutional Court to receive a petition containing a germ of SAA-EU law in it, it might feel able to follow its CEEC counterparts

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80 German Federal Const. Ct., Lisbon, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 *CMLR* 712; Hungarian Const. Ct., Dec. 143/2010 (VII.14) AB: ABK 2010. július-augusztus, 872; Polish Const. Trib., Dec. K 32/09, 24 November 2010: OTK ZU 2010/9A, Item 108; and Czech Const. Ct., 26 November 2008: Case No. Pl. ÚS 19/08 and 3 November 2009: Case No. Pl. ÚS 99/09.

81 Tatham (2009), at 375-397.

82 J.H. Anderson and C.W. Gray, Transforming Judicial Systems in Europe and Central Asia, World Bank, Washington, DC (2007), at 347:
<siteresources.worldbank.org/EXTECAREGTOPJUDREF/Resources/ABCDEF.pdf>. 12 February 2011. This paper updated J.H. Anderson, et al., ***Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future***, World Bank, Washington, DC (2005).

and rule on a "Euro-friendly" interpretation of national law, before accession, using as a basis for such approach Serbia's "commitment to European principles and values" from Article 1 of the 2006 Constitution and from Article 16(2), "ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly."

Nevertheless, as the Polish Constitutional Tribunal considered, there would be limits to this type of interpretation, viz., Article 194(2) of the Serbian Constitution (like Article 8 of the Polish Constitution) provides: "The Constitution shall be the supreme legal act of the Republic of Serbia." In addition, it might be possible to follow the example of the Hungarian Constitutional Court and its understanding of the relationship between a European interpretation of national law and the limits on such interpretation found under Constitution Article 2 on a democratic state under the rule of law and popular sovereignty. These limits to a Euro-friendly interpretation of national law by the Serbian courts could be based on the 2006 Constitution Articles 1-3.

It might also be that the Serbian Constitutional Court would be called upon to rule on the constitutionality of provisions of the SAA, under Constitution Article 167(2), for which clearly Constitution Article 16(3) would form a basis: "Ratified international treaties must be in accordance with the Constitution." To what extent might the SAA be unconstitutional? At least one problematic issue has been avoided: unlike Slovenia, the 2006 Constitution (Article 85) allows foreign natural and legal entities to obtain real property, according to the law or international treaty.

In fact, the Serbian Constitution also appears to pre-empt concerns of equal treatment of EU natural or legal persons under the SAA. In dealing with the status of foreign nationals, Article 17 provides: "Pursuant to international treaties, foreign nationals in the Republic of Serbia shall have all rights guaranteed by the Constitution and law with the exception of rights to which only the citizens of the Republic of Serbia are entitled under the Constitution and law." Such approach is reinforced by the equality clause, in Article 18, which prohibits, inter alia, direct and indirect discrimination on grounds of national origin and proclaims equal rights to legal protection which latter right is reinforced by Article 36 that adds the right to a legal remedy. These provisions together reflect the contents of Article 126 SAA.

With regard to competition, the Serbian Constitution under Article 84(2) has gone so far as to provide express prohibition of acts that are contrary to the law and restrict free competition by creating or abusing a monopolistic or

dominant status, and under Article 84(4) ensures equal treatment between Serbian and foreign persons, whether legal or natural, on the market. These provisions of themselves might not be sufficient to alleviate the possibility of a Hungarian-style scenario occurring in respect of the application of the EU competition acquis, as applied and developed by the Commission and the European Courts, through Article 73(2) SAA. But this provision and those in Articles 72(1), 126 and 129(1) SAA (the latter being a so-called "Union loyalty-lite" clause) should be further read with the 2006 Constitution which provides under Article 142(2) that courts shall perform their duties in accordance inter alia with the Constitution, law and ratified international contracts, and under Article 145(2) that their decisions are based on the Constitution and law, ratified international treaty, and regulation passed on the basis of the law. It could be argued, at least from an EU law perspective, that the Serbian courts are bound (in competition cases) to use Commission Notices and Decisions and the rulings of the European Courts, whenever decided, in determining cases before them.

With the coming into force of the SAA, the next few years will consequently prove to be vital in ensuring the protection of rights derived from EU law in Serbia, particularly though not exclusively those in the field of intellectual property rights and competition.